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Articoli

CANADIAN JURISDICTION AND CANADIAN LEGAL EDUCATION: WHY SHOULD AN ITALIAN SCHOLAR LOOK TO CANADA, AND WHAT CAN HE TAKE AWAY FROM IT WHEN VIEWING IT FROM A FOREIGN (AND ITALIAN) PERSPECTIVE?

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Abstract

This essay examines Canadian bijuralism as a distinctive model for legal education and comparative legal scholarship. It explains how Canada combines common law and civil law traditions within a single constitutional and legislative framework. Particular attention is given to Quebec, whose private law is rooted in the civil law tradition while coexisting with federal and provincial common law systems. The paper highlights the educational impact of bijuralism, especially through dual B.C.L./J.D. programs offered by leading Canadian law schools. It shows how these programs prepare lawyers to operate across provinces, legal traditions, and institutional contexts. From an Italian and European perspective, Canada offers a valuable laboratory for rethinking comparative law beyond purely national categories. The essay focuses especially on two private law issues: contractual cause and the control of unfair clauses in adhesion contracts. Quebec civil law is compared with Canadian common law doctrines such as unconscionability, particularly in relation to exclusion and arbitration clauses. Recent Canadian case law demonstrates an increasing convergence between civil

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law and common law solutions in the protection of weaker contracting parties. The Canadian experience ultimately provides Italian scholars with a rich example of legal pluralism, doctrinal dialogue, and transsystemic legal education.
Keywords: Canadian bijuralism; legal education; comparative law; Quebec civil law; unconscionability.

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1. FOREWORD.

I am grateful to my colleague Chiara Tenella for inviting me to this conference, on "*University Courses in Private and Comparative Law: Educational Models and Prospects in Legal Education*".

I was invited, I suppose, because I have been hosted several times at some of the most important Canadian universities to further my research and teach. My fellow Canadian colleagues have also been invited to reciprocate at our beloved university.

In addition to providing a general overview of the legal framework of the Canadian jurisdiction and the resulting shape of Canadian legal education, I will primarily address the fundamental question of why an Italian scholar should look to Canada and what they can learn by viewing it from a foreign (and Italian) perspective.

I will not discuss the use of the Socratic method in law schools in Vancouver, Toronto or Montreal, as it is well known that it derives from the ideas and case method of Christopher Columbus Langdell[1,] dean of Harvard Law School at the end of the nineteenth century. This approach, which combines casebooks and question-and-answer sessions in class, is followed in common law Canadian universities and was also adopted to some extent in our university, when Pier Giusto Jaeger pub-

1 Christopher Columbus Langdell, Dean of Harvard Law School from 1870 to 1895.

lished a series of books titled "Casi e materiali di diritto commerciale" in the 1980s.

This approach has advantages, such as deep attention to law in action before courts, but also disadvantages, such as significant time consumption and diminished systematic and holistic approaches to legal systems as a whole.

2. CANADA AND ITS *BIJURALISM*.

The Canadian legal system is characterized by legal pluralism, which is defined as the coexistence and interaction of multiple sources of law and legal systems.

One form of Canadian legal pluralism is Bijuralism, which is the presence of both common law and civil law within the same legislative framework.

In Quebec, civil and common law have repeatedly exchanged roles in governing property and contract law.

Initially, New France (the territory that is now Quebec) adopted the laws, customs, and practices of the civil law tradition. From 1664 onward, the "Coutume de Paris," a consolidation of civil law rules, was the official governing law of New France. After the British Conquest of 1760 and the Treaty of Paris of 1763, however, the common law of England became the law of reference in New France.

In 1774, the Quebec Act reinstated, with certain exceptions, the rules and principles of civil law in matters of property and civil rights. This act also formalized the coexistence of common and civil law within a single territory in Canada for the first time, with civil law applied to private law matters and common law applied to public law matters[2].

The 1867 Constitution Act divides legislative powers between the Parliament of Canada and the provinces, allowing for the continued coexistence of common and civil law in Canada.

According to subsection 92(13) of the Constitution Act of 1867, matters relating to property and civil rights fall under the legislative jurisdiction of the provinces. These matters include provincial private law issues such as civil liability, torts, property, securities, and contracts. In Quebec, this broad power is exercised in a civil law environment. In contrast, the rest of Canada exercises this power in a common law environment.

2 As recalled in the official website of the Department of Justice Canada.

Since the 1990s, the Department of Justice has ensured that federal acts and regulations are accessible, easily understood, and applicable across Canada in both official languages, in the context of both civil law in Quebec and common law in other provinces and territories.

To be effective and understood across Canada, federal legislation must be bilingual and bijural. This brings us to the topic of interpretation. The relevant principles and parameters for the bijural interpretation of legislative text are set out in the Interpretation Act [3], which confirms that civil law and common law are both equally authoritative sources of law in the context of property and civil rights in Canada.

In particular, Sections 8.1 and 8.2 of the Interpretation Act, read: "8.1. *Duality of legal traditions and application of provincial law. - Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.*

8.2.- Terminology.- Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces".

3. THE TWO SUBSEQUENT CIVIL CODES OF LOWER CANADA AND QUEBEC.

Unlike all the other provinces and territories, which adhere to common law, Quebec has and had civil codes on matters of private law.

As it was recalled: "*Today Quebec has two Civil Codes, the 1993 Civil Code of Québec, and the 1866 Civil Code of Lower Canada, which remains in force to the extent of federal jurisdiction under the Constitution Act of 1867 - notably in relation to marriage, interest and insolvency. The 1866 Code was the fruit of a Codification Commission created in 1857 to consolidate, in a bilingual statement, all civil laws in Canada East. For doctrine, the commissioners relied heavily on the works of the great French jurist Pothier, to a lesser extent on various commentaries on the Code*

[3] The Interpretation Act is a consolidation made on 2025 (R.S.C., 1985, c. I-21) under Subsections 31(1) and (2) of the Legislation Revision and Consolidation Act, in force on June 1, 2009.

Napoléon and occasionally upon the text of the Louisiana Civil Code. They derived the majority of the Code's rules from the Custom of Paris, brought to New France in 1663"[4].

4. CROSS - PROVINCE LEGAL PRACTICE AND THE SUPREME COURT OF CANADA.

The dual legal system, which is based on both common and civil law, requires practitioners who aspire to practice across provinces, as well as federal civil servants, to pursue legal education in both fields. A deep knowledge of both common and civil law is mandatory for practicing efficiently in Quebec and in the other provinces and territories, for serving in public state departments, and for submitting cases before the Supreme Court of Canada (SCC), as well as for being appointed as a judge in it.

Regarding the SCC, former Chief Justice Richard Wagner proudly stated that the SCC is "*the only bilingual and bijural supreme court in the world*" able to "*decide cases in both English and French and from both common law and civil law*".

The Court originally had six judges. The number of Supreme Court justices increased to seven in 1927 and again in 1949, reaching the current total of nine members. The Supreme Court Act requires that three of the nine judges be appointed from Quebec. The others are traditionally appointed from the following regions: three from Ontario, two from the western provinces or northern Canada, and one from the Atlantic provinces.

5. THE IMPACT OF BIJURALISM ON THE LEGAL EDUCATION SYSTEM. THE BACHELOR OF CIVIL LAW (B.C.L.) AND THE JURIS DOCTOR (J.D.): LAW SYLLABUSES AND DOUBLE DEGREES.

Since the Canadian legal system is *Bijural*, some of the main universities started offering dual degree programs. Upon completion, students receive a Bachelor of Civil Law (B.C.L.) for civil law and a Juris Doctor (J.D.) for common law, two degrees to qualify students to practice in both jurisdictions. The standard duration of a

4 Roderick A. Macdonald, entry *«Civil Code»*, in *The Canadian Encyclopaedia*.

J.D. or B.C.L. program is three years, and the combined program for a double degree is an additional year, for a total of four years.

Among the universities offering these programs are McGill University in Montreal and Osgoode Hall Law School in Toronto (York).

McGill University's double degree program is called the "BCLJD." It started in 1999 as - "*a bold experiment for teaching the common law and the civil law in an integrated or (in McGill parlance) "transsystemic" manner from the first day of the first year of the law school*"[5].

Such a program, established also in Louisiana State University, "*should provide a cosmopolitan citizenship"* because, as it was said, "*Bijuralism is first and foremost a means of gaining a personal culture*"[6], which is the mission of the law schools.

At McGill's Faculty of Law, within the aforementioned curriculum, otherwise referred to as the "National Program", students embark upon an integrated program of studies that qualifies them for Bar Admission Programs across all Canadian provinces. The faculty confers its Bachelor of Civil Law (B.C.L.) and Juris Doctor (J.D.) degrees upon candidates who have successfully completed a minimum of 105 credits.

The first year at McGill is based on courses split into topics taught from both civil and common law perspectives. Topics include: Contractual Obligations and Extra-Contractual Obligations/Torts, which respectively cover, as the syllabuses read, respectively "*Basic concepts of contractual obligation in the Civil and Common Law. Formation and consent; formalities; cause and consideration; relativity of contracts and privity; lesion and unconscionability; performance and breach; frustration and force majeure; contractual remedies*" and "*Integrated study of basic concepts of extracontractual obligations in the Civil and Common law. Fault and other bases for liability; protected interests; causation; reasons for exoneration; apportionment of liability; intersection of human rights and civil wrongs*".

During the second year, *Property Law* is, again, taught on a dual basis (Civil and Common Law, but considering also a third source of law, the Indigenous one). The Syllabus reads: "*Integrated study of the foundations, principles and mechanisms of property law. Examination of common law, civil law and indigenous traditions in respect of property. Key relationships in respect of things and services as well as limitations on property rights*.

In the following years more advanced courses are delivered in the two legal tradi-

[5] N. KASIRER, *Bijuralism in Law's Empire and in Law's Cosmos,* in *Journal of Legal Education,* Vo. 52, Numb 1 and 2 (March/June 2022), p. 29 ss.
[6] N. KASIRER, *Bijuralism in Law's Empire and in Law's Cosmos,* p. 39.

tion perspective: Civil Law Immersion Courses, such as Advanced Civil Law Property (3 credits) and Advanced Civil Law Obligations (3 credits) and Common Law Immersion Courses, such as Advanced Common Law Obligations; Remedies; Restitution; Equity and Trusts and Advanced Torts

Coming to Toronto, at Osgoode Hall Law School -York University the double degree Juris Doctor/Bachelor of Law (Civil) is delivered jointly with the Université de Montréal (with which our University of Milan had had summer schools' program for several years).

As the Osgoode Hall website tells, "*Knowledge of both common law and civil law systems is increasingly valuable in today's environment of frequent cross-border transactions and global clientele. Dual credentials are also valuable when applying for a judicial clerkship at the Supreme Court of Canada. After four years combined study, students graduate with a Juris Doctor in common law from Osgoode Hall Law School and a Bachelor of Law (Civil) from the Université de Montréal, Faculté de Droit. After completing three years in their home faculty, students in the combined program are granted two years advance standing at the other law school and are thus able to complete their second law degree in one year*".

In this joint educational program, students apply for admission during their third year at their home faculty. Admitted students then take a combination of first-year and upper-level courses at the second law school.

As to western Canada, it is worth noting that another prominent Canadian law school, the Peter A. Allard School of Law at the University of British Columbia (UBC)- Vancouver, does not offer a dual degree program. Instead, it focuses solely on common law and provides the option to study civil law concepts during its common law courses. Additionally, it allows students to transfer credits for civil law courses taken outside of UBC. Therefore, students who have already obtained a three-year Bachelor of Civil Law (B.C.L.) from other universities that offer a three-year civil law education program (namely, in Montreal) can earn a Juris Doctor (JD) in only one year in Vancouver.

6. SOME IMPRESSIONS ON THE CANADIAN SCHOLARS' ATTITUDE AND POSTURE TOWARD COMPARATIVE LAW.

Unlike what a European scholar might expect, given the distinctive bijuridical nature of the Canadian legal system, a culture of comparative law is not particularly widespread in Canadian academia. University lecturers and scholars tend to discuss and explore legal issues while remaining firmly within their own legal tradition.

Of course, there are exceptions, particularly among those who, by virtue of their role, are in contact with the two legal families present in the Canadian legal system. One example is Mr. Nicholas Kasirer, a current member of the Supreme Court of Canada (SCC), who was a close friend of Rodolfo Sacco.

Mr. Kasirer spoke with great affection and admiration about Sacco's teachings and their dialogue when he was invited to speak at a seminar in Sacco's memory. The seminar was organized a few years ago by the University of Turin and Antonio Gambaro on November 16, 2023.

The general lack of curiosity in the Canadian academic world about the approaches and methodologies used to study the other legal system sometimes causes Canadian scholars to miss opportunities offered by the comparative law method.

One example stands out.

It is well known that the teaching and educational approach of the "Civilians" is more theoretical and inclined towards dogmatics than that of a common lawyer. With a peculiar "provincialism," Italian scholars tend to undervalue their own conceptual toolkit and envy the case-based study typical of the common law tradition.

However, one area of common law, the Law of Restitution, has undergone a process of identification, autonomy, and systematization through the Restatements of the American Law Institute since the 1930s.

John McCamus, Professor Emeritus at Osgoode Hall Law School is the Canadian standard-bearer and promoter of the autonomous study of this third branch of law, the Law of Restitution, previously scattered among *quasi-contracts* and trusts. I invited him a few years ago to deliver a highly acclaimed series of seminars at our University of Milan.

On that occasion, I noted with surprise that the creation of such a new field of study after contract and torts had not taken advantage, in North America, from the systematization that the subject matter had received in European civil codes.

Indeed, the rules on recovery of undue payments provided by continental civil codes have their roots in the Roman *condictio indebiti* and in the *condictio ob causam finitam* and are frequently employed in civil law jurisdictions to address ineffective or terminated contracts. However, the North American approach appears to demonstrate a limited engagement with the European civile codes and the Roman Law roots of this tradition.[7]

7. WHAT A *BIJURAL JURISDICTION* CAN GIVE TO ITALIAN AND EUROPEAN SCHOLARS AND LAWYERS.

From an alternative standpoint, it is worthwhile to consider the potential benefits that the bijural nature of the Canadian system could offer an Italian or European legal scholar.

Here, I will limit myself to two topics I have addressed in the past: the issue of "cause" as an essential element of the contract[8] and the judicial control over the unilateral drafting of standard terms in adhesion contracts[9].

7.1. Cause and Consideration in Quebec Civil Law.

As for the first one, the meaning of the concept of 'cause,' which Italian legal scholars have lost over the decades due to the different functions to which the causa has been put, I would like to highlight two points.

During the late eighties, we law school students were taught that *cause* and *consideration* perform similar tasks but are specific to different legal systems. Therefore, they do not coexist within the same framework and cannot be compared on a theoretical level.

Furthermore, the doctrine of consideration evolved in a complicated manner in North American common law jurisdictions. On the other hand, civil law code drafters did not define cause.

The concept of cause is currently ambiguous, and the matter seems difficult to address. Civil lawyers seem to have lost the roots of the concept of cause. Problems have arisen in managing the concept of cause itself, as well as in comparing it with

[7] At most, a general principle against unjust enrichment "*can serve as a basis for modifying and extending the existing law*", while, "*retaining the existing categories*" which is consistent with the Supreme Court of Canada (J. McCamus, *The Restatement (Third) of Restitution and Unjust Enrichment*, in *Canadian Bar Review* 90.2 (2011): 439-467, at 450)

[8] For a more detailed exposure, I would like to make reference to my essay DELFINI, *Instances of Civil Law in North American Common Law Tradition: Cause and Consideration in Quebec and Louisiana Civil Codes,* in *The Italian Law Journal,* Vol. 02 – No. 01 (2016).

[9] Once again, I would like to refer to my essay DELFINI, *Unnegotiated Contracts of Adhesion in American Common and Civil Law Jurisdictions: The Canadian and Argentinian Cases,* in *Milan Law Review,* 2021, n. 1.

consideration.

As we know, the first Italian Civil Code, enacted in 1865, was consistent with the Napoleonic Code. The section titled "Upon the Cause of Contracts" contained articles 1119 and 1120, which read "*An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect*" and "*A contract is valid, although its cause is not expressed*", following quite literally the wording of 1131 and 1132 of the Napoleonic Code[10], but in the current Italian Civil Code (ICC), enacted in 1942, the *cause* is mentioned in number 2 of Section 1325 – which sets out the requirement for a valid *contract* – without any explanation of its meaning.

Since the 1942 ICC mentions cause as a requirement for contracts, not for obligations, scholars and courts have started using the concept of cause to control the lawfulness of legal operations and the practical results that the parties to a contract seek. As a result, the meaning of the word "cause" has become uncertain in civil law systems, and the concept has often become redundant as quite a duplication of the object (or subject matter) of the contract.[11]

Therefore, prominent Italian scholars, fully aware of the importance of legal comparisons, proposed returning to the root of the concept of cause as the reason for a promise to be enforceable. They believed this was the only way to give the concept back its understandable meaning[12].

Nevertheless, current case law shows that the concept of cause (mentioned in Section 1325, No. 2 of the ICC) is often used as a general clause to challenge the validity of contracts whose outcomes are not acceptable to the contracting parties.

In their quest to understand cause, Italian scholars and lawyers can look to Canadian law for guidance.

Firstly, Quebec's codification followed French law, which was also influenced by

[10] Nap. Code Section 1131: "*An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect"*; Section 1132: "*An agreement is nevertheless valid, although its cause is not expressed"*.

[11] For example, Guido ALPA and Vincenzo ZENO ZENCOVICH, *Italian Private Law,* in *The University of Texas at Austin - Studies in Foreign and Transnational Law*, Routledge – Cavendish, 2007, p. 162, translate the word *cause,* requested as per Section 1325, n° 2, Italian Civil Code, as <<the object [that] is the outcome that the transaction is calculated objectively to produce>> and therefore speak about the object (Section 1325, no 3, Italian Civil Code) as <<subject matter [that] is whatever the declarer is making disposition of, in other words the content of the legal transaction>>.

[12] Rodolfo Sacco, in Sacco – De Nova, *Il contratto*, in Trattato Sacco, 3rd ed, Torino Utet, 2004, I, 790 following the paths of Gino Gorla, *Il contratto. Problemi fondamentali trattati con il metodo comparativo e casistico,* I, Milano, 1955; Gorla, entry on "*Consideration",* in Enciclopedia giuridica, IX, Milano, 1961, 176 ss.

the Louisiana Civil Code of 1870 (LCC)[13]. Its lawmakers also included a definition of cause that is consistent with the one subsequently adopted by the Quebec Civil Code. Section 1967 (LCC) titled "Cause Defined; Detrimental Reliance" reads: "*Cause is the reason why a party obligates himself*".

Secondly, the current Civil Code of Quebec contains a definition of "cause," and despite being a very recent code, dating from the nineties, it does not abstain from laying down definitions as some nineteenth-century codifications did. Thus, we find Section 1410, which defines "cause" as follows: *The cause of a contract is the reason that determines each of the parties to enter into the contract"*.

Finally, Section 984 of the former Code of Québec (then known as Lower Canada) explicitly equates cause with consideration. This is in line with the original meaning of the term "cause," as used in nineteenth-century continental codes. It refers to both the obligation and the transfer of title.

Section 984 of the Civil Code of Lower Canada states the following: «*There are four requisites to the validity of a contract: Parties legally capable of contracting; their consent legally given; something which forms the object of the contract; a lawful* cause or consideration».

We may note that the wording is a *verbatim* replication of Article 1108 of the Code Napoléon, except for the addition of "consideration" as the equivalent of "cause": therefore I am sure many of you are wondering if, before writing his famous entry on "consideration" in the "*Enciclopedia del Diritto*", Gino Gorla had the Civil Code of Lower Canada in his hands!

7.2. Control over unilateral drafting of clauses in adhesion contracts and the Civil Code of Quebec.

As for the second issue, the control over the unilateral drafting of contract claus-

13 As E. Fabre-Surveyer, a prominent Judge of the Superior Court of the Province of Quebec, pointed out in a speech delivered on 8 April 1938, at the Dedication of the Law Building of the Louisiana State University law school, <<*The position of the civil law in Quebec might well have been very different had not the Code of Louisiana been a successful experiment. In Louisiana the civil law was codified in 1808; the Civil Code of Quebec did not come into existence until 1866. Hence the experience of Louisiana in codifying and applying French civil law in America, extending over half a century, was of inestimable benefit to the framers of the Quebec Code*>> E. Fabre-Surveyer, *The Civil Law in Quebec and Louisiana*, 1 La. L. Rev. (1939), 649. He adds: <<*It is true that during the first half of the nineteenth century other countries had modelled their law on the Civil Code of France; but distance and difference of language made their work less valuable to Quebec than the experience of Louisiana. In 1857, the law decreeing the preparation of a civil code for Quebec stated that "the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada*>>.

es in standard contracts, the current Civil Code of Quebec has confirmed a thesis I had put forward in Italy. Namely, in contracts of adhesion, the systematic unilateral derogation from merely supplementary code provisions may be challenged in court, by the adhering party, as invalid and unenforceable.

This thesis is substantially confirmed not only in the most recent Argentinian code,[14] of 2015 - which Art. 988 states that in contract of adhesion "*must be considered as non-written: the clauses that* (…) *entail a waiver or restriction to the rights of the adherent or expand the rights of the standard terms drafter which are provided by the code default rules"* - but also by the Canadian Quebec Civil Code of 1991, which Section 1437 provides that "*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 contrary to the requirements of 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"*.

In other words, Section 1437 of the Quebec Civil Code makes it clear that the code's default rules — the ones we call "*norme dispositive*" — can only be set aside through vis-à-vis and *ad hoc* negotiations. On the contrary, they cannot be repelled unilaterally by the drafter of standard terms in a contract of adhesion and this applies not only to B2C contracts, but also to B2B ones.

7.3. The way in which the doctrine of unconscionability is used by Canadian common law to address the same topic.

Finally, it is interesting to note that the other Canadian common law provinces have addressed the same issue of controlling unilateral contract terms with a different tool, and yet have ended up with practical outcomes that are very similar to those that may result from the application of Section 1437 of the Civil Code of Quebec in specific cases.

Such a result has been achieved – in the absence of a civil code - through the

[14] The *Código Civil y Comercial de la Nación,* CCCN was enacted in Argentina on 1 August 2015 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. Its Art. 988 CCCN, headed "Abusive clauses", reads: *«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»*.

evolving development[15] of the doctrine of unconscionability, departing from the original, stricter British one and starting from the suggestions given by the U.S. Uniform Commercial Code[16].

Indeed, 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" [17].

This concept 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 [18]. According to Canadian case law, awareness of the vulnerability of the other party is not necessary, except in cases where the effects of the doctrine are claimed involving third parties[19].

Under the traditional unconscionability doctrine, the remedy available to the weaker party is basically the "rescission" of the agreement (in equity) [20]. 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 – and not only the unconscionable clause - 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» [21].

The original common law approach can make it difficult to achieve as "generally, if a contract is to be rescinded. The whole contract must be set aside"[22], although in some cases a party can seek the removal of just a part of the contract.

However, a second hurdle arises because common law has not developed a com-

15 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 Beale (ed.), Chitty On Contracts28, 1, London, 1999, 455, referring to Commonwealth courts and in particular to Canadian (but also Australian) courts.

16 *Uniform Commercial Code* (UCC), at § 2-302 "Unconscionable contract or Clause".

17 The roots of the concept lie in equity: see, among others, Treitel, The Law of Contract10, London, 1999, 382; Beale (ed.), Chitty On Contracts28, 1, London, 1999, 450; Calamari, Perillo, The Law of Contracts3, St. Paul, 1987, 399.

18 Calamari-Perillo, op. cit., 406-407.

19 J. McCamus, The Law of Contracts2, Toronto, 2012, 431-436.

20 "Agreements can be set aside, or enforcement can be refused" (Calamari-Perillo, op. cit., 403). In addition, sometimes also damages can be awarded (McCamus, op. cit., 439).

21 J. McCamus, The Law of Contracts2,, 440.

22 B. MacDougall, *Introduction to Contracts,* 5th ed.. Lexis Nexis Canada. 2022, 329.

plete and satisfactory doctrine of severance—a process that would allow courts to remove part of a contract.

Traditionally, case law has applied the so-called "blue pencil test," which involves removing certain words or clauses without adding anything and determining whether the remaining contract still makes sense. Nevertheless, the Supreme Court of Canada has recently developed – starting from -Transport North American Express Inc. v. New Solution Financial Corp. in 2004 - a new approach, called "notional severance", in which «a court allows a term to be severed in conjunction with rewriting part of the contract for the parties to make what is left of the contract have a meaning consistent with the original intent of the parties»[23].

In addition, a selective apply of the doctrine, to set aside merely a part of the contract, is supported in the Uniform Commercial Code (UCC), at § 302, which allows to set aside the unconscionable clause and to enforce the remainder of the contract[24].

Therefore, these two grounds can allow a party to challenge, under the unconscionability doctrine, only some clauses unilaterally crafted by the other party and not the whole contract.

As a result, in the last decades the Supreme Court of Canada has held that the doctrine of unconscionability – which rests mainly on the principle of good faith [25] – may be employed to delete "disclaimer" or "limitation of liability" clauses – and, more recently, also "arbitration" clauses - and to render them unenforceable, maintaining the rest of the agreement still in force [26]. As it was noted, by its seminal 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[27].

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23 B. MacDougall, *Introduction to Contracts,* 331.

24 *Uniform Commercial Code, § 2-302 he*aded "Unconscionable contract or Clause": «(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»*

25 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.

26 J. McCamus, The Law of Contracts2, 440.

27 J. McCamus, The Law of Contracts2, 831-832.

The most important cases decided by the Canadian Supreme Court were Hunter and Tercon, in which the court deemed it feasible and practical to delete an unconscionable exculpatory clause and enforce the rest of the contract[28]. These two decisions were followed in 2020 by Uber Technologies Inc. v. Heller, and more recently in 2024 by Lochan v. Binance Holdings Limited, which was decided by the Ontario Court of Appeal regarding the arbitration clause

7.3.1. 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 [29].

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»[30].

The Court deemed the exclusion clause enforceable in this case because the parties to the contract were found to have roughly equal bargaining power, rendering the unconscionability doctrine inapplicable [31].

Although the decision was positive on the enforceability of the clause at issue [32], the most important outcome for the topic addressed here is that the Court found it possible, albeit in principle, to not enforce a single clause while maintaining the rest of the contract.

7.3.2. Tercon Contractors Ltd. v. Province of British Columbia

In the 2010 subsequent case Tercon Contractors Ltd. v. Province of British Co-

28 J. McCamus, The Law of Contracts2, 446.
29 Hunter Engineering Co. v. Syncrude Canada Ltd. [1989] 1 SCR. 426.
30 Hunter, at 462 (Chief Justice).
31 Hunter, at 517-518
32 Hunter, at 522.

lumbia [33], 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.

With a majority vote of 5 to 4, the Court found that the exclusion clause could not have prevented the province from being sued for damages due to its ambiguity. Therefore, the Court decided in favour of Tercon [34]. The majority of the Court did not consider the clause applicable to the case due to its unclear wording. Therefore, there was no point in debating whether it could be set aside by the unconscionability doctrine.

However, the issue was raised in the dissenting opinion written by four judges, including Chief Justice McLachlin, Binnie, Abella, and Rothstein, who deemed that the traditional doctrine of fundamental breach was not useful in this case due to its vagueness [35], as was previously noted in Hunter v. Syncrude.

The dissenting minority therefore held it more efficient to rely on the unconscionability doctrine [36].

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

33 Tercon Contractors Ltd. v Province of British Columbia 2010 SCC 4, [2010] 1 SCR 69.

34 See reasoning of the Court, Tercon, 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 favour 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».

35 Tercon, par. 108.

36 Tercon, par. 108.

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» [37].

Upon applying this to the facts of the case, the dissenting opinion concluded that the exclusion clause, which was drafted as a standard term by the Province of British Columbia, was not unconscionable. Therefore, the Province could not be held liable for awarding the road construction contract to an ineligible bidder.

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 capable of looking after itself in a commercial context. Therefore, the dissenting opinion found that there was no relevant imbalance in bargaining power[38].

Since no material imbalance was found, the clause was deemed valid in the dissenting opinion. Therefore, there was room for the third step of the test: assessing whether an overriding public policy required refusing to enforce the clause. The minority of the court did not find such a policy[39].

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 here addressed, is that the 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 aside only the clauses found unconscionable, maintaining and enforcing the remainder of the contract as amended without them [40].

Moreover, Tercon is considered a seminal case because the dissenting opinion established a clearer and more precise definition of the Canadian doctrine of unconscionability. It also provided courts and practitioners with a three-step test for applying the doctrine.

After a decade, as predicted by a prominent Canadian scholar[41], more recent Ca-

37 Tercon, par. 122.
38 Tercon, par. 131.
39 Tercon, par. 141.
40 See also J. McCamus, The Law of Contracts2, 826.
41 J. McCamus, *The Law of Contracts*2, 443- 444 who predicted that «the new doctrine is likely to

nadian case law on unconscionability has addressed *arbitration clauses*.

Two cases stand out: Uber Technologies, Inc. v. Heller (2020 SCC 16), which was decided by the Supreme Court of Canada, and Lochan v. Binance Holdings Limited (2024 ONCA 784), which was decided by the Court of Appeal for Ontario.

7.3.3.- Uber Technologies Inc. v. Heller, 2020

The facts of the Uber case, 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 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 favour 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*

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».

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 made reference to the said Canadian legal literature and 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*» [para. 54] [42].

Recalling its previous decisions in Hunter, Norberg, and Douez, the Canadian Supreme Court adhered to the two-layer 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 [43].

Therefore, 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

42 Making reference to (Mitchell McInnes, The Canadian Law of Unjust Enrichment and Restitution (2014), at p. 521; see also 520-24; Bradley E. Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966), 44 Can. Bar Rev. 142, at p. 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" (Peter Benson, Justice in Transactions: A Theory of Contract Law (2019), at p. 165; see also Angela Swan, Jakub Adamski and Annie Y. Na, Canadian Contract Law (4th ed. 2018), at p. 925)».

43 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».

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 fully aware that the development of the unconscionability doctrine is intended to serve as the principal remedy for controlling the drafting of standard contracts, as well as specific clauses that may render the adhesion contract unfair[44].

Finally, it is worth noting that applying such a new doctrine of unconscionability to standard contracts leads to the excision of the clause while maintaining the enforceability of the rest of the contract, as was seen in the case in question. Therefore, as stated in the decision, «[87] Respecting the doctrine of unconscionability has implications for boiler-plate or standard form contracts»[45].

44 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 and unconscionability has been suggested in judicial decisions, textbooks, and academic articles 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)».

45 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

7.3.4. Lochan v. Binance Holdings Limited (2024).

More recently, the Ontario Court of Appeal addressed an arbitration clause deemed unconscionable in the same way the Supreme Court of Canada did in the Uber decision.

The factual background was as follows: "*The appellant operates the world's largest cryptocurrency trading platform. Between 2019 and early 2022, the appellant sold cryptocurrency derivatives to Canadians through its website. The motion judge found that cryptocurrency derivatives contracts are novel, complex, and risky securities, which present investor protection concerns. A seller is required to file a prospectus prior to selling cryptocurrency derivatives. The appellant did not register with the Ontario Securities Commission or seek an exemption from registration. The appellant did not file a prospectus with respect to any of its securities offerings. The respondents are representative plaintiffs who commenced a proposed class action in June 2022. The claim is based on s. 133 of the Ontario Securities Act, R.S.O. 1990, c. S.5, which provides purchasers with a right of action for recission or damages against a company selling securities for failure to file or deliver a prospectus. The statement of claim proposes a class defined as everyone in Canada who, from September 2019 to the date of certification of the proposed class proceeding, purchased cryptocurrency derivatives from the appellant. The appellant moved to stay the proceeding on the basis that the terms of use contract agreed to by users of the Binance website requires that any disputes be resolved by arbitration. The motion judge dismissed the motion for a stay in favour of arbitration. He found that exceptions to the competence-competence principle applied that justified the Ontario court deciding whether the arbitration clause was void as contrary to public policy or on the basis of unconscionability. He found that a stay in favour of arbitration should be refused because the arbitration clause was void both as contrary to public policy and because it was unconscionable. In coming to the conclusion that the arbitration clause was contrary to public policy and unconscionable, the motion judge's findings included the following: The appellant's website prompted users to open accounts in "under 30 seconds", during which the users purported to agree to roughly 50 pages of terms, including the arbitration clause; The arbitration clause provides that the appellant can change any part of the arbitration agreement, and that by agreeing to the terms of use for the website, users*

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)».

agree to any subsequent amendment to the terms by the appellant; The record showed that during the proposed class period, the appellant changed the forum of the arbitration and the governing law four times, to various destinations far from Canada, including from April 2020 to January 2021 to an "unspecified location, under unspecified law, under unspecified administration and rules"; The last forum for arbitration set by the appellant, Hong Kong, under Hong Kong law, administered by the Hong Kong International Arbitration Centre, imposed prohibitive costs. For disputes under $1 million USD, the median cost of arbitration is $26,743 USD (approximately $36,000 CAD). This figure does not include costs of travel and accommodation, tribunal appointed expert advice, legal fees, transcript services, etc. The motion judge found that the starting cost to access the arbitral tribunal of approximately $36,000 CAD plus legal fees and travel expenses rendered the forum inaccessible to the average crypto investor: Given that the OSC report discloses that the average crypto investor will have something like a $5,000 claim, the choice of Hong Kong as an arbitral forum – a forum with no connection to either the potential claimants or Binance itself as a Cayman Islands company – could effectively amount to a grant of immunity to Binance. He further found: The Plaintiffs and other prospective class members signed an unnegotiable 'click' contract where not only were the details, including the changeable location, of the arbitration clause buried out of sight, and the logistical complexity and expense of arbitration were not revealed anywhere. <u>Binance, as the party that designed and whose professionals drafted the contract, engineered the arrangement to take advantage of the complexity that was hidden behind that superficially benign appearance of an arbitration clause"</u>.

The court upheld the motion judge's decision and dismissed the appeal, stating that the preeminent principle of competence-competence (which reserves the decision on jurisdiction to the arbitral panel) was correctly set aside in this case, as permitted by the Supreme Court in Uber whenever a Canadian judge is required to assess the enforceability of an arbitral clause based solely on the law and a mere "superficial review of the record."

The Court of Appeal – following the opinion of the SSC in Uber which "*permitted the exception to the competence-competence principle for cases where impediments exist that functionally prevent a party from bringing a matter to arbitration such that, if the issue of validity of the arbitration clause is left to the arbitral tribunal, there is a real prospect that it will never be resolved by the arbitral*" - concurred with the motion Judge on the unconscionability of the clause "*because of the inaccessibility of the arbitration forum due to cost, distance, and choice of law, there was a real prospect that the challenge to the validity of the arbitration clause would never be resolved if it were referred to the arbitral tribunal*".

7.4. Unconscionability v. Section 1437 Civil Code of Quebec.

The above analysis of Canadian case law reveals that exculpatory and arbitration clauses in standard terms that are unilaterally drafted can be challenged under the new Canadian doctrine of unconscionability and set aside. The same result can be achieved more directly under Section 1437, second paragraph, of the Civil Code of Quebec, which provides, as we have recalled, that "*An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore contrary to the requirements of 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"*.

In comparison to the approach of the Quebec Civil Code, the common law approach to controlling the unilateral drafting of adhesion contracts appears to be somewhat complex. This is not unexpected.

Firstly, a complete and efficient doctrine of contract severance has yet to be established in common law, as previously reported.

Secondly, in the absence of a code, it is difficult to determine a self-evident set of "rules normally governing the contract," such as those provided by a civil code. This is likely why the targets of the unconscionability doctrine have only been exculpatory and arbitration clauses. Indeed, after setting aside such clauses, common law can fill the gaps in the remainder of the contract by applying traditional precedents on contractual liability and state jurisdiction instead of arbitral jurisdiction.

We may than wonder if Canadian common law courts will address entire agreement clauses in the next future; as it was suggested "*the most likely candidate for subjection to the new doctrine is the "entire agreement" clause. Known to be a "trap for the unwary", entire agreement clauses have often been held to be enforceable only where Canadian courts are satisfied that the significance of the clause was brought home to the affected party. Moreover, entire agreement clauses might be considered to be at least distant cousins of the exculpatory clauses as they preclude liability for what the unsuspecting party might have considered to be a contractual obligation"*[46].

Despite such differences, significant convergence remains evident in the operational rules of Canadian civil and common law. In conclusion, we concur with the finding that "*the doctrine of the unconscionable term may provide a common law device, long*

[46] J. McCamus, *The Law of Contracts*[2], 444.

awaited by some, that can ameliorate the harsh impact of unfair terms in boiler plate adhesion contracts" [47]: a device that is aimed at the same result as it is already reached under Canadian civil law by virtue of Section 1437 of the Civil Code of Quebec.

[47] J. McCamus, *The Law of Contracts*[2], 444.