# Unnegotiated Contracts of Adhesion in American Common and Civil Law Jurisdictions: The Canadian and Argentinian Cases

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ABSTRACT

Il saggio affronta il tema del controllo sulla predisposizione unilaterale dei contratti standard e degli strumenti giuridici a tal fine sviluppati sia nella tradizione di *common law*, sia in quella di *civil law*. In particolare, da un lato, si concentra sulla "*Unconscionability Doctrine*", così come è stata originariamente recepita nell'*Uniform Commercial Code* statunitense e come recentemente sviluppata nelle decisioni dalla Corte Suprema canadese; dall'altro, esamina la disciplina recata dai codici civili americani del Québec e dell'Argentina in punto di determinazione unilaterale del contenuto del contratto da parte del predisponente. Infine, muovendo da alcuni casi emersi nella giurisprudenza italiana, ci si interroga sulle indicazioni che possono essere tratte, anche per la giurisdizione domestica, dalla disciplina contenuta nei codici del Québec e dell'Argentina (così come nel codice civile francese, recentemente novellato) per

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la valutazione delle clausole non negoziate di determinazione unilaterale dell'oggetto e del contenuto giuridico del contratto standard.

**Parole chiave:** Contratti per adesione; Condizioni generali di contratto; *Unconscionability*; *Uniform Commercial Code*; Corte Suprema del Canada; Codice civile del Québec; Codice civile e commerciale argentino.

The essay addresses the control of Unnegotiated Standard Form Contracts and the legal tools developed for such purpose both in common and civil law traditions. In particular, on the one hand, it focuses on unconscionability, as it was originally crafted by the USA's Uniform Commercial Code and recently shaped as a new doctrine by the Canadian Supreme Court; on the other hand, it looks to the American civil codes of Quebec and Argentina. Then it deals with some cases occurring in Italian case law, suggesting that the Quebec and Argentinian Codes (as well as the recently amended French Civil Code) could give guidance in assessing the enforceability of unnegotiated standard clauses that affect the very core of the contract and its subject matter.

**Keywords**: Standard Form Contracts; Unconscionability; Uniform Commercial Code; Supreme Court of Canada; Quebec Civil Code; Argentinian Civil and Commercial Code.

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# Unnegotiated Contracts of Adhesion in American Common and Civil Law Jurisdictions: the Canadian and Argentinian Cases



## 1. Meeting of the minds and standard terms in contracts law jurisdictions.

Quoting an acclaimed essay written in the 1980s, we can say that civil law codes and common law "*share a common heritage: one set of rules for the formation of contracts, with the implicit premise that all obligations are contracted at arm's length through a process of actual term-by-term bargaining by parties having relatively equal bargaining power. The need for mass contracting, brought about by mass production and mass marketing, surely undercut whatever validity that implicit premise historically may have enjoyed*"[1].

Indeed, it is common knowledge that rules on the formation of contract in European (and South American) civil codes – mostly deriving from the Napoleonic Code – are mainly based on the interaction and exchange of ideas during encounters between the two or more parties involved in the contract. The same occurs in the few instances of civil law embedded in the east coast north

([1]) R. L. HERSBERGEN, *Contracts of Adhesion Under the Louisiana Civil Code*, in *Lousiana law review*, 1982, 43, 15.

American predominant common law jurisdictions, such as Quebec and Louisiana.

Such a 19th-century manner of building consent – through an exchange of offer, acceptance or counterproposal – has been overturned (except in certain specific fields, such as in real estate sales to individuals) by the unilaterally formed standard contract, for which the economically weaker party's sole option is to adhere or not to the proposed terms.

The matter of "standard form contracts of adhesion" has been clearly considered by code makers in the 20th century: in the Italian Civil Code (ICC) of 1942 the party joining a standard contract is protected from unfair standard terms by Art.s 1341 and 1342[2]. This type of protection, though very up-to-date for that time, appears now merely formal as it relied only on specific approval in writing of a limited set of clauses and did (and does) not allow Italian courts to ascertain the fairness of the standard terms.

However, at least a basic protection, shared by the majority of Civil Codes and by common law, is what the latter refers to as the *contra proferentem* rule[3], as a way to interpret and construe the adhesion contracts: as the rule is set forth in Louisiana's Civil Code, following the path of many European Codes[4] "*A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party*" (Art. 2056, 2nd par.).

But the challenges posed by adhesion contracts need more than an interpretation rule or some special form requirements (as the Italian Civil Code provides): tools are needed that can address the potential substantive unbalance or even inutility, for the adherent party, of a contract which clauses are unilaterally crafted and imposed by the drafter.

Considering that a more substantive protection in contracts between professionals and consumers was needed, the European Union, in the late 1990s, developed, by means of directives which were then implemented in member States[5], a set of rules allowing courts to control the potential imbalance and

(2) On the Italian legal literature in English, see M. GRAZIADEI, *Control of price related terms in standard form contracts: the Italian experience*, in *Annuario di diritto comparato e studi legislativi*, 2018, 193 ff.

(3) In the Canadian common law cases, see See Hillis Oil and Sales Ltd. *v* Wynn's Canada Ltd., [1986] 1 S.C.R. 57, 68-69.

(4) For the Italian Civil Code, see art. 1370.

(5) Art. 3.1 of EU Directive 93/13/ of 5th April 1993 on unfair terms in consumer contracts reads: "1. *A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". Art. 4.1 of the same Directive reads: "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language".*

unfairness between rights and obligations arising from standard terms[6]. The same approach was followed in some North American Common law Jurisdictions, such as British Columbia, where a set of specific rules was enacted for consumer transactions[7].

The actual debate, in Europe, is on how to provide quite the same protection also in B2B contracts, as no general provision on the topic exists as yet.

In particular, in Italy it is disputed whether the same substantial protection as provided for consumer contracts may be granted in business-to-business commerce by extending the scope of Art. 9 of Law no. 192 /1998[8] (a statute preventing abuses of economic dependence in industrial subcontracting), suggesting it could be regarded as a general clause, although it was a rule established for the specific field of subcontracting.

Indeed, even though European lawmakers had focused on the protection of consumers as the main issue at stake, the need for this kind of protection has also been seen, more recently, whenever professionals (or individuals) enter into contracts (formally) as peers[9] but without having the same economic and bargaining power as their counterparty, as is the case for a small or a medium-sized company adhering to standard contracts on the basis of the counterparty's form and terms.

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([6]) A control that targets only the juridical balance of the contract, with the express exemption of questioning the price and the subject matter (the goods or service rendered under the contract) if they are correctly expressed and disclosed. Consumer protection under European law has been debated and addressed by scholars starting from the main Directive 93/13 on Unfair Terms in Consumer Contract. See the debate reported in P. NEBBIA, *Law as Tradition and the Europeanization of Contract Law: A Case Study*, in *Yearbook of European Law*, 2004, 363 ff. An essay on the more specific Italian domestic case law concerning control over penalty clauses and liquidated damages clauses is delivered in English by F.P. PATTI, *Penalty Clauses in Italian Law*, in *European Review of Private law*, 2015, 309 ff.

([7]) For British Columbia, as we will see below, reference is made to the *Business Practices and Consumer Protection Act*, S.B.C. 2004.

([8]) Art. 9 of Law. no. 192 of 18th June 1998, headed "Abuse of economic dependence", reads: «1. *The abuse by one or more companies of the economic dependence in which, in its or in their regards, a client or supplier company is prohibited. The economic situation in which a company is able to determine, in commercial relations with another company, an excessive imbalance of rights and obligations is considered an economic dependency. The economic dependence is assessed also taking into account the real possibility for the party who has suffered the abuse to find satisfactory alternatives on the market. 2. The abuse can also consist in the refusal to sell or in the refusal to buy, in the imposition of unjustifiably burdensome or discriminatory contractual conditions, in the arbitrary interruption of commercial relations in progress. 3. The clause or agreement through which the abuse of economic dependence is done is void and null*».

([9]) In "commercial transactions", as opposed to "consumer transactions", as they are called in British Columbia.

**2. The doctrine of unconscionability in North American common law jurisdictions.**

The main tool for such control of contract power, developed in North American Common law jurisdictions[10], appears to be the *"unconscionability"* doctrine.[11]

As was noted: "*In the common law jurisdictions "unconscionability" has emerged from Uniform Commercial Code § 2-302(1) as the principal judicial device by which the fairness of standard form contracts of adhesion in a consumer transaction is adjusted"*[12].

Moving on from the end of the nineteenth century, English Courts of equity began to set aside agreements when they resulted from an inequality of bargaining power, referring to the concept of "unconscionability"[13].

The term addresses something which "affronts the sense of decency", as it involves a gross overall one-sidedness of the contract or of a specific term such as disclaiming a warranty, limiting damages or granting procedural advantages.[14] According to Canadian case law, awareness of the vulnerability of the other

(10) It is a common remark that common law jurisdictions outside the United Kingdom, notably Canada and the USA, are more open to establishing a general doctrine of unconscionability: see H. BEALE, *Chitty on Contracts*[28], London 1999, 1, 455, referring to Commonwealth courts and in particular to Canadian (but also Australian) ones. As it was noted (S. M. WADDAMS, *Unconscionability in Canadian Contract Law,* in *Loyola of Los Angeles International and Comparative Law Review*, 1992, 14, 543: *"English courts generally do not recognize unconscionability as a contractual defense. This is partly on account of the United Kingdom's Unfair Contract Terms Act and the general mood of judicial conservatism prevailing in English courts"*.

(11) Although some Canadian Scholars expressed skepticism as to the "*impossible tasks that are delegated to the judiciary by the unconscionability doctrine*" (R. A. HASSON, "*Unconscionability in Contract Law and in the New Sales Act - Confessions of a Doubting Thomas* " in *Canadian Business Law Journal*, 4.4/1980, 383-402, in particular 384: "*To whom it may be replied that his examples are case law in which the unconscionability doctrine was applied to assess the fairness of the economic exchange and level of profits secured by the contract and not, as more properly should be, to assess the potential unbalance of the terms and clauses unilaterally drafted*")

(12) R. L. HERSBERGEN, *Contracts of Adhesion*, cit., 14- 15.

(13) The roots of the concept lie in Equity: see, among others, G. TREITEL, *The Law of Contract*[10], London 1999, 382; H. BEALE (ed.), *Chitty On Contracts*[28], cit., 1, 450; J. D. CALAMARI, J. M. PERILLO, *The Law of Contracts*[3], St. Paul 1987, 399.

(14) J. D. CALAMARI, J. M. PERILLO, *The Law of Contracts*, cit., 406-407. As it was recently expressed in Canadian legal literature, "*the idea of sanctity of contract has been balanced against the desire of courts to avoid enforcement of contracts that have been perceived as very unfair*" (S. M. WADDAMS, *Abusive or Unconscionable Clauses from a Common Law Perspective,* in *Canadian Business Law Journal*, 2010, 49, 378).

party is not necessary, except in cases where the effects of the doctrine are claimed involving third parties[15].

**2.1. USA's Uniform Commercial Code.**

Under traditional unconscionability doctrine, the remedies available to the weaker party are basically the "rescission" of the agreement (in equity)[16]. Thus, the scope of the traditional doctrine is unlikely to prove efficient in controlling contract power in adhesion contracts because, as a result of its application, the whole contract would be set aside.

Therefore "*it may be asked whether the weaker party, rather than seeking rescission of the entire agreement, may seek to set aside the particularly oppressive term of the contract and enforce the remaining terms of the unconscionable bargain*"[17].

The answer is affirmative in American Common Law, as *Uniform Commercial Code* (UCC), at § 2-302[18] "Unconscionable contract or Clause" provides (emphasis added):

"(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.*

*(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*". And, it was noted, "*Canada shares with the United States the traditions of English common law and equity underlying section 2-302*".[19]

(15) J. D. MCCAMUS, *The Law of Contracts*[2], Toronto 2012, 431-436.

(16) "*Agreements can be set aside or enforcement can be refused*" (J. D. CALAMARI, J. M. PERILLO, *The Law of Contracts*, cit., 403). In addition, sometimes also damages can be awarded (J. D. MCCAMUS, *The Law of Contracts*, cit., 439).

(17) J. D. MCCAMUS, *The Law of Contracts*, cit., 440 (emphasis added).

(18) Among USA literature on the Uniform Commercial Code, a classic milestone remains R. DUGAN *Standardized Forms: Unconscionability and Good Faith*, in *New England Law Review*, 1979, 711, which deals with the potential uncertainty arising out of the reference made in UCC to unconscionability - as «*no two courts or commentators employ the same set of working rules for determining unconscionability*» - and attempts to give different and separate scopes to the "unconscionability doctrine" and to the "good faith doctrine".

(19) S. M. WADDAMS, *Unconscionability in Canadian Contract Law*, cit., 541, pointing out that the Courts' control over contract formation is made by excluding unfair provisions or modifying them by incorporating implied terms, or by means of the doctrine of unconscionability.

The rule can be applied to single standard terms[20], if the clauses involved are so one–sided as to be unconscionable under the circumstances existing at the time of the making of the contract.[21] The provision also shows similarities to Unidroit Principles Art. 3.2.7 on gross disparity.[22] Moreover, some comparison referring to the European Draft Common Frame of Reference has been made by the Canadian Scholars[23].

UCC § 2- 302 is intended to apply directly to "transactions in goods", but it is regarded as an expression of a general principle or is deemed to be applicable by analogy: therefore in North American common law it has become a part of the general law of contract.[24] It has been applied mostly in favor of consumers, but the doctrine has been invoked also by professionals and small business operators such as franchisees, which can be victimized by unconscionable contracts.[25] As a result of such widespread application of UCC, the adherent party is entitled to seek as a remedy the mere excision of the unconscionable clause, maintaining the remainder of the contract intact.

**2.2. The new Canadian doctrine of unconscionability**

Such a broad range of reliefs (namely excision of clauses or adaptation of the contract) has not traditionally been granted in Canadian common law, but in

([20]) The reference to the contract and to the clause, instead of to the party's behavior, is suggested, moving from section 2-302 UCC, by S. M WADDAMS, *Good Faith, Unconscionability and Reasonable Expectations*, in *Journal of Contract Law*, 1995, 9, 60, footnote 21: *"Some modem cases and commentators have used the word 'unconscionable' with reference to conduct. The older usage, however, and that of the Uniform Commercial Code (s 2-302), applies the word unconscionable to the contract itself, or a clause of it, not to the conduct of the party seeking enforcement".*

([21]) E. A. FARNSWORTH, *Contracts*[3], New York 1999, 310.

([22]) Unidroit Principles Art. 3.2.7 ("Gross Disparity") reads: **"***(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 Art. 3.2.10(2) apply accordingly".*

([23]) S. M. WADDAMS, *Abusive or Unconscionable Clauses*, cit., 49, 378 ss. (spec. 386) making specific reference to sect. 7:207 "Unfair exploitation".

([24]) E. A. FARNSWORTH, *Contracts*, cit., 308; J. D. CALAMARI, J. M. PERILLO, *The Law of Contracts*, cit., 403.

([25]) E. A. FARNSWORTH, *Contracts*, cit., 314; J. D. CALAMARI, J. M. PERILLO, *The Law of Contracts*, cit.,404.

the last decades the Supreme Court of Canada has held that the doctrine of unconscionability – which rests mainly on the principle of good faith[26]- may be employed to delete a particular term from the unconscionable bargain: in particular to challenge "disclaimer" or "limitation of liability" clauses and to render them unenforceable, with the result that the remainder of the agreement still remains enforceable[27].

Canada is a bijuridical federal country of great interest for a civil law scholar because it embeds a civil law jurisdiction (Quebec) among a predominant number of common law ones and therefore the contacts and coexistence of the two legal traditions are intertwined. In addition, certain provincial consumer protection legislations (statutes) are, to a large extent, similar to the European Union rules.

In British Columbia, one of the most important common law Provinces, Part 2 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, par. 2, contains a statutory regime applicable to unconscionable acts or practices by suppliers. There, "consumer transactions" are defined as follows: «*"consumer transaction" means (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in par. (a), and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the "consumer"*».

The statute reverses the burden of proof, requiring the supplier to prove that the unconscionable act or practice in question was not committed and it empowers the courts with considerable flexibility as to remedies.

Outside of consumer transactions - i.e., in commercial transactions - the control of contract power[28] may rely on common law unconscionability doctrine.

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([26]) See Bhasin *v* Hrynew, 2014 SCC 71, where Supreme Court of Canada (SCC) – dealing with the performance of the contract - pointed out that a general principle of good faith underlies the law of contracts as it is reflected in many of the existing doctrines, including unconscionability. On the the duty of good faith in contract performance, and on its extent, see R. JUKIER, *Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec*, in *Journal of Commonwealth Law*, 2018, 1, 83 ff. (paper presented at the Symposium "*Bonne foi en matière contractuelle / Good Faith in Contract*", held at the Faculté de droit, Université de Montréal, Montréal, Québec, on May 10–11, 2018).

([27]) J. D. MCCAMUS, *The Law of Contracts*, cit., 440.

([28]) Common law scholars, and Canadians in particular, use the expression "the Control of Contract Power" to refer to the concerns arising out of an unshakable faith in the "freedom of contract" doctrine and in the related "sanctity of contract", which both stem from the original common law of the 19th century and are based on the idea of contractual consent resulting from exchange of offer and acceptance, or from face to face negotiation between single individuals (see A. SWAN, J. ADAMSKI, A. Y. NA, *Canadian Contract Law*[1], London 2006, 629 ff.). The expression harks back to the title of the famous essay published in the Eighties by another Canadian scholar, Barry J. Reiter (B. J. REITER, *The*

As stated above, in traditional common law unconscionability leads to *rescission* of the contract and therefore the entire contract would be set aside. But in the last decades, albeit in principle, the opportunity to challenge single particular standard terms (e.g. *exculpatory clauses*) by means of the unconscionability doctrine has been considered in Canadian Supreme Court and British Columbia Court of Appeal decisions that have shaped a new "doctrine of unconscionable terms", which effect has been «*to preclude reliance on the exculpatory clause, but to leave the remainder of the contract intact and enforceable*»[29].

As was noted, with such decisions the Supreme Court of Canada has «*crafted a unique Canadian rule designed to control the unjust application of exculpatory clauses*», that may call "for a new name" for the doctrine itself[30].

The most important leading cases decided by the Canadian Supreme Court were "Hunter" and "Tercon", in which it was considered feasible and practicable to delete an unconscionable exculpatory clause and enforce the remainder of the contract[31]; they have been followed more recently, in 2020, by Uber Technologies Inc. v. Heller.

**2.2.1. Hunter v. Syncrude.**

In 1989, in the first leading case mentioned above, Hunter v. Syncrude – a decision on a dispute which arose out of three contracts for the supply of gearboxes for the Alberta tar sands project – the Supreme Court of Canada addressed, *inter alia*, the enforceability of a clause included in standard form supply contracts, namely a warranty limiting the liability of the supplier.[32]

In the reasoning, it was pointed out: «*In light of the unnecessary complexities the doctrine of fundamental breach has created, the resulting uncertainty in the law, and the unrefined nature of the doctrine as a tool for averting unfairness, I am much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate, to deal explicitly with unconscionability*».[33]

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*Control of Contract Power*, in *Oxford Journal of Legal Studies*, 1981, 347) in which, with a more theoretical approach to the issue, he examined the different legal techniques used and useful at macro and micro level for such control, among which "the modern notion of unconscionability".

([29]) J. D. MCCAMUS, *The Law of Contracts*, cit., 822, footnote 21.

([30]) J. D. MCCAMUS, *The Law of Contracts*, cit., 831-832.

([31]) J. D. MCCAMUS, *The Law of Contracts*, cit., 446.

([32]) *Hunter Engineering Co. v. Syncrude Canada Ltd*. [1989] 1 SCR. 426.

([33]) *Hunter Engineering Co. v. Syncrude Canada Ltd*, cit., 462 (Chief Justice, emphasis added). S. M. WADDAMS, *Unconscionability in Canadian Contract Law*, cit., 543 noted that Karl Llewellyn, the principal drafter of section 2-302 UCC "*favored open recognition of a general principle of unconscionability. He thought that such a principle was more reliable and rational than the tortuous use of judicial techniques, such as construction*", and added "*There is much in the Canadian experience to bear out Llewellyn's thesis. For example, under the influence of the fundamental breach doctrine, the law of disclaimer clauses became arbitrary and*

In the case, the Court deemed the exclusion clause enforceable because the parties to the contract were found to have roughly equal bargaining power and so unconscionability doctrine would not be applicable. [34]

Although the decision was positive on the enforceability of the clause at issue[35], the most important outcome, for the topic here addressed, is that the Court (even though in principle) found it possible not to enforce only a single clause and maintain the residual part of the contract enforceable.

**2.2.2. Tercon Contractors Ltd. *v.* Province of British Columbia.**

In the 2010 subsequent case Tercon Contractors Ltd. v. Province of British Columbia[36], the Supreme Court was asked to assess the validity of a standard term (i.e. *exclusion clause*), which prevented the Province from being sued for damages for having awarded a public work of highway construction to an ineligible bidder.

The Court – with a majority vote of 5 to 4 - found that, because of its ambiguity, the exclusion clause could not have prevented the Province from being sued for damages and therefore decided in favor of Tercon[37]. Not holding the clause applicable to the case, due to its unclear wording, there was no point – for the majority of the Court - in debating whether it can be set aside by the unconscionability doctrine.

The issue was raised, however, in the dissenting opinion written on behalf of the four judges (among whom the Chief Justice) McLachlin C.J., Binnie, Abella and Rothstein JJ, who deemed that the traditional doctrine of fundamental breach was of no avail in that case due to its vagueness[38], as was previously noted in Hunter v. Syncrude.

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*unpredictable, and led the courts to wrong results in both directions: courts enforced unfair clauses and struck down clauses that were fair and reasonable. The same has happened with the law relating to penalty clauses*".

([34]) *Hunter Engineering Co. v. Syncrude Canada Ltd*, cit., 517- 518

([35]) *Hunter Engineering Co. v. Syncrude Canada Ltd*, cit., 522.

([36]) *Tercon Contractors Ltd. v. Province of British Columbia*, 2010 SCC 4, [2010] 1 SCR 69.

([37]) See reasoning of the Court, *Tercon Contractors Ltd. v. Province of British Columbia*, cit., par. 79: «*If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants". Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favor of Tercon under the principle contra proferentem: see, e.g., Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd., [1986] 1 S.C.R. 57, at pp. 68-69. Following this approach, the clause would not apply to bar Tercon's damages claim*» (emphasis added).

([38]) *Tercon Contractors Ltd. v. Province of British Columbia*, cit., par. 108.

The dissenting minority therefore held it more efficient to rely on the *unconscionability* doctrine[39].

In the very pragmatic way common law courts shape their reasoning, a three-step test was laid down to assess whether to enforce an exclusion of liability clause included in party's standard terms: «*[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (Hunter, at p. 462). This second issue has to do with contract formation, not breach. [123] If the exclusion clause is held to be valid and applicable, the court may undertake a third enquiry, namely whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts*»[40].

In the application to the facts of the case, the dissenting opinion found that the exclusion clause drafted as a standard term by the Province of BC was not unconscionable and therefore could prevent the Province from being liable and bound to pay compensation for having awarded the road construction contract to an ineligible bidder.

Indeed, performing the second step of the proposed test, the dissenting opinion noted that although Tercon was not on the same level of power and authority as the Province of British Columbia, Tercon was in any case a major contractor, perfectly able to look after itself in a commercial context and therefore found that there was no relevant imbalance in bargaining power[41].

Having not found such a material imbalance, the clause was deemed valid, in the dissenting opinion, and therefore there was room for the third step of the test, assessing whether there was an overriding public policy that requires refusing to enforce the clause[42], which the minority of the court did not find[43].

In their opinion, the dissenting Judges would then have dismissed the appeal, which was not the majority decision. But what is relevant, for the topic addressed in this paper, is that also this case confirms the developing of the unconscionability doctrine resulting from Hunter v. Syncrude, *id est* the applicability of the doctrine not for rescinding a contract as a whole, but to set

(39) *Tercon Contractors Ltd. v. Province of British Columbia*, cit., par. 108.

(40) *Tercon Contractors Ltd. v. Province of British Columbia*, cit., par. 122 (emphasis added).

(41) *Tercon Contractors Ltd. v. Province of British Columbia*, cit., par. 131(emphasis added).

(42) *Tercon Contractors Ltd. v. Province of British Columbia*, cit., par. 135.

(43) *Tercon Contractors Ltd. v. Province of British Columbia*, cit., par. 141.

aside only the clauses found unconscionable, maintaining and enforcing the remainder of the contract as amended without them[44].

Moreover, Tercon can be considered a seminal case because its dissenting opinion built up a more precise and clear shape of the Canadian doctrine of unconscionability and provided courts and practitioners with the three-step test to apply the doctrine itself.

**2.2.3. The "waiver of liability clause" and the "entire agreement clause" before the Court of Appeal for British Columbia.**

The provincial courts in British Columbia have applied the aforementioned Supreme Court decisions in considering the potential unconscionability of specific standard terms.

In *Loycuk v. Cougar Mountain Adventures Ltd.* [45], brought before the Court of Appeal for British Columbia in 2012, the three-step test suggested in Tercon was tried on a "waiver of liability clause" drafted by Cougar Mountain Adventures Ltd. (a zip-line tour operator), and signed by the clients, injured when they collided while travelling on the same zip-line.

In the application to the facts, the court did not find it unconscionable for the operator of a recreational-sports facility to require a person who wishes to engage in activities to sign a release that bars all claims for negligence against the operator and its employees, and therefore the standard term was considered enforceable.

A previous case decided by the same Court of Appeal for British Columbia in 2007 - *Taurus Ventures Ltd. v. Intrawest Corporation and Whistler Mountain Resort*[46] - is also relevant, because it addressed a different clause, the "entire agreement clause" (known also as "merger clause" and commonly to be found among the so called "boilerplate clauses").

The main question posed to the court was «*whether pre-contractual representations may give rise to damages, where the contract entered into does not address the matters about which the representations were made, and includes an "entire agreement" clause*» (par.1).

Intrawest sold to Taurus a building lot on Whistler Mountain in a development called Kadenwood and marketed it as a "premier ski-in/ski-out" residential development, with access to the lots by skiers on ski *runs* and ski *trails,* but the contract did not provide for the construction of them. The buyer claimed that Intrawest represented that it would build and pay for both the ski runs and ski trails within a reasonable period of time following their

(44) See also J. D. MCCAMUS, *The Law of Contracts*, cit., 826 (emphasis added).

(45) Court of Appeal for British Columbia, *Loycuk v. Cougar Mountain Adventures Ltd*. 2012 BCCA 122.

(46) Court of Appeal for British Columbia, *Taurus Ventures Ltd. v. Intrawest Corporation and Whistler Mountain Resort Limited Partnership*, 2007 BCCA 228.

purchase of the lot, and that it failed to do so and sued Intrawest for damages for, among other claims, breach of a collateral contract and negligent misrepresentation.

The judgement dealt with a specific common law issue, the concurrency with action in contract and action in tort (of misrepresentation), when a subsequent contract was entered into between the parties. Because the doctrine of concurrency between contract and tort actions expressly allows the parties to exclude the concurrency itself, when such a clause is inserted in the contract, its enforceability could be challenged (*inter alia*) through the unconscionability doctrine, as was done in the reasoning of the previous case "BG Checo"[47].

In the Taurus decision, the court found that the "entire agreement clause" could be deemed an exclusion of liability in tort, but did not consider the clause unconscionable because it found that «the parties were both sophisticated, commercial entities» and «the contract was not a "standard adhesion contract»[48].

The most important Canadian common law literature, having noted that such a new Supreme Court of Canada doctrine has been tested mainly with regard to limitation or exclusion of liability clauses, wondered «*to what types of clause is the doctrine likely to apply other than exculpatory clauses*», suggesting that «*the new doctrine is likely to apply to other clauses that have been the subject of "special notice" requirements under prior law. Of these provisions, perhaps the most likely candidate for subjection to the new doctrine is the "entire agreement clause*» and recalled also the «*arbitration clauses inserted in consumer services agreements for the apparent purpose of precluding consumer class actions*»[49].

Such a suggestion proved sound and farsighted, as more recently, on June 26th, 2020, the Supreme Court of Canada addressed an arbitration clause embedded in a standard contract drafted by Uber (Uber Technologies Inc. v. Heller, 2020 SCC 16)

### 2.2.4. Uber Technologies Inc. v. Heller, 2020 SCC 16

The facts, as recalled by the Court, were quite simple: "*H provides food delivery services in Toronto using Uber's software applications. To become a driver for Uber, H had to accept the terms of Uber's standard form services agreement. Under the*

(47) Court of Appeal for British Columbia, *Taurus Ventures Ltd. v. Intrawest Corporation and Whistler Mountain Resort Limited Partnership*, cit., par. 58: «*Thus, whether the entire agreement clause excludes Intrawest from liability for negligent misrepresentation is not easily answered. The principles of concurrency, as expressed in BG Checo, support the entitlement of a plaintiff to choose either, or both, contract and tort remedies. It is also clear, however, that parties may arrange their affairs to exclude liability in tort by including valid exclusion clauses in their contract*».

(48) Court of Appeal for British Columbia, *Taurus Ventures Ltd. v. Intrawest Corporation and Whistler Mountain Resort Limited Partnership*, cit., par. 59 (although the court left room for a more thorough examination of the case in a subsequent full trial).

(49) J. D. MCCAMUS, *The Law of Contracts*, cit., 443-444.

*terms of the agreement, H was required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500, plus legal fees and other costs of participation. The fees represent most of H's annual income. In 2017, H started a class proceeding against Uber in Ontario for violations of employment standards legislation. Uber brought a motion to stay the class proceeding in favor of arbitration in the Netherlands, relying on the arbitration clause in its services agreement with H. H argued that the arbitration clause was unconscionable and therefore invalid. The motion judge stayed the proceeding, holding that the arbitration agreement's validity had to be referred to arbitration in the Netherlands, in accordance with the principle that arbitrators are competent to determine their own jurisdiction. The Court of Appeal allowed H's appeal and set aside the motion judge's order. It concluded that H's objections to the arbitration clause did not need to be referred to an arbitrator and could be dealt with by a court in Ontario. It also found the arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration*".

The majority of the Court considered the clause unconscionable: *"Because of the extensive fees for initiating arbitration, there is a real prospect that if the matter is sent to be heard by an arbitrator, H's challenge to the validity of the arbitration agreement may never be resolved. The validity of the arbitration agreement must therefore be resolved by the court. H's claim that the arbitration clause is unconscionable requires considering two elements: whether there is an inequality of bargaining power and whether there is a resulting improvident bargain. There was inequality of bargaining power between Uber and H because the arbitration clause was part of an unnegotiated standard form contract, there was a significant gulf in sophistication between the parties, and a person in H's position could not be expected to appreciate the financial and legal implications of the arbitration clause. The arbitration clause is improvident because the arbitration process requires US$ 14,500 in up-front administrative fees. As a result, the arbitration clause is unconscionable and therefore invalid"*.

In the joint reasoning the Court observed: "*Unconscionability is an equitable doctrine that is used to set aside "unfair agreements* [that] *resulted from an inequality of bargaining power" (John D. McCamus,* The Law of Contracts *(2nd ed. 2012), at p. 424). Initially applied to protect young heirs and the "poor and ignorant" from one-sided agreements, unconscionability evolved to cover any contract with the combination of inequality of bargaining power and improvidence"* [par. 54][50]

(50) Making reference to M. MCINNES (*The Canadian Law of Unjust Enrichment and Restitution*, New York 2014, 521; see also pp. 520-24; B. E. CRAWFORD, *Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties*, in *Can. Bar Rev.*, 1966, 44, 142-143), and adding that: "*This development has been described as "one of the signal accomplishments of modern contract law, representing a renaissance in the doctrinal treatment of contractual fairness*" (P. BENSON, *Justice in Transactions: A Theory of Contract Law*, Cambridge 2019, 165; see also A. SWAN, J. ADAMSKI, A. Y. NA, *Canadian Contract Law*[4], London 2018, 925)".

Recalling its precedents Hunter, Norberg and Douez, the Canadian Supreme Court stuck to the two layers test which "*requires both an inequality of bargaining power and a resulting improvident bargain*" [par. 65], pointing out that "*[74] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable*" and that "*Improvidence is measured at the time the contract is formed*", and, at the same time, limited the assessment for applying the doctrine to these two requirements[51] .

As a consequence, the Court considered that "[84] *Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant (see Boustany, at p. 6). But unconscionability can be triggered without wrongdoing*", noting that otherwise "[85] *… A rigid requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate*".

Then, coming to a crucial point, it said: "[89] […] *unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented…. The potential for such contracts to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconscionability doctrine is meant to apply*".

The Court is therefore fully aware that such development of the unconscionability doctrine aims to be the main remedy to control the drafting of standard contracts and, moreover, of some specific clauses which themselves may render the contract of adhesion unfair[52].

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([51]) In particular, repealing the insertion, suggested by the appellant Uber, that unconscionability would require, in addition, also the following elements: "*a victim's lack of independent legal advice or other suitable advice; an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and the other party's knowingly taking advantage of this vulnerability*": the Court rejected such approach because "[82] *…This four-part test raises the traditional threshold for unconscionability and unduly narrows the doctrine, making it more formalistic and less equity-focused. Unconscionability has always targeted unfair bargains resulting from unfair bargaining. Elevating these additional factors to rigid requirements distracts from that inquiry*".

([52]) In the words of the Court: "*[90] This development of the law of unconscionability in connection with standard form contracts is not radical. On the contrary, it is a modern application of the doctrine to situations where "the normative rationale for contract enforcement . . .* [is] *stretched beyond the breaking point" (Radin, at p. 179). The link between standard form contracts*

Last but not least, it is worth noting that such a new doctrine of unconscionability, applied to standard contracts, would lead, as it did in the case decided, to the excision of the clause, maintaining the enforceability of the remainder of the contract. Therefore, as was stated in the decision, "*[87] Respecting the doctrine of unconscionability has implications for boiler-plate or standard form contracts*" [53].

The reasoning underlying the decision – introducing a further development of the so called new Canadian doctrine of unconscionability - was not unanimously viewed with favor.

Following the concurring reasoning of Judge J. Brown, who supported the decision, but not the reasoning, of the majority - suggesting instead that the arbitration clause could have been declared invalid and unenforceable simply because it "*[136] undermines the rule of law and is therefore contrary to public policy*" – it could be said that the reference to unconscionability added confusion because it has stretched its original scope[54].

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*and unconscionability has been suggested in judicial decisions, textbooks, and academic Art.s for years (see, e.g., Douez, at para. 114; Davidson v. Three Spruces Realty Ltd. (1977), 79 D.L.R. (3d) 481 (B.C.S.C.); Hunter, at p. 513; Swan, Adamski and Na, at pp. 992-93; McCamus, at p. 444; Jean Braucher, "Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State" (2007), 45 Can. Bus. L.J. 382, at p. 396). It has also been present in the American jurisprudence for more than half a century (see Williams v. Walker-Thomas Furniture Company, 350 F.2d 445 (1965), at pp. 449-50)".*

([53]) The Court added: "*As Karl N. Llewellyn, the primary drafter of the Uniform Commercial Code, explained: Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in. There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which . . . at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted: the boiler-plate is assented to en bloc, "unsight, unseen," on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair. (The Common Law Tradition: Deciding Appeals (1960), pp. 370-71)".*

([54]) See Par 174: "*174] In sum, my colleagues' approach drastically expands the scope of unconscionability, provides very little guidance for the doctrine's application, and does all of this in the context of an appeal whose just disposition requires no such change".* On the contrary, it should be noted that in the previous SCC decisions (particularly Hunter, reported above) the "unconscionability doctrine" was preferred to the old one of "fundamental breach" due to its alleged greater precision.

That being said, the concurring reasoning is certainly not on the same page as the previous decision of the Canadian Supreme Court, when it suggests that the doctrine could not apply to single clauses[55] and when it refers the doctrine merely to *procedural* rather than *substantial* unfairness[56]; in any case the uncomplete development, in common law, of the doctrine of severance has been signaled by the most prominent Canadian scholars[57] for some time.

**3. Unconscionability doctrine and Civil Code of Louisiana.**

In a well-known research project carried out in the 1980s in Louisiana - one of the two instances of Civil law among the North American common law jurisdictions of Canada and USA - noting that Louisiana was one (the other being California) of the two US states which did not enact section 2-302 of the UCC (referring to unconscionability), R. Hersbergen[58], after having examined several cases decided by Louisiana courts on contracts and clauses that elsewhere in the US could have been decided in accordance with § 2-302 UCC, concluded that "*in the clear majority of these "unconscionability cases," the result yielded by application of § 2-302 or of its principle would be, and would have been, the same if decided under the Civil Code of Louisiana*".

The underlying rationale of the research was the prospected functional equivalence of an express codification and recognition of the unconscionability (§ 2-302 UCC) and of the original rules on interpretation, contained in the Louisiana Civil Code (LCC), for the substantial[59] control of adhesion contracts, as they

(55) "*[172] …the doctrine of unconscionability was never meant to apply to individual provisions of a contract. Unlike public policy considerations that target a specific contractual provision, unconscionability's substantive inquiry must consider the entire bargain — that is, the entire exchange of value between the parties*".

(56) Par. 160

(57) See J. D. MCCAMUS, *The Law of Contracts*, cit., 445- 446, who noted that no role for a severance doctrine has been suggested by the courts in this context.

(58) R. L. HERSBERGEN, *Unconscionability: The Approach of the Louisiana Civil Code*, in *Louisiana Law Review*, 1983, 43. 1318-1319. The main features of the case law examined were described by the author as follows: "*Not all of the unconscionability cases contain a clear holding that the contract or a clause therein is unconscionable; in several cases, unconscionability is offered as an alternative ground for non-enforcement. In virtually all the cases, however, a standard form contract, offered on a take-it-or-leave-it basis, is expressly or implicitly involved. None of the cases give a clear indication that any serious bargaining as to terms took place."*

(59) The unconscionability doctrine received in § 2-302 UCC is mostly relevant on the substantial side: "*Judges and legal commentators frequently speak of "procedural" unconscionability as distinguished from "substantive" unconscionability*. (…) *Substantive unconscionability has reference to the terms themselves and whether they are commercially reasonable. In applying UCC section 2-302, judges tend to examine first the terms of the contract alleged to be unconscionable, and if they are not unreasonably favorable to one party, the inquiry into unconscionability typically ends"* (R. L. HERSBERGEN, *Unconscionability*, cit., 1401).

allow courts "*to refuse to enforce any clause or group of clauses found to be unconscionable or, indeed, to refuse to enforce the contract as a whole*".[60]

The Louisiana Civil Code (unlike the Quebec Civil Code) follows mostly the original path of the Napoleonic Code, and does not have any special provision for standard form contracts, except for some rules on interpretation that can be exploited by courts to provide relief for the adherent party to a contract which clauses have been unilaterally drafted ambiguously, or which would lead to "absurd" consequences.

On one hand the reference is to the current Art. 2056 LCC "Standard-form contracts": "*In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party*", which contains a rule leading to results similar to the common law's "*contra proferentem*" doctrine (as we noted above) and also to Art. 2474 LCC "Construction of ambiguities respecting obligations of seller": *The seller must clearly express the extent of his obligations arising from the contract, and any obscurity or ambiguity in that expression must be interpreted against the seller*", containing a rule for sale which courts have applied, by analogy, to contractors, lessors and other suppliers[61].

On the other hand, Louisiana courts have found grounds in the interpretation rules to avert the enforcing of contracts which effects appeared absurd. As was noted, regarding case law on "*Clauses or Contracts that Lead to an Absurdity*", "*Under Art. 1945*[62]*, the courts are bound to give legal effect to a contract according to "the true intent" of the parties, determined by the words of the contract, "when these are clear and explicit and lead to no absurd consequences*"[63].

**4. American Civil Codes and control of the merits of the unnegotiated terms: Quebec and Argentina cases.**

The legal framework differs from Louisiana in other civil law American jurisdictions, based on more recent codes. Reference could be made, in North America, to Quebec and, in South America, to Argentina.

**4.1. The Quebec Civil Code**

The Quebec Civil Code (QCC) considers and defines the result of standardized contracting[64] in art. 1379: "*A contract of adhesion is a contract in which*

(60) R. L. HERSBERGEN, *Unconscionability*, cit., 1315-1316.

(61) R. L. HERSBERGEN, *Unconscionability*, cit., 1318, 1346.

(62) The current art. 2045 LCC, which reads: "*Art. 2045. Determination of the intent of the parties. Interpretation of a contract is the determination of the common intent of the parties.*"

(63) R. L. HERSBERGEN, *Unconscionability*, cit., 1394.

(64) For the expression, R. L. HERSBERGEN, *Unconscionability*, cit., 1317.

*the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable".*[65]

Having defined the category, the Code addresses the control of the drafter's power in art. 1437, which reads: "*An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.*

*An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules* ***normally*** *governing the contract that it changes the nature of the contract is an abusive clause".*

The rule is relevant, for our topic, from several perspectives.

Firstly, its scope encompasses both consumer contracts and contracts *of adhesion*, making clear that a control of contract power is needed not only in the B2C sector, but also when an individual negotiation cannot occur although between professionals, one of which imposes or drafts standard terms.

Secondly, it refers to specific clauses instead of to the whole contract, making it easier to maintain the remainder of the contract intact without the abusive clause.

Thirdly, the assessment demanded of the Judge is substantial and not limited to formal requirements. Moreover, the benchmark indicated is the good faith principle.

Lastly, but no less importantly, it gives clear guidance to the Judge, considering abusive a clause which "*so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract".* Such a long string of words could be summarized as what civil law scholars refer to as the "default rules", describing the subject matter, the very core and the object of the contract; in other words, the "*supplementary*" (also called non-mandatory) rules that civil law codes provide as a fair and balanced set of rights and obligations of the parties to that particular type of contract: such is the most widely accepted interpretation of Canadian civil law scholars of Quebec.[66]

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([65]) Art. 1379, 2nd par., names the negotiated contract as "*contract by mutual agreement"* and the category is defined as the remnant kind of contract, stating: "*Any contract that is not a contract of adhesion is a contract by mutual agreement".*

([66]) S. GHOZLAN, *La notion d'obligation essentielle dans le cadre du contrôle des clauses abusives : Étude des systèmes juridiques français et québécois,* in *http://editionthemis.com*, 2015, 414 : *« …les obligations essentielles comme celles qui découlent de la nature du contrat, celles sans lesquelles le contrat ne peut subsister, qui s'imposent aux parties contractantes de par la nécessité de respecter l'essence même du contrat. En dépit du fait qu'elles s'imposent aux parties, il ne peut s'agir de règles impératives puisque celles-ci ne gouvernent pas « habituellement » le contrat, mais toujours. Par déduction, il est donc question de dispositions supplétives, du moins pour les contrats nommés. En effet, une clause dérogeant à une règle impérative est nécessairement nulle sans qu'il faille recourir à l'Art. 1437 du Code civil du Québec ».*

### 4.2. The Argentinian Civil and Commercial Code

It is worth noting that the same approach is to be found in an important South American Civil Law Jurisdiction, Argentina.

On 1 August 2015, a new Civil and Commercial Code was enacted in Argentina by Law no. 26994 (*Código Civil y Comercial de la Nación*, or CCCN), repealing the former separate Civil and Commercial Codes and following, on the unification of the two into one, the Italian path set in 1942.

As an XXI century Code, the CCCN provides a complete set of rules (Art.s 984 to 989 CCCN) for adhesion contracts or standard-form contracts: contracts entered into by adhering to predisposed general clauses as defined in Art. 984[67].

For such contracts, stringent provisions will apply to the standard terms, requiring complete and plain wording of the clauses and deeming as unwritten standard terms distorting obligations of the adhering party or extending the rights of the drafter of the clause.

In particular, Art. 988 CCCN, headed "Abusive clauses", reads: "*In the contracts envisaged in this section, the following must be considered as non-written: a) the clauses that denaturalize the obligations of the predisposing party; b) those that import waiver or restriction to the rights of the adherent, or extend predisposing's rights that result from supplementary norms; c) those which, due to their content, writing or presentation, are not reasonably foreseeable*"[68].

Furthermore, the rules, as they are set out in the civil and commercial code, apply not only in consumer transactions, but also in commercial ones.

Lastly, as it was in Quebec Civil Code, there is an even more direct reference to "default rules" – "*las normas supletorias*" – i.e., the "*supplementary*" (also called non-mandatory) rules provided by civil law codes as a fair and balanced set of rights and obligations of the parties.

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On the same position, S. GRAMMOND, *La règle sur les clauses abusives sous l'éclairage du droit comparé*, in *Les Cahiers de droit*, 2010. 51, 104- 105: «*Le texte même de l'Art. 1437 suggère au juriste de mesurer l'écart entre la clause dont est évalué le caractère abusif et les «obligations essentielles qui découlent des règles gouvernant habituellement le contrat. (…) Le caractère habituel d'une règle peut d'abord être évalué sur le plan juridique : le tribunal se réfère alors aux dispositions supplétives des chapitres du Code civil sur les contrats nommés, qui s'appliquent à un contrat, à moins que les parties n'en aient disposé autrement* ».

([67]) (Emphasis added). The Spanish wording is: Articulo 984.- "Definición": "*El contrato por adhesión es aquel mediante el cual uno de los contratantes adhiere a cláusulas generales predispuestas unilateralmente, por la otra parte o por un tercero, sin que el adherente haya participado en su redacción".*

([68]) The Spanish wording is: Articulo 988.- "*Cláusulas abusivas": "En los contratos previstos en esta sección, se deben tener por no escritas: a) las cláusulas que desnaturalizan las obligaciones del predisponente; b) las que importan renuncia o restricción a los derechos del adherente, o amplían derechos del predisponente que resultan de normas supletorias; c) las que por su contenido, redacción o presentación, no son razonablemente previsibles*".

5. **Unnegotiated standard clauses affecting the core and subject matter of the contract.**

The references made by the Quebec Civil Code (art. 1437) to "*a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract",* and by the Argentinian Civil and Commercial Code (art. 988) to clauses *"that denaturalize the obligations of the predisposing party"* or "*import waiver or restriction to the rights of the adherent, or extend predisposing's rights that result from supplementary norms",* recall examples that have shown up for decades in civil law jurisdictions, whenever the unnegotiated standard clauses affect the very core of the contract and its subject matter.

The issue is not limited to contractual relations among large companies and small or medium-sized ones, as three categories of legal cases in Italy have proven in the past decades.

**6. Some relevant Italian Case Law**

**6.1. The Safe Deposit Boxes Cases**

The first group of cases relates to the safe deposit boxes arranged by banks.

When a series of floods occurred (mainly November 1st, 1966 in Florence) and the contents of the boxes were damaged or destroyed by the water, clients sued the banks for full compensation for the damage that occurred, but the banks opposed these claims relying on standard terms (Art. 2 and 3 of the Banking standard terms crafted by ABI, the national association of banks) that limited damages to 1,000,000 old Lira (equivalent to about Euro 500 today), a merely symbolic and nominal value compared to the value of goods which are usually placed in safe boxes.

Pursuant to Art. 1229, headed "*Exoneration of liability clauses*", 1st par., Italian Civil Code (ICC)[69], "*Any agreement which, in advance, excludes or limits the liability of the debtor for fraud, malice or gross negligence is void*" and therefore plaintiff usually claimed bank's gross negligence to render these standard terms unenforceable, but the defendant rebutted, to challenge the applicability of Art. 1229, that such a standard clause was not an exculpatory one, but a clause which merely determines the subject matter of the contract (an issue allegedly being entirely left to the freedom of the parties).

It is worth noting that in these cases Art. 1839 ICC states that "*In providing safe deposit boxes, the bank is answerable to the user for the fitness and custody of the premises and for the safekeeping of the box, except for fortuitous events*" and, as a result of such a standard term, the bank in practice sets aside what is provided in Art.

[69] The translation of ICC quoted in this paper is the one provided by J. H. MERRYMAN, *The Italian Civil Code*, Dobbs Ferry 1969.

1839 itself (although the code is silent on whether such a rule is mandatory or not).

In those cases, the Italian Supreme Court ruled[70] the clauses ineffective as they result in exculpatory clauses even if they are reshaped, as they were, nominally asserting that the client was bound not to insert in the safe boxes goods of a value exceeding 1,000,000 old Lira. In that case, according to Italian scholars[71], although formally shaping the contract's subject matter, the clause deprived the contract itself of its very cause as depicted in the reported Art. 1839 ICC.

**6.2. Suretyships in Favor of Banks Cases.**

Another group of Italian cases relates to suretyships in favor of banks.

According to Art. 1936, 1st par., ICC: "*A surety is a person who guarantees the performance of the obligation of another by binding himself personally to the creditor*".

Under Italian law, the guarantee is given upon condition of the validity of the guaranteed obligation, as Art. 1939 ICC states: "*A suretyship is not valid unless the primary obligation is valid…*".

When the creditor is a bank, the contract is entered into by adhesion of the surety to standard terms crafted by ABI (the national banks' association) and these standard terms set aside Art. 1939, 1941 and 1957 ICC which, although not explicitly characterized as mandatory, depict the subject matter of the suretyship contract in a manner that is completely overturned by such standard terms[72].

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([70]) The Italian Supreme Court's most important decisions on safe deposit box contracts were: Cass. 29th March 1976, no. 1129, in *Banca, borsa e tit. cred.*, 1976, II, 173 ff.; Cass. (joint divisions) 1st July 1994, no. 6225 and 6226, in *Giur. It.*, 1995, I, 1994 and, more recently, Cass. 30th September 2009 no. 20948. For a reference to the topic, in the Italian legal literature in English, see M. GRAZIADEI, *Control of price*, cit., 204.

([71]) See F. BENATTI, *Le clausole di esonero da responsabilità nella prassi bancaria,* in ID. *Studi Urbinati,* 1976, 140; C. CASTRONOVO, *La responsabilità da cassette di sicurezza,* in AA. VV., *Le operazioni bancarie,* edited by G. B. Portale, Milano 1978, 493.

([72]) Art. 1939 and 1941 ICC show the close link between primary obligation and suretyship, as they respectively state, regarding to its validity: «Validity of suretyship. *A suretyship is not valid unless the primary obligation is valid, except when the suretyship is undertaken for an obligation contracted by a person lacking capacity*» (Art. 1939), and «Limitations of Surety. *A suretyship cannot be undertaken for a greater amount than that owed by the primary debtor nor under more burdensome conditions*» (Art. 1941, 1st par.). Subsequent Art. 1957, 1st par., adds: «Maturity of primary obligation. *The liability of a surety remains in effects even after the primary obligation has matured, provided that the creditor, within six months, has instituted an action against the debtor and has diligently pursued it*». It must also be considered that under Italian Law the suretyships is a contract that heavily affects the guarantor, as his payment can be relieved only by action of recourse against the debtor's assets, and is a contract that needs no consideration; being a "typical" promise, it is binding as such and, as was noted by G. Gorla, one of the pioneers in Italian comparative law studies, «*because of the serious consequence of the suretyship, the civil law codes require an*

In recent decisions[73], the Italian Supreme Court ruled that such standard terms, being the outcome of an anti-competition cartel (the national banks' association ABI, as so deemed by the Court), are barred by Art. 2 of the Italian Competition Law (Law no. 287/1990) and therefore are null and void.

**6.3. The Claims-Made Insurance Policies Cases.**

The third group of cases comes from a more global contractual phenomenon, the shifting of civil liability insurance contracts from the *loss occurrence* model to the *claims-made* one.

Art. 1917, 1st par., ICC reads: "*In liability insurance the insurer is bound to indemnify the insured for the damages which the latter must pay to a third person because of events occurring during the insurance period and resulting in the liability referred to in the insured contract. Damages deriving from fraudulent acts are excluded*".

The choice of the Italian Civil Code, in shaping (professional) liability insurance, was in the direction of the loss occurrence model, in which the trigger for coverage is an accident or an unfavorable event causing damage or loss due to malpractice committed during the validity of the policy.

A completely different model of liability policy – the claims-made insurance – appeared on the market mainly in the 1980s and was created in common law systems[74] to enable the insurance industry to cope with long tails

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*express manifestation of the intent to guarantee another's debt: see Art. 2015 French Civil Code, 1937 Italian Civil Code, Art. 1766 German Civil Code, … require the written form …"*: such a contract implies for the surety "*a risk corresponding to the possibility of the principal debtor becoming insolvent. This risk may represent a detriment more serious that that suffered in making a donation*» (G. GORLA, *Suretyship (fideiussio) promises to pay another's debt: promises to give security,* in ID., *The fundamental problems of contracts. Principles, methods, and techniques of the civil law as compared with the common law,* notes by Gino Gorla, course held in 1958-1959 at University of Michigan Law School, now published in ID., *I problemi fondamentali del contratto,* Napoli 2017, 227, footnote 3).

([73]) Cass., 12th December 2017, no. 29810; Cass., 22nd May 2019, no. 13846.

([74]) The claims-made policy can be characterized as an "alien contract" (quoting G. DE NOVA, *The Alien Contract*, in *Riv. dir. priv.*, 2011, 487 ff.: «*A contract governed by Italian law but conceived and drafted on the basis of a common law model and in particular a U.S. and/or a U.K. model can be depicted as an "alien contract*")», having been imported in Italy from a common law tradition. Therefore it could be of some interest to verify whether the domestic debate has taken into due account the suggestion and indications given by the legal system of origin. Common law Courts are fully aware of the consequent risk of *coverage gaps,* the same mentioned by the Italian Supreme Court as a potential hazard for an insured's clients. Sometimes, by means of an appropriate construction of the contract, Courts may avoid the insured being unreasonably denied of policy coverage, as was suggested by the Court of Appeal for Ontario, in Stuart *v.* Hutchins**,** (1998): «*…where circumstances beyond the control of the insured render it physically impossible for the insured to comply with the notice provision, general principles of contract interpretation would come to the insured's aid (…) it would be open to the court to construe the notice provision as containing an*

*implied term that non-compliance due to physical impossibility would not be fatal to coverage but that the insured be given a reasonable opportunity to comply*».

Moreover, it must be pointed out that policies sold in the Italian market usually contain a definition of "claim" – which is necessary, as a statutory provision in ICC describing claims-made insurance is absent – with a very narrow scope, which prevents the insured from reporting circumstances or mere potential claims that may likely result in a future real claim.

This situation was addressed in an English leading case, Kidsons (a Firm) *v.* Lloyds Underwriters, brought before the England and Wales High Court Queen's Bench Division - Commercial Court, and decided on 9thAugust 2007 (r*ead it at* http://www.bailii.org/ew/cases/EWHC/Comm/2007/1951.html ), where it was found that: «*It is integral to the structure of claims made policies being successively renewed from year to year, that provision is made for claims arising after the expiry of any one policy period out of circumstances of which the assured has first become aware during that period. Unless provision is made to treat such claims as having been made during that policy period, the concept of claims-made policies applying in successive policy years would create an unexpected and inappropriate gap in coverage*».

The relevant point, for the Italian domestic market where this common law contractual model has landed, is that the High Court found the inclusion of a deeming clause "integral" to the structure of claims-made policies being successively renewed from year to year.

In other words, a deeming clause is – and must be – part of the *naturalia negotii* of an insurance coverage split, as is usually arranged by insurers, in short periods of one year each, much shorter compared to the years of practice of the professionals and to the longer statute of limitation period for professional liability.

In conclusion, the British common law system gives a clear indication in construing claims-made policies combined with the faculty to gain coverage by reporting, "as soon as practicable", circumstances of which the insured has become aware during the insurance period, and which may give rise to a loss or a claim against them likely after the completion of the same period.

Such a clear indication is not present in the Canadian common law system.

In the leading case Jesuit Fathers of Upper Canada *v.* Guardian Insurance Company of Canada and ING Insurance Company of Canada (Jesuit v. Guardian) decided on 10 January 2006, the Supreme Court of Canada was fully aware of the possible lack of coverage in claims-made policies, but it noted that policies offering more comprehensive protection are available on the Canadian market: among them, on the one side, claims-made policies enlarged with a deeming clause and, on the other side, occurrence based policies.

The Court therefore refused to hold the insurer liable for claims not reported during the coverage period mainly due to the availability on the market of these more comprehensive policies and to the failure of the insured Jesuit Fathers to purchase them. In other words, as the policy did not include a "deeming clause" (also known as "notice of circumstance clause") in spite of the fact that it was commercially available upon the last renewal, the Canadian Supreme Court inferred that the Jesuits did not want this coverage to be included in the policy: hence, as a consequence, the client's refusal to purchase the additional coverage offered by the deeming clause was considered an

damages (*i.e.* product liability, asbestos exposure, etc.), that arise a long time after their cause and may even result from an uncertain series of different co-causes.

The claims-made policy has a completely different trigger than an occurrence-based policy: i.e., the filing and initial reporting of a claim during the policy period, so the professional malpractice need not have occurred during the policy period, for coverage.

In short, claims-made means, for the insurance industry, avoidance of "long tail": which is why in the Italian market it is nowadays quite impossible to find any offer of an occurrence based professional liability policy.

As has been pointed out also by the Italian Supreme Court (*Corte di Cassazione*)[75], there may be relevant negative issues for the insured on a claims-made basis in respect of the loss occurrence model shaped by Art. 1917 ICC: firstly, claims-made policyholders may find it impossible to change insurance company once an actual claim has brought their potential risk to the attention of insurance underwriters; secondly, if the misconduct that originates the professional liability occurs during the policy period but the claim is not raised in the same period, they may find it difficult to obtain a new claims-made policy when they have complied with the duty to disclose circumstances that may result in a prospective (although not yet made) claim; thirdly, professionals need to maintain insurance for new claims from year to year and need to be able to obtain cover for potential claims, not yet made, of which they learn in the current year.

As quoted above, Art. 1917, 1st par., ICC describes liability insurance as a contract on a loss occurrence basis and there is no provision in ICC that refers to the claims-made policy. In any case, Art. 1917, 1st par., is not characterized as mandatory under Art. 1932, 1st par., ICC.

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implied rejection of this coverage that prevented the insurance company from being held liable to indemnify the client.

The Italian insurance policy market being so different, where professionals currently cannot find an occurrence-based policy and can hardly find a claims-made with deeming clause policy (and, if any, at a prohibitive price), the reasoning of Jesuit v. Guardian is of little help in dealing with the issues raised in Italy.

An important suggestion, on the point, came, instead, from Australia, where in FAI *v.* Australian Hospital Care Pty Limited (FAI v. Australian) - a case decided on 9th July 1999 by the Supreme Court of Queensland and subsequently, on 27th June 2001 by the High Court of Australia – the Courts considered the "deeming" clause a necessary complement to fix the inadequate cover given by the mere "claims made and reported" clause: among the Reasons for Judgment – written by Judge Derrington – it is worth noting that the premium was considered comprehensive for the coverage of a whole, composed by the "simple claims-made clause" *plus* the "deeming clause", the combined operation of them being necessary to avoid gaps of coverage.

([75]) The concern for potential "coverage gaps" is also expressed in Cass. (joint divisions), 6th May 2016, no. 9140, quoted below.

We must add that, as stated by Art. 1322 ICC, headed Contractual Autonomy[76]: "*1. The parties can freely determine the contents of the contract within the limit imposed by law. 2. The parties can also make contracts that are not of the types that are particularly regulated, provided that they are directed to the realization of interest worthy of protection according to legal order*".

Thus, the main questions are: can the parties modify and reverse the scope of liability insurance set forth by Art. 1917, 1st par. ICC? To what extent can the insurer – especially drafting standard terms - reshape the scope of the professional liability policy? Can the insurer do so also if it leads to gaps in coverage that may affect not only the professional insured, but even his/her clients whom the coverage, in the end, is intended by law to benefit?

These questions have been dealt with by the Italian Supreme Court in the decisions rendered on the topic. In examining them, we must be aware that judgements of the Italian Supreme Court on claims-made policies have been sometimes inaccurately reported to be entirely in favor of the feasibility and unquestionability of the model as per Italian law. On the contrary, on non-biased and closer examination, the decisions appear more dubious.

It is true that Italian Supreme Court judgment no. 5624, of 15th March 2005, stated that claims-made polices may be valid under Art. 1322, second par., ICC, but the reasoning aimed to affirm that these clauses fell under the definition of "unfair terms" of the Art. 1341 of the Civil Code on standard terms and conditions of contracts, and required specific approval in writing by the insured, the clause being void and unenforceable without it.

Again, a subsequent decision, no. 3622, lodged on 17th February 2014, was not a point in favor of the claims made. In that case, it was the insurer that alleged the claims-made clause (by itself crafted and imposed) was void, in order to deny cover for claims made during the policy period but relating to professional mistakes that occurred before the contract was entered into. The decision, therefore, can be regarded mostly as a ban on attempted unfair withdrawal from the contract, more than as an assertion of indisputable validity of the claims-made model.

Then came the Joint Divisions of the Italian Supreme Court, with decision no. 9140 filed on 6th May 2016, in which the Court stated that the so called "mixed" claims-made policies (those providing coverage only if: i) the claim is made during the policy period and ii) also the event – i.e. the misconduct of the professional - occurred within a limited previous period) may be declared void because the underlying interests sought by the contract do not deserve protection under the applicable law, sending them for such case by case assessment, under Art. 1322, second par., to lower courts (Tribunals and Courts of Appeal). The decision did not offer any guideline for such evaluation, except

[76] On the topic, briefly, G. ALPA, V. ZENO ZENCOVICH, *Italian Private Law*, London 2007, 157 ff.; G. IUDICA, P. ZATTI, *Linguaggio e regole del diritto privato*, Padova 2005, 115.

for the note that the suitability of the policy is not likely to be found where the claims-made clause, regardless of how it is conceived, exposes the insured to "coverage gaps". Moreover, the Supreme Court decision stated that if the clause were found null and void, the statutory provision of Art. 1917, first par., ICC would apply to the contract, which therefore would remain valid but would be construed as a *loss occurrence* policy.

Subsequently, the Third Division of the Supreme Court, by decision no. 10506 rendered on 28th April 2017, nominally following the previous decision of the Joint Divisions, stated that a claims-made clause that fails to allow the insured to obtain coverage for malpractice (in that case medical) occurring in the policy period but not resulting in a proper claim being made in the same period is not directed at interests worthy of protection and therefore the policy remains enforceable, except for the claims-made clause, as a loss occurrence insurance pursuant to Art. 1917 first par.

At present, the debate on the claims-made policy is not yet over in Italy.

On 24th September 2018 a second judgement, no. 22437, of the Supreme Court Joint Divisions was lodged, stating the following principle of law: the model of insurance for civil liability with clauses "on claims-made bases" is a sub type of insurance against damages claims, as an exemption permitted in the first par. of Art. 1917 of the Civil Code, and remains a typical contract. It follows that, with respect to the single insurance contract, it is unnecessary to ascertain the worth of the contract itself under the *second* par. of Art. 1322 above quoted, but the lower courts must consider whether it remained "within the limits imposed by law", as stated by the *first* par. of the same art. 1322: therefore the insured party can seek remedies that range from pre-contractual liability for unfair terms, to nullity, full or partial, of the contract due to lack of specific *cause*, with potential judicial adaptation of the contract according to the principle of adequacy of the insurance for the practical purpose pursued by the contracting parties.

More recently, a decision rendered on 13th May 2020 (no. 8894) by the Third Division of the Supreme Court considered null and void a claims-made clause as it required, for the coverage, the claim made by the damaged party to be filed within 12 months from the expiration of the insurance. The Court held that such a clause departs from the contractual type depicted by art. 1917 ICC and is unlawful as it is contrary to art. 2965 ICC[77], which forbids stipulations establishing forfeitures that jeopardize the exercise of the counterparty's rights.

Had the Italian Civil Code had a rule similar to art. 1437 Quebec Civil Code or art. 988 Argentinian Civil and Commercial Code, the decisions in the cases reported above would have benefited of a more direct and clear ground to

([77]) Art. 2965 reads: "Forfeiture established by contract. *Stipulations establishing forfeiture upon the expiration of time limits which make the exercise of rights excessively difficult for one of the parties are void*".

prevent what has been called "denaturalization of the obligations of the predisposing party".

The reason for such a gap in ICC is likely to be merely historical.

The code was conceived in the early 1940s and had its roots in the previous 19th century Civil Code of 1865: as a result, the matter of adhesion contracts was poorly addressed, if we consider it nowadays.

Such a remark is not only confirmed by the cases of American Codes (of Canadian Quebec and Argentina) referred to above, but also by the recent amendments to the French Civil Code, from which, in origin, practically all civil codes stemmed.

**7. The French Civil Code, as amended in 2015.**

The French Civil Code was amended by a process started in 2015 (Law 2015-177 of 16 February 2015[78]), passed through Ordinance 2016-131[79] and concluded in 2018 (Law 2018-287).

What here matters most is the new Art. 1171, included in the subsection headed "The Content of a Contract", that reads: "*Art. 1171. – Any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written*"[80].

Firstly, it must be pointed out that in the French Civil Code, as in the Italian Consumer Code, the assessment of the potential significant imbalance must not concern either the main subject-matter to be performed under the contract or the adequacy of the price in relation to the act of performance.

Then it is worth noting that the applicability of the rule expressly to "adhesion contracts" was added at the end of the legislative amendment process, to link the scope of the rule only to cases where the "significant imbalance" occurred without the opportunity to negotiate the contract.

Therefore, the new wording of Art. 1171 makes a significant distinction between adhesion and negotiated contracts (as art. 1379 Quebec Civil Code had previously done), giving courts, in the first category of cases, power to adapt the contract itself, removing the unbalancing standard terms from it and maintaining the remainder of the content.

Again, the insertion, in the same section, of Art. 1170 - that states: "*Any contract term which deprives a debtor's essential obligation of its substance is deemed not*

(78) "*LOI n° 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*" (art.s 8 et 27).

(79) "*Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*".

(80) French Civil Code 2016 translated by John Cartwright (University of Oxford), Bénédicte Fauvarque-Cosson (Professeur à l'Université Panthéon-Assas) and Simon Whittaker (University of Oxford) (French original wording: "*Dans un contrat d'adhésion, toute clause non négociable, déterminée à l'avance par l'une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite*").

*written"*[81] - is of utmost relevance: the scope of the rule, which is not limited to adhesion contracts, avoids the very subject of a contract being shaped in a manner that could render the contract itself useless (as could be, in some cases, claims-made professional insurance policies, as long as they imply coverage gaps to the detriment of both the professional insured and his/her client).

**8. Conclusions**

At the one hand, looking to the Civil Law Jurisdictions, we can note that codifications of Quebec, Argentina and France, being more recent, could give guidance also with reference to the Italian Civil Code, previously conceived and enacted, and could allow courts of civil law - whenever a contract of a *type particularly regulated* is unilaterally crafted in a fashion that changes the nature of it or *"denaturalizes the obligations of the predisposing party"* and outside "*the fundamental obligations arising from the rules normally governing the contract"* (to use the Argentinian and Canadian wording) - to re-establish the *supplementary norms*, which can be overridden only in individual negotiations between the parties.

Indeed, in the unnegotiated contracts of adherence these rules must be considered mandatory and could not be unilaterally overturned: at least when they shape the very scope and the juridical content of the agreement, as they must be considered as the "limits imposed by law" referred to by art. 1322 first paragraph (recently pointed to as a benchmark by the Italian Supreme Court to assess the validity of claims made insurance policies).

Considering, on the other hand, the Common Law jurisdictions, we can acknowledge that the unconscionability doctrine can allow a quite efficient control on the contract power, especially on standard terms, whenever no statute provides express benchmarks for assessing the fairness of the agreement.

However, certain issues remain unsolved: firstly, the range of standard terms or clauses that fall within the doctrine's scope and, secondly, how to manage the adaptation of the contract, unburdened by the unconscionable clauses.

Canadian legal literature appears fully aware of this.

Concerning the first issue, the Supreme Court of Canada new doctrine[82] has been tested mainly with regard to limitation or exclusion of liability clauses, but it has been suggested that also "entire agreement" or "arbitration" clauses (inserted in consumer contracts) could be assessed under the doctrine, and the Supreme Court of Canada recently scrutinized the latter in *Uber v. Heller*[83], as we

([81]) French original wording: "*Toute clause qui prive de sa substance l'obligation essentielle du débiteur est réputée non écrite".*

([82]) J. D. MCCAMUS, *The Law of Contracts*, cit., 831-832.

([83]) J. D. MCCAMUS, *The Law of Contracts*, cit., 443-444.

have seen above.

But it is the second issue that raises more concerns. In particular, a material question «*relates to the role, if any, of a doctrine of severance in the context of the unconscionable term analysis. (…) in order to determine whether the entire agreement should be struck down or, alternatively, whether the offending clause can be deleted and the remainder of the agreement enforced*».[84]

As a civil law scholar, I may concur with the concerns raised above, but I can add that, on this issue, the civil law tradition has a quite better position in dealing with these problems.

When a standard term is excised by civil law courts - using a variety of legal tools (such as the lack of *cause*, or the barring of unfair terms) having the same aim as the Canadian unconscionable terms doctrine - there is less room, in civil law, for concerns about potential unfairness of the remainder of the agreement, absent the unfair term: whenever an unbalance of such kind is ascertained, civil codes provide solid guidance to courts for maintaining the remainder of the agreement with "*supplementary*" rules, filling the gap by a fair and balanced set of rights and obligations.

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