

ENDING ABUSIVE CLAUSES IN CONSUMER CONTRACTS

Final Report of the Project
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Office of Consumer Affairs



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The masculine is used generically in this report.

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Union des consommateurs, *Strength through Networking*

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (*Associations coopératives d'économie familiale*), the *Association des consommateurs pour la qualité dans la construction* (ACQC), as well as individual members.

Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households. Union des consommateurs' activities are based on values cherished by its members: solidarity, equity and social justice, as well as the objective of enhancing consumers' living conditions in economic, social, political and environmental terms.

Union des consommateurs' structure enables it to maintain a broad vision of consumer issues even as it develops in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Finally, regarding the issue of economic globalization, Union des consommateurs works in collaboration with several consumer groups in English Canada and abroad. It is a member of *Consumers International* (CI), a United Nations recognized organization.

1 Introduction

Consumer contracts often abound with clauses highlighting the imbalance between merchants and consumers. Under statutory provisions, the applicability of many contract terms may be questioned – some may be deemed abusive while others are the focus of specific regulations. However, provisions concerning abusive clauses can be difficult for the courts to interpret and apply; this is probably one of the reasons why the problem persists and consumer contracts still contain many clauses that may appear abusive.

Consumer and research associations have conducted many studies focusing on abusive clauses. Moreover, the vast majority of consumer problems reported by the media stem from contract terms of an abusive nature, such as amending a contract unilaterally. Most jurisdictions acknowledge the scope of the problem. In Quebec, the Government has given the Consumer Protection Act regulatory authority to identify prohibited clauses in consumer contracts. Foreign jurisdictions (such as the European Union, Great Britain, France, Germany and Australia) have adopted various approaches to dealing with abusive clauses. These approaches include developing lists of clauses deemed to be abusive, or establishing specific procedures for timely handling of complaints.

How can Canada manage the problem of abusive clauses, so that consumers are properly protected and the market is regulated?

Given that foreign jurisdictions have adopted various measures to limit or prohibit the use of abusive clauses in consumer contracts, those approaches could likely serve as models for an appropriate regulatory framework. What methods are used to prohibit clauses? What types of tests are advocated to determine whether a clause is abusive? What types of tests are advocated to determine whether a clause is abusive? What measures are implemented to ensure compliance with the prohibition of a clause? What are the advantages and disadvantages of the various regulatory procedures?

In Canada as well, governments are attempting to restore a certain balance in consumer contracts by regulating abusive clauses. Is the problem being handled in a complete and effective manner across Canada? Is the approach uniform?

In this study, we have compared Quebec regulations with those of other Canadian provinces, but also with what is found in foreign jurisdictions, whether in common law or civil law countries: Great Britain, the United States, Australia, France, the Netherlands, Germany and Brazil. Since some of the countries studied are members of the European Union, we have also examined the latter's directives and their effects on national laws.

Of course, the goal of this research was to determine if there are weaknesses in our consumer legislation with regard to abusive clauses, and to identify – through our comparative study, among other means – possible solutions or improvements that could be applied in Quebec and Canadian consumer law.

The first part of our report outlines the context – particularly the historic context – in which regulations against abusive clauses are adopted.

We studied Canadian and foreign legislation by examining and comparing various means of regulation, protection and remedy.

The second part of our report focuses on Quebec regulations against abusive clauses, and the third part on Canadian regulations.

The fourth part describes foreign regulations.

In the fifth part, we identify the best practices observed in the course of our research.

2 Context

As part of a conference organized by the Groupe de recherche en droit international et comparé de la consommation (GREDDIC) in 2009, there was a presentation on consumer associations and the defence of consumers' common interests. It was pointed out that an examination of many contracts, some of which concerned millions of consumers, had revealed the presence of a large number of abusive clauses and of clauses that directly contravened the rights explicitly conferred to consumers by the Consumer Protection Act (Quebec)¹.

In 2008-2009, Union des consommateurs conducted a study on unilateral modification clauses in Canada. The 13 contracts analysed in that study (in the fields of cellular telephony, the Internet, cable television and banking services) contained unilateral modification clauses that did not provide for any compensation to consumers would suffer prejudice as a result of the company unilaterally modifying the consumer contract².

Abusive clauses in common consumer contracts (for instance, exclusion clauses, unilateral modification and cancellation clauses, binding arbitration clauses, or clauses prohibiting class actions) prevented consumers from exercising important rights. Indeed, it appears that many consumers do not question selling practices involving abusive clauses, mainly because they don't know that those clauses are inapplicable to them. And when consumers know their rights, they still rarely turn to the courts to assert them, because the available remedies are not appropriate for consumer disputes³.

In Quebec, cell phone contracts contained so many abusive clauses that the Office de la protection du consommateur decided to legislate the sector. Since June 2010, several provisions regulating contracts of successive performance (particularly cell phone contracts) have been in effect.

In Manitoba, a public consultation paper on improving consumer protection in cell phone and wireless services mentioned that everywhere in Canada, complaints about cellular telephony were multiplying. In fact, the majority of complaints received by the Commissioner for Complaints for Telecommunications Services and the Canadian Council of Better Business Bureaus pertain to cellular telephony⁴. The consultation paper also reported that Manitoba's Consumers' Bureau was receiving information requests and complaints particularly about clauses likely to be abusive: price increases without prior notice, high cancellation fees, complicated renewal offers. New legislative measures, scheduled to come into effect in 2012, have been developed to make cell phone contracts fairer and more transparent. For example,

¹ GREDICC. *L'accès des consommateurs à la justice*. Texts of conferences organized by UQUAM's GREDICC and presented in Montreal in 2008-2009. Éditions Yvon Blais, Cowansville, 2010. 180 pages.

² Yannick LABELLE. *Les contrats de consommation : quand est-il permis de changer les règles du jeu?* Union des consommateurs, Quebec, 2009, 143 pages.

³ GREDICC. *L'accès des consommateurs à la justice*. Texts of conferences organized by UQUAM's GREDICC and presented in Montreal in 2008-2009. Éditions Yvon Blais, Cowansville, 2010, p. 51.

⁴ Consumers' Bureau. *For better market conditions*. Manitoba's Plan for Stronger Consumer Protection. *Improving Consumer Protection in Cell Phone / Wireless Device Contracts*, Public Consultation Paper. On the website of Manitoba Family Services and Consumer Affairs. <http://www.gov.mb.ca/fs/ccca/cpo/pubs/cellphone.pdf> December 2012. 12 pages (page consulted on September 25, 2011).

companies will be prohibited from including a unilateral modification clause on an important aspect of a contract, if the customer obtains no benefit from the clause⁵.

Although new legislation to better protect consumers against abusive clauses are in effect (notably in Quebec), they do not completely shield consumers from the negative effects of such clauses, which can still be found in contracts. According to Benoît Moore, a commission with the mandate to “*proposer la réglementation ou l’interdiction de certaines clauses, à mesure qu’elles apparaissent, de proposer l’utilisation de contrat ou de clauses types, ou encore de voir au respect de la législation en dénonçant les contrats qui ne s’y conforment pas*”⁶ should be established.

Unfortunately, individual and class actions do not appear to be, in their current form, appropriate vehicles for consumers to assert their rights in cases of abusive clauses. For its part, Union des consommateurs estimates that consumer associations should, as is now the case almost everywhere in Europe, have the right to go to court and demand the cessation of practices violating the Consumer Protection Act.

2.1 CONSUMER LAW

Consumer law is at once simple and complex. In theory, it can be defined simply as the field covering the relations between a consumer and a professional – relations that generate laws. But it is complex due to the great number of daily life aspects affected and to the diversity of legal concepts involved: consent, adhesion contracts, abusive clause, lesion, unforeseeability, etc.

In Quebec, this complexity is illustrated by, among other things, the many laws regulating consumer relations. There are in Quebec hundreds of consumer protection laws. To add to the complexity, all those laws do not necessarily form a coherent whole; for instance, the concept of lesion has, on one hand, been integrated since 1978 into the Consumer Protection Act, but on the other hand an explicit political choice was made in 1994, during the Civil Code reform, not to extend to adults the possibility of using this motive to attack or rescind a contract.

However, the amount of legislation related to consumer rights illustrates the importance given to consumer protection in Quebec. Despite the shortcomings pointed out by certain authors⁷, which we will discuss in the present study, we must recognize that the Quebec consumer is relatively well protected in a large number of fields where he encountered many problems historically. For instance, the fields of insurance, funeral services, travel, mobile shop trade and car sales have all been disciplined thanks to legislation countering delinquent behaviours.

The same applies to the rest of Canada, where consumer law is constantly evolving. Indeed, it is impossible to rest content with improvements in consumer law: market developments, technological changes, new practices and, simply, changing customs require that laws adapt constantly in response to problems encountered by consumers. In this regard, despite the

⁵ Manitoba Family Services and Consumer Affairs. Consumers’ Bureau. *Cell Phone Contracts*. On the website of Manitoba Family Services and Consumer Affairs. <http://www.gov.mb.ca/fs/cca/cpo/cellphones.html>, no date. (Page consulted on September 25, 2011).

⁶ Benoît MOORE. *La réforme du droit de la consommation et l’équité contractuelle. La réforme de la Loi sur la protection du consommateur*. Éditions Yvon Blais, Cowansville, 2005. Our translation.

⁷ Pierre Claude LAFOND, Benoît MOORE, Pierre Gabriel JOBIN.

modernization process launched in Quebec in recent years, some think our consumer law needs to be substantially renewed not only by the addition of new provisions, but also by a more comprehensive, cross-cutting approach⁸.

The development and multiplicity of adhesion and other pre-formulated consumer contracts is an example of the challenges faced. “Take it or leave it” offers and contracts are the form of “negotiation” most often encountered nowadays. Traditional negotiation is limited, in consumer matters, to certain specific purchases and is often limited to certain clauses, such as price, service definition or duration or, for purchased goods, price and quantity. And the margin of manoeuvre is very narrow for any possible negotiation – especially since one of the parties, the consumer, is at a disadvantaged in terms of economic power, cognitive skills and organizational capacity⁹.

Ancillary clauses, although often greatly important – warranty clause, penal clauses, binding arbitration clauses, disclaimer clauses – are for the most part imposed by the stronger contractor. Unfortunately, in those clauses imposed on consumers, and thus not negotiated and in most cases not denounced either, the stronger party takes advantage of the absence of discussion and imposes rules to its own benefit, while totally ignoring the consumer’s interests. As Biquet-Mathieu puts it, “The professional is thus strongly tempted to impose on his co-contractor particularly draconian and unbalanced pre-formulated clauses¹⁰.”

If the advantage that the party in a position of strength gives itself exceeds standards, contravenes the good faith obligation, or is not offset by any advantage conceded to the co-contractor, the state should intervene.

In a comparative analysis of the implementation of the European Union’s directive on abusive contract terms found in the various member countries, Martin Ebers recalls the reasons for regulating pre-formulated contract terms:

If one enquires into the policy reasons for monitoring pre-formulated contract terms, two primary lines of argument come to the fore.

The first theory is based on a consideration of transaction costs: A party using pre-formulated terms is usually better informed about the content of the terms than the other party (whether a consumer or business). By drafting terms just once for several transactions, the user can spread costs an infinite number of times, whereas for the other party it is often too expensive to obtain the information required for negotiating the conditions of the transaction. Informational asymmetries – disparities in the level to which each party is familiar with the terms of the contract – and the uneven distribution of transaction costs therefore have to be balanced by reviewing pre-formulated terms.

According to the second model (“abuse theory”) the control of pre-formulated contract terms is based, in contrast, upon the notion that unfair terms are often used against

⁸ Pierre Claude LAFOND, *Pour un code québécois de la consommation*, Pour une réforme du droit de la consommation, proceedings of the symposium on March 14 and 15, 2005, p. 169.

⁹ Sébastien GRAMMOND, *La règle sur les clauses abusives sous l’éclairage du droit comparé*, (2010) 51 Cahiers de droit 83-116.

¹⁰ Ch. BIQUET-MATHIEU. *Les contrats du consommateur* – Belgian law report – Draft text - (completed at July 10, 2007). Association Henri CAPITANT. Journées colombiennes, Bogota – Cartagena, September 24 to 28, 2007.

*weaker parties. The main catalyst for control of terms is not the danger of standard terms, but rather the protection of a specified class of persons. In view of the economic, social, psychological and intellectual superiority of the business the customer has no choice other than to submit to the clauses in question. A review of validity shall accordingly counter an imbalance in bargaining power and knowledge*¹¹.

While the first theory may serve to justify an approach that only targets pre-formulated abusive terms, the second model clearly advocates broader regulations against abusive terms wherever they are found, including in contracts that the consumer has the opportunity to negotiate, if his vulnerability has hindered negotiation between equals or if his co-contractor has used the terms unfairly¹².

Generally, a clause is considered abusive if it is imposed by a party in a dominant position on another party in a more vulnerable situation, for example economically dependent, thus causing significant imbalance between the two contractors' rights and obligations.

The delinquent behaviours of certain companies and professionals with regard to abusive clauses do not cause prejudice only to consumers, whether their individual or collective interests are considered; companies that respect consumers in their transactions risk being disadvantaged in a competitive sense. For instance, it costs more to provide a real warranty or adequate after-sales service than to offer nothing, and this is of course reflected in the price demanded for goods and services. Accordingly, even the most laissez-faire countries have had to regulate abusive clauses, in order to protect consumers of course, but also to discipline the market.

¹¹ Martin EBERS, *Comparative Analysis. C. Unfair Contract Terms Directive (93/13)*. In *EC Consumer Law Compendium*. Universitat Bielefeld (2011), p. 385.

http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf It should be noted that the abusive clauses targeted by the directive are only those contained in prewritten contract terms. We will see below that the laws adopted by certain member countries are much broader in scope than this type of clause alone.

¹² Of course, we also find arguments, at times surprising, against the regulation of abusive clauses. For example, the Australian *Productivity Commission* explains how abusive clauses benefit consumers: "There are also counter-arguments against a blanket ban of apparently unfair terms based on understanding why these terms are so prolific across all types of contracts, including in competitive industries (as suggested by evidence in appendix D). Such terms are certainly not specific to rogue traders. So why do businesses with strong incentives to please consumers choose to insert unfair terms into their contracts? One explanation is that 'one-sided' contracts can actually be beneficial to consumers as a whole by providing them — through the business — with a way of deterring problematic behaviour by small groups of consumers. In particular, just as some businesses behave in bad faith or otherwise inappropriately, so too do some consumers. For instance, they may not be careful in using their purchases, conceal damage they have done to a rented asset, or seek to extract themselves from contracts that require businesses to commit significant upfront resources. Crucially, unlike businesses, consumers do not generally have a brand name or reputation to lose from such conduct. It is hard for suppliers to foresee all the forms that such conduct might take, hence the need for disclaimers that deal with unspecified contingencies.

As a result, what appear to be one-sided contracts may sometimes better protect the bulk of customers from the behaviour of the few, than balanced contracts (Bebchuk and Posner 2006; Johnston 2005 and Gillette 2004)." Australian Government, Productivity Commission. *Review of Australia's Consumer Policy Framework - Inquiry Report*. No. 45, April 30, 2008, Volume 2 – Chapters and Appendixes, p. 151.

This concern to protect consumers is not new. It is a long process that has led, in a field where the will of the parties was paramount – i.e., in contracts – to government intervention in the interest of fairness.

2.2 INTRODUCTION OF FAIRNESS PRINCIPLES IN CONTRACT LAW

The history of Quebec law is coloured by the Conquest and the territory's colonization, in turn by France and Britain. But it also illustrates the attachment of the Quebec people to the values of France, with which it shares so much. But over time, Quebec has also incorporated its own values into its laws. As the first codifiers of Quebec Civil Law explained, it is necessary to make room “for the circumstances and state of mind of this people¹³.”

The French Civil Law that prevailed in the XIXth century integrated certain concepts of fairness as a fundamental legal value (civil liability, apparent mandate and support plan¹⁴); however, this concept of fairness is almost absent from contract law. This is no accident – the absence of protection from unfairness is the product of premeditated choices. To lawmakers, “The contract is fairness¹⁵”. Indeed, the importance given to consent, which is at the very heart of the concept of contract, assumes an inherent absence of any unfairness¹⁶. Contract freedom – the underlying principle of the very concept of this legal act – is in fact apparent everywhere in the French Civil Code, the Napoleonic Code (hereinafter N.C.). Article 1134 N.C. states it explicitly: “*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.*”

The writers of the French Civil Code based contract law on the principle of free will by largely insisting on the conditions under which the contractors expressed an intention free of any

¹³ *Civil Code of Lower Canada, 1st Commissionaires’ Report*, Quebec, Stewart Derbyshire and George Desbarats, 1863, p. 9.

¹⁴ Pierre-Gabriel JOBIN, *L'équité dans les contrats*, in Pierre-Claude LAFOND, *Mélanges Claude Masse – En quête de justice et d'équité*, Éditions Yvon Blais, Cowansville, 2003, pages 473 and 480.

¹⁵ Benoît MOORE, *La réforme du droit de la consommation et l'équité contractuelle*, in François MANIET (dir.), *Pour une réforme du droit de la consommation au Québec*, Éditions Yvon Blais, Cowansville, 2005, pp. 113-130.

¹⁶ Lionel THOUMYRE explains as follows: “La formation des contrats passera par l'échange préalable du consentement de chacune des parties à l'acte. Cette étape constitue a priori l'élément primordial, voire fondateur, du contrat. En effet, dans son article 1108, le Code civil français définit quatre conditions essentielles pour la validité d'une convention: 'le consentement de la partie qui s'oblige; sa capacité de contracter; un objet certain qui forme la matière de l'engagement; une cause licite dans l'obligation.' Ainsi, le consentement arrive en 'pole position' des conditions de formation du contrat. Il en est de même dans le Code civil québécois, bien plus explicite à ce sujet, puisque l'article 1385 est ainsi rédigé: 'Le contrat se forme par le seul échange de consentement entre des personnes capables de contracter (...), il est aussi de son essence qu'il ait une cause et un objet.' De leur côté, les pays de la Common Law se rattachent plus semble-t-il à la notion d'accord, d' 'agreement', sous laquelle l'on retiendra l'idée de consensus. En fait, nous savons que le verbe français 'consentir' accepte deux traductions principales en anglais : 'to consent' et... 'to agree'.

A quelques nuances près, les systèmes juridiques qui s'inscrivent dans une tradition consensualiste, posent l'existence du consentement comme condition essentielle de la formation des contrats.” Lionel THOUMYRE, *L'échange des consentements dans le commerce électronique*. *Lex Electronica - Revue du Centre de recherche en droit public* (1998) <http://www.lex-electronica.org/articles/v5-1/thoumfr.htm> (Page consulted on September 25, 2011).

duress. But contract freedom is not absolute: it is always limited by the concepts of public order and good morals¹⁷.

Other than the weight of this dogma of the contract considered as the expression of the parties' true intention, it appears that the lawmakers wanted at all costs to avoid risking the stability of contracts by granting judges the power to intervene in freely negotiated contracts¹⁸. Despite everything, a few timid measures of protection against unfairness were applied: for example, since 1804, article 1674 N.C. has protected merchants against the enormous lesion of which he could be a victim when selling a building¹⁹. The British courts also recognized, as early as the XVIIIth century, their power to cancel a contract that could not have been freely consented to if an imbalance existed between the parties: "If the party is in a situation in which he is not a free agent and is not equal to protecting himself, this Court will protect him²⁰." A century later, this approach was still in effect: "... a Court of Equity will inquire whether the parties really did meet on equal terms, and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress it will void the contract²¹." However, only in the late XIXth century did actual measures to protect contractors appeared.

It should be understood that until the XIXth century, consumer relations were still highly personalized. The contractual relationship was thus based on mutual trust. If a dispute arose, contract common law, and even penal law, sufficed to settle the few difficulties that could arise.

The explosive industrial growth of the XIXth and early XXth centuries, the arrival of all kinds of corporations, urbanization, but particularly the concentration of economic power depersonalized trade relationships and dramatically changed the context.

What used to be negotiated verbally became a written contract, pre-formulated by one of the parties, and left for the other party to sign without discussion. The agreement pertains to the essentials – object and price; the other contract clauses are no longer discussed: one of the contractors subscribes to what the other proposes. This applies particularly to relations between professionals and consumers²².

Two new contract categories then appeared: adhesion contracts and futures contracts. Adhesion contracts are contracts whereby one of the parties is compelled to accept the other's requirements because the former cannot forego the good offered by the party in a dominant position. As for futures contracts, they are contracts pre-formulated either by the professional himself or by professional organizations to which he belongs²³.

¹⁷ Under section 6 of France's Civil Code, "On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs."

¹⁸ Pierre-Gabriel JOBIN, *Deux lacunes de la justice contractuelle dans le Code civil du Québec*.

¹⁹ Under section 1674 of France's Civil Code, "Si le vendeur a été lésé de plus de sept douzièmes dans le prix d'un immeuble, il a le droit de demander la rescision de la vente, quand même il aurait expressément renoncé dans le contrat à la faculté de demander cette rescision, et qu'il aurait déclaré donner la plus-value."

²⁰ *Evans v Llewellyn*, [1787] 29 ER 1191.

²¹ *Frey v Lane* (1888) 40 Chancery Div 312.

²² Jean-Yves CHOLEY, *L'offre de contracter et la protection de l'adhérent dans le contrat d'adhésion* : Thèse Aix-en-Provence, 1975.

²³ George BERLIOZ, *Le contrat d'adhésion*. Paris, Librairie générale de droit et de jurisprudence, 1973, p. 204.

Since the co-contractor is in fact compelled to accept the terms, these contracts provide, through their clauses, for more or less explicit terms to the advantage of the contract's author and to the detriment of his co-contractor. Indeed, the latter not able to negotiate, because he needs the good or service concerned. This is the very real imbalance between the co-contractors that becomes the basis for legislation to protect the apparently weaker party.

These paradigm changes in effect distort the laissez-fair model of contractual freedom and oblige all industrialized nations to legislate to prevent consumers from losing trust and being exploited, and to ensure that competition actually plays a protective role. It is important to maintain mutual trust between the parties, which was the very basis of contracts. And this trust is equally if not more necessary in the case of adhesion contracts.

Le contrat d'adhésion, plus encore que tout autre contrat, est basé sur cette confiance puisque ses clauses ne sont pas discutables. Cette confiance doit être protégée, car elle est le fondement des rapports d'affaires. Ces liens sont conçus dans un but d'utilité économique et non pas dans le sens d'une recherche de profits sans contrainte. Ils doivent viser une convergence d'intérêts plutôt que leur opposition²⁴.

In 1864, England adopted the *Canal and Railways Act*, which regulated the use of unfair terms in rail transport contracts²⁵ whereby just a few corporations, in a monopoly position, were imposing their rules, particularly regarding limitation of liability clauses.

In the early XXth century, the United States also recognized that Common Law did not adequately protect consumers against certain unfair business practices, so in 1914 it adopted the *Federal Trade Commission Act*, which designated as an "unfair practice" an act or practice that caused or was likely to cause consumers serious damage that they could not reasonably avoid themselves, and that was not compensated for by benefits to consumers or the competition²⁶.

In the second half of the XXth century, this movement in favour of contract justice grew to major proportions.

The *Uniform Commercial Code* was thus published in 1952. Section 1-203 provided for protections against abusive clauses, and more generally, exceptions to the principles of freedom to contract. This section codified the doctrine regarding the obligation of good faith of acting fairly when contracting²⁷, as well as the doctrine of unconscionability²⁸.

²⁴ Nathalie CROTEAU, *Le contrôle des clauses abusives dans le contrat d'adhésion et la notion de bonne foi*, (1996) 26 R.D.U.S., pp. 403 and 407.

²⁵ The Law Commission, *Consultation Paper No. 166* and The Scottish Law Commission, *Discussion Paper No. 119, Unfair terms in contracts*, London TSO.

²⁶ 15 USC Sec 45. (n) (n) Standard of proof; public policy considerations: "The Commission shall have no authority under this section or section 57a) of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial lesion to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination."

²⁷ UCC § 1-203, 1 U.L.A. 109 (1999).

²⁸ Section 2-302 of the UCC provides:

In the United Kingdom, the *Supply of Goods (Implied Terms) Act 1973* was adopted in 1973, limiting for instance the use of warranty exclusion clauses, considered unfair, particularly in consumer contracts²⁹.

In France, the *Loi N° 78-23 du 10 janvier 1978*³⁰ introduced the concept of abusive clause in contracts entered into between professionals and consumers; certain clauses may be prohibited, limited or regulated when imposed on non-professionals or consumers by the other party's abusive use of economic power, which confers an advantage to the professionals.

In 1993, a European Union Directive³¹, mainly inspired by measures established in France and Germany, a precursor in this regard, compelled all Member States to prohibit abusive clauses and provide for adequate remedies for ensuring the prohibition's effectiveness.

The search for contract justice thus led to the establishment of measures, multiple and varied, to prevent the exploitation of the weaker contractor by the one who is in a position of power. Longstanding concepts, mainly derived from common law, were updated (the principles of the *non est factum* error, for example), concepts of lesion and abuse were re-evaluated and codified – across the world, legislators dealt with reportedly abusive clauses by means of tools and measures that, based on shared foundations, greatly increased in variety.

The following sections focus on the various measures adopted and applied by legislators to ensure the observance of basic contract ethics.

(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 so 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.

²⁹ The *Sale of Goods Act 1979* (c. 54, SIF 109:1) and the *Consumer Credit Act 1974* (c. 39), notably, would reinforce this type of provision a few years later.

³⁰ *Loi N° 78-23 du 10 janvier 1978, Loi sur la protection et l'information du consommateur de produits et de services* (1).

³¹ *Directive 93/13/EEC of 5 April 1993* (Official Journal L 095 of April 21, 1993).

3 Protection against Abusive Clauses in Quebec

3.1 HISTORY

In Quebec, the first codification of law was the Civil Code of Lower Canada (hereinafter the CCLC), adopted in 1866, one year before the British North America Act of 1867 established the Dominion of Canada – which raised fears that Quebec, attached to the Civil Code tradition, would have the common law imposed on it in matters of civil law. The law that launched this codification in 1857 stated in its first sections that it had to follow the same general plan as France's Civil Code³², which Quebecers had applied hitherto in matters of civil law.

However, the codifiers, for reasons not understood, decided not to adopt some of the fairness measures present in French law. Thus disappeared the possibility of invoking lesion among persons of full age during the sale of a building³³. In addition, the third paragraph of article 1134 N.C., which reads “[les conventions] doivent être exécutés de bonne foi,” disappeared from the codification.

The courts were not more open to the concept of fairness. Although section 1024 CCLC repeats section 1135 N.C., which states “*Les obligations d'un contrat s'étendent non seulement à ce qui y est exprimé, mais encore à toutes les conséquences qui en découlent, d'après sa nature, et suivant l'équité, l'usage ou la loi,*” this article does not appear to have been precedential:

De plus, bien que le libellé de l'article 1024 C.c.B.-C. ait reconnu l'équité comme principe d'interprétation des obligations contractuelles, l'évolution du droit civil l'avait réduite au rang honorable, mais secondaire, des déclarations de principes. Le temps avait effectivement prouvé que l'équité contractuelle, mentionnée dans le Code de 1866, était impuissante pour remédier aux injustices auxquelles étaient exposées les parties vulnérables dans des rapports contractuels. Cela était particulièrement vrai à l'égard des relations entre les consommateurs et les « manufacturiers », tels qu'on les nommait alors³⁴.

It was not until 1964 that the winds of change blew in Quebec in terms of contract justice. That year, a short part was added to the Civil Code on “equity in certain contracts”. That part provides for measures enabling a judge to reduce, due to lesion, the obligations related to a money loan or other financing transaction. In that part, in section 1040 c) CCLC, the Civil Code of Québec included an application of the common law doctrine of unconscionability. The judge could henceforth reduce a party's financial obligations when the contract terms make “the operation abusive and exorbitant”. The French version uses the terms “abusives et exorbitantes”.

But much more significantly, Quebec adopted in 1971 its *Consumer Protection Act* (RSQ, c P-40.1, hereinafter CPA), which it amended in 1978 to give it the form it has today. The CPA

³² Sec. 7, *An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure*, 1857, L.C., c. 43.

³³ Sec. 1674 N.C.

³⁴ Louis LEBEL, *Le principe de bonne foi en droit civil québécois*. Manuscripts of the conference in memory of Honourable Charles D. Gonthier. Montreal, 2011.
<http://cisdl.org/gonthier/public/pdfs/papers/Conf%C3%A9rence%20Charles%20D%20Gonthier%20-%20Louis%20LeBel.pdf> (Page consulted on September 25, 2011).

notably allows a judge to intervene because of abuse or lesion in any consumer contract, and no longer only in contracts pertaining to financing or loans.

8. The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable³⁵.

In 1973, the Civil Code was amended again, particularly with regard to housing rental, to protect tenants against lesion, by establishing rent control procedures, but also by prohibiting abusive clauses (sec. 1664d, 1664g and 1664h³⁶).

At the same time, the Quebec government began the work of completely revising the Civil Code. This work was completed with the adoption in 1991 of the Civil Code of Québec; one of the most publicized measures of this new Code was the new section 1437, pertaining specifically to abusive clauses.

3.2 ABUSIVE CLAUSES AND QUEBEC LEGISLATION

The reform of the Civil Code of Québec (CCQ) belongs to a global movement of reform³⁷; starting with classic contract theory, a powerful movement emerged toward what has been called the new contract justice or ethics. As early as 1964, a new section titled “Of Equity in Certain Contracts” had been added to the general provisions of the title of the Civil Code of Lower Canada in order to mitigate contractual laissez-faire³⁸.

The Civil Code of Lower Canada was inspired by the ideology of laissez-faire liberalism, was based on the obligation of contracts, focused on the parties’ free will, and opposed the judge’s intervention in a contract. As opposed to this, the CCQ recognizes that certain rules of public order, including good faith, must today prevail over the obligation of contracts.

In fact, one of the fundamental principles that guided the work of codifiers is that of the good will obligation in private relations. Thus, the good will obligation is no longer only a general principle of interpretation, but also becomes a legal rule (secs. 6, 7 and 1375 CCQ). The legislation recognizes that the contract has a social purpose and must meet the ethical standards recognized by our society. This is how the Justice Minister presented the new section 6:

Cet article a pour effet d’empêcher que l’exercice d’un droit ne soit détourné de sa fin sociale intrinsèque et des normes morales généralement reconnues dans notre société³⁹.

³⁵ Sec. 8, CPA.

³⁶ These provisions are found in sections 1900, 1901, 1904, 1905, 1906, 1910 par. 2 of the Civil Code of Quebec.

³⁷ Undertaken in 1955 by the adoption of the Act respecting the revision of the Civil Code and the creation of the Civil Code Revision Office (1965), the complete reform of the Civil Code, following substantial modifications to family law, deemed a priority, in 1980, and then to the law of persons, the law of successions and property law in subsequent years, would be completed almost 40 years later. The new Civil Code was adopted in 1991 and came into effect in 1994.

³⁸ Department of Justice Canada. *Important dates in the history of the civil law of Quebec*. (2009)

³⁹ Comments of the Justice Minister regarding sec. 6 CCQ

The social role and purpose of contracts have been recognized by doctrine, along with that purpose's justification of legislative intervention:

Le contrat doit être utile. L'utilité s'entend dans le sens d'intérêt général. Le contrat a une utilité sociale. Il s'avère l'instrument par excellence pour effectuer les échanges de biens et de services entre les personnes. Cet instrument est indispensable à la vie en société. Le citoyen ne vit ni en ermite, ni en solitaire. Il a nécessairement besoin de l'activité de ses pairs et de mécanismes juridiques pour assurer sa croissance. Le contrat a donc une utilité sociale certaine, et c'est à ce titre que le législateur le sanctionne et qu'il intervient pour contrôler les abus qu'il peut engendrer⁴⁰.

As part of the Civil Code's establishment of new contract justice, several measures were adopted to protect the contractor in a position of weakness. For instance, section 1623 CCQ allows judges to reduce a penal clause if it is abusive:

1623. *A creditor who avails himself of a penal clause is entitled to the amount of the stipulated penalty without having to prove the lesion he has suffered.*

However, the amount of the stipulated penalty may be reduced if the creditor has benefited from partial performance of the obligation or if the clause is abusive.

In addition, section 2332 CCQ, also based on the doctrine of unconscionability derived from common law, allows the courts to cancel or reduce a loan agreement's obligations if they deem that a party has suffered lesion:

2332. *In the case of a loan of a sum of money, the court may pronounce the nullity of the contract, order the reduction of the obligations arising from the contract or revise the terms and conditions of the performance of the obligations to the extent that it finds that, having regard to the risk and to all the circumstances, one of the parties has suffered lesion.*

With regard to housing leases, legislation has also intervened to prevent a vulnerable contractor from being exploited:

1900. *A clause which limits the liability of the lessor or exempts him from liability or renders the lessee liable for damage caused without his fault is without effect.*

A clause to modify the rights of a lessee by reason of an increase in the number of occupants, unless the size of the dwelling warrants it, or to limit the right of a lessee to purchase property or obtain services from such persons as he chooses, and on such terms and conditions as he sees fit, is also without effect.

1901. *A clause stipulating a penalty in an amount exceeding the value of the damage actually suffered by the lessor, or imposing an obligation on the lessee which is unreasonable in the circumstances, is an abusive clause.*

Such a clause is null or any obligation arising from it may be reduced.

⁴⁰ Brigitte LEFEBVRE, *La justice contractuelle : mythe ou réalité ?*, Les Cahiers de droit, vol. 37, No. 1, 1996, pp. 17-30, p. 21 <http://id.erudit.org/iderudit/043375ar> (Page consulted on September 25, 2011).

1904. *The lessor may not exact any instalment in excess of one month's rent; he may not exact payment of rent in advance for more than the first payment period or, if that period exceeds one month, payment of more than one month's rent.*

Nor may he exact any amount of money other than the rent, in the form of a deposit or otherwise, or demand that payment be made by postdated cheque or any other postdated instrument.

1905. *A clause in a lease stipulating that the full amount of the rent will be exigible in the event of the failure by the lessee to pay an instalment is without effect.*

1906. *A clause in a lease with a fixed term of 12 months or less providing for an adjustment of the rent during the term of the lease is without effect.*

A clause in a lease with a term of more than 12 months providing for an adjustment of the rent during the first 12 months of the lease or more than once during each 12 month period is also without effect.

1910. *A lessor is bound to deliver a dwelling in good habitable condition; he is bound to maintain it in that condition throughout the term of the lease.*

A stipulation whereby a lessee acknowledges that the dwelling is in good habitable condition is without effect.

However, beyond targeted measures provided for specific contracts, the legislation has created a general protection plan to protect the weaker contractor against abusive contract clauses. This general plan to prohibit abusive clauses is also found in sec. 1437 CCQ, which has particularly drawn the attention of the courts⁴¹ and the doctrine.

Faced with the multiplicity of adhesion contracts and the injustices acknowledged by the courts, the legislators chose to prohibit abusive clauses by granting judges the power to cancel or reduce all abusive clauses unfavourable to a party in an excessive and unreasonable manner contrary to good faith:

1437. *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.

We note that this intervention against abusive clauses targets only consumer and adhesion contracts – two types of contract in which imbalance between the contractors is taken as a given.

But this movement toward fairness, although intended to protect the weaker contractor against exploitation, unfairness and injustice, has not developed without some reluctance, because the

⁴¹ Benoît MOORE, *Sur l'avenir incertain du contrat de consommation*, in *Les contrats du consommateur. Rapport national québécois Partie I, journées colombiennes*, Henri Capitant, p. 11.

traditional laissez-faire approach has left its mark and its tenants have hindered the legislators' audacity.

In the Civil Code Revision Office's report, submitted to the government in 1978 and tabled in the National Assembly in the form of a draft Civil Code accompanied by two volumes of comments, the codifiers proposed, notably, the adoption of three different measures of protection against contractual exploitation, i.e., those against abusive clauses, lesions and unforeseeability⁴². Pressure quickly followed from partisans of classic laissez-faire economics, who expressed worry about the contractual instability that would result from these approaches in the CCQ. Even after the concept of unforeseeability was hurriedly and completely abandoned, and after the scope of measures regarding lesion were considerably mitigated, thus limiting their applicability to consumer contracts alone (already protected against lesion at the time by the CPA⁴³, it should be recalled), the legislators, faced with the detractors' outcry, backed down from adopting those measures. Thus, despite the recommendations of the Civil Code Revision office, lesion between persons of full age was put aside, along with unforeseeability, as a reason for cancelling or amending a contract. The Justice Minister, borrowing the arguments of the *status quo* defenders, justified the backtracking as follows:

Le domaine d'application de la lésion n'a pas été étendu à toute personne physique, même majeure et pleinement capable. Car, même si elle se situait dans le prolongement d'une extension constante du concept de lésion entre majeurs en droit québécois, notamment avec l'émergence du droit de la consommation, l'extension du domaine de la lésion, non circonscrite à des cas spécifiques, paraissait susceptible de compromettre la stabilité de l'ordre contractuel, d'engendrer éventuellement certains abus et de diminuer dans une certaine mesure le sens des responsabilités des citoyens⁴⁴. (Emphasis added.)

This concern is quite surprising, given that the *Consumer Protection Act* has provided for remedies against lesion between persons of full age since 1978, without provoking the instability so feared by partisans on judge non-intervention in contracts.

This omission is all the more unfortunate because the inclusion, through section 8 of the CPA, of the option to dispute a contract and have it rescinded or cancelled due to lesion has had a preventive effect on the formulation of contracts. In fact, as pointed out by Professor Jobin, very few contracts have been revised by a court on the basis of lesion. As he puts it, "*Les piliers du temple de la stabilité contractuelle ne sont pas ébranlés*⁴⁵." He estimates that including in sec. 1408 CCQ a defendant's possibility, during proceedings based on lesion, of offering to increase his own obligation or reduce that of the party that considers itself injured introduces an innovative legal means of increasing – rather than imperilling – contract stability by granting judges a certain leeway to avoid cancelling an otherwise lesionary contract⁴⁶. The author harshly criticizes this choice of the status quo:

⁴² Pierre-Gabriel JOBIN, *Deux lacunes de la justice contractuelle dans le Code civil du Québec*, p. 4.

⁴³ Sec. 8 and 9 L.P.C.

⁴⁴ *Commentaires du ministre de la justice : Le Code civil du Québec*, Québec, Publications du Québec, 1993, Art. 1405.

⁴⁵ Pierre-Gabriel Jobin, *La modernité du droit commun des contrats dans le code civil du Québec : Quelle modernité?*, R.I.D.C. 1-2000, 49, 57.

⁴⁶ *Ibid.*

À l'instar du droit antérieur, dans le Code civil du Québec, la lésion n'est admise que dans quelques domaines étroitement circonscrits, tels que le prêt d'argent. Dans les dispositions générales du code traitant du droit commun des contrats, la lésion retrouve exactement la place qu'elle occupait dans code précédent : une place vide. En effet, selon l'article 1405 du Code civil du Québec, « outre les cas expressément prévus par la loi, la lésion ne vicie le consentement qu'à l'égard des mineurs et des majeurs protégés ». Ceci représente ni plus ni moins qu'une volte-face par rapport aux recommandations de l'Office de révision du Code civil⁴⁷.

He concludes, relying on leading analysts such as Pineau, Lluellas and Crépeau:

En définitive, de l'avis de la grande majorité des auteurs, la réforme du Code civil a été un véritable échec en ce qui concerne la lésion⁴⁸.

This is especially regrettable because, as we note below in our comparative study of abusive or unfair clause regulations in common law jurisdictions, whether Canadian, American, British or Australian, the doctrine of unconscionability, very similar to that of lesion, and enabling judges to revise a contract, is universally accepted nowadays. In addition, the Dutch, German, Brazilian, Swiss and Italian civil codes, among others, have incorporated this concept of lesion among persons of full age without any tsunami of contractual instability having been observed in those countries.

But what differentiates the concept of unfair clause from that of lesion? Are they not identical for all practical purposes, given that both aim to “*sanctionner l'exploitation de la faiblesse de l'un par l'abus de puissance de l'autre*”⁴⁹ – to counter a flagrant imbalance, an excessive and unreasonable disadvantage victimizing one of the contractors?

In fact, the two concepts, which are at the heart of consumer law, appear quite easy to differentiate theoretically. A lesion is an overall imbalance, a lack of equivalency between obligations (between the contract's object and its price); for its part, a clause is unfair in terms of its content – the imbalance revealed is inherent to a specific clause of the contract. A contract is lesionary, a clause is unfair⁵⁰.

Admittedly, this view is not unanimous among legal experts, and more importantly, caselaw certainly has not adopted a clear-cut position on the application of the two concepts to specific cases. In fact, Moore adds:

[...] le lien entre ces deux notions fait actuellement l'objet d'un vif débat dans la doctrine québécoise, certains soutenant que la notion de clause abusive se rapproche, voire se confond, avec celle de lésion⁵¹.

Let us take a closer look at sec. 1437 and its application.

⁴⁷ Pierre-Gabriel Jobin, *Deux lacunes de la justice contractuelle dans le Code civil du Québec*, p. 8.

⁴⁸ *Ibid.*, p. 10.

⁴⁹ Benoît MOORE, *Les clauses abusives : Dix ans après*, *Revue du Barreau*, tome 63, spring 2003.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

First, we note that this section pertains to public order, and the judge alone can determine whether a clause is abusive or not. Accordingly, a contract clause to the effect that the parties consider no provision to be unconscionable or excessive would be illegal on its face⁵².

As we will see below, it is usual in Europe, European Union directives and national protection plans against abusive clauses, to draw up lists of clauses presumed or considered abusive. This is not the approach chosen by Quebec legislators: section 1437 is not accompanied by and does not refer to any list of clauses that could frame the interpretation or application desired by the legislators.

Nevertheless, many contract clauses or stipulations have been the object of specific regulations or cautions by the courts. The *Consumer Protection Act* explicitly prohibits many clauses: explicit prohibition of exclusion (sec. 10), giving the merchant unilateral power (sec. 11), imposing binding arbitration or restricting consumers from going to court (sec. 11.1), allowing the merchant to modify a contract unilaterally, except under certain conditions (sec. 11.2), allowing the merchant to unilaterally cancel a fixed-term contract of successive performance, and in the case of an open-ended contract of successive performance without giving the consumer prior notice (sec. 11.3), charging the consumer other fees than accrued interest (sec. 13), binding the consumer to a foreign law (sec. 19), choice of forum (sec. 22.1), obliging a consumer who wants to avail himself of a warranty to prove that previous owners have met the warranty's conditions (sec. 52.1)⁵³.

The authors of a recent report on the opportunity to create a Consumer Code stated the following about the desirability of adopting a list of abusive clauses:

Une telle liste simplifierait grandement la détection des abus dans les contrats de consommation et aurait pour effet de faciliter la preuve par le consommateur d'une violation à la loi par l'entreprise. Elle aurait aussi l'avantage d'apporter cohérence et clarté au texte de la CPA actuelle en regroupant en un lieu unique des dispositions actuellement éparses⁵⁴.

In addition, we think such a list would have a preventive effect. We will return to this subject below.

As we reported, the first paragraph indicates that section 1437 applies only to consumer or adhesion contracts: “*An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.*” The adhesion contract is defined in section 1379 CCQ, and the consumer contract in sec. 1384 CCQ:

⁵² *Location Tiffany Leasing Inc. v. 3088-6022 Québec Inc.*, J.E. 98-1485 (C.Q.);

⁵³ As we will see below, the German legislature, which has adopted a “catalogue” of unfair clauses, does not designate them either by this specific name. The general prohibition clause does not mention “unfairness” or “abuse” either, although the content corresponds in all points to typical clauses prohibiting unfair clauses (such as that of the Civil Code of Québec) and that clauses listed in the German “catalogue” are those (or are of the same type as those) that appear in European laws establishing lists of clauses said to be unfair.

⁵⁴ Thierry BOURGOIGNIE, Pierre-Claude LAFOND and Lindy ROUILLARD. *La réforme de la Loi sur la protection du consommateur du Québec. Jalons pour un Code de la consommation du Québec*. Montreal, 2011.

1379. *A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.*

1384. *A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.*

It should be noted here that the *Consumer Protection Act* itself does not define the consumer contract, but that its scope is delimited as follows:

1. *This Act applies to every contract for goods or services entered into between a consumer and a merchant in the course of his business.*

The consumer, a natural person, is defined in section 1 in contrast to the merchant: “a natural person, except a merchant who obtains goods or services for the purposes of his business;” curiously, the definition of merchant is reserved to the English version of section 1: “In this Act, the word ‘merchant’ includes any person doing business or extending credit in the course of his business.”

We can see that the definition of consumer contract results in some contracts “whose field of application is delimited by legislation respecting consumer protection” cannot, in the sense of the Civil Code, be considered consumer contracts⁵⁵.

A) The Scope of Sec. 1437

Once the contract is classified as adhesion or consumer, the latter type being a prior condition for the application of section 1437, doctrinal debates invite us to ask what type of clauses may be subject to the judge’s revision under that section.

Indeed, historically, the concept of abusive clauses, as developed in Europe, allows for countering only a contract’s ancillary clauses. Legal protections against abusive clauses cannot find application to a contract’s essential clauses, such as those pertaining to the price paid or the main object of a contract.

This dichotomy rests on the way the contract is negotiated in principle. In an adhesion contract (which is what a consumer contract usually is), ancillary clauses are not negotiated, but imposed. This way of contracting aggravates the adhering party’s position of weakness, by

⁵⁵ This incongruity results from the fact that debates took place, during the Civil Code reform, on the appropriateness of integrating or not the CPA’s content into it, i.e., to include a chapter specifically on consumer law. For some, integrating this Act in the Civil Code would have constituted recognition of consumer law’s social importance and of the fact that the Civil Code appreciates today the importance of protecting the weaker contractors. For the opponents, integrating consumer law in the Code would ultimately have slowed down the former’s evolution and lessened its protective effect. The compromise position was to maintain the CPA outside the Civil Code, while including in the CCQ certain stipulations regarding consumer contracts. However, as pointed out by some authors, this choice has certainly not proved very fortunate: by so proceeding, the legislature established two consumer protection systems – divergences are likely to be revealed according to the sources of law.

establishing a model of contractual relationship whereby that party is passive in not having any choice other than to submit to market rules, as dictated by his co-contractor. The adhering party is thus likely to be abused or ill-informed about the terms of the contract⁵⁶. This is why legislation has granted the power to intervene and restore a little justice and fairness to the contract. With regard to essential clauses, which at times may be somewhat negotiated, only a recourse to the concept of lesion can allow the judge's intervention, when permitted by law.

In its directive on abusive clauses, the European Union has clearly established this distinction between types of clauses that can be countered, and has thus indicated explicitly that a contract's main clauses are excluded from an examination of the abusive nature of clauses:

[I] 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 supplies in exchange, on the other⁵⁷.

Section 1437 does not make such a distinction. On the contrary, the text states explicitly: "*An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer [...]*" (emphasis added). If the legislators wanted to limit the scope of this provision only to ancillary or peripheral clauses, the formulation is awkward, to say the least. And it is all the more surprising because, as mentioned above, the legislation clearly stated that it refused to allow adults to invoke lesion as a cause for revising contracts; accordingly, many have seen in this section a breach of that refusal.

If a clause is deemed abusive, a judge may, under section 1438, cancel the entire contract in cases where "the contract may be considered only as an indivisible whole." Thus, the court has the power to cancel a contract, and therefore essential clauses, which we recall is normally the province of remedy against a lesion.

Finally, some view the similarity of texts dealing with abusive clauses and lesion as an indication that these two concepts overlap. Thus, the expression "excessively and unreasonably detrimental to the consumer" of section 1437, which defines abusive clauses, would be equivalent to "exploitation of one of the parties by the other, which creates a serious disproportion between the prestations of the parties » (sec.1406 par.1), which defines lesions.

However, for the majority of commentators, the explicit refusal to include in the Civil Code a provision that would allow the possibility of invoking lesion among persons of full age, as clearly expressed in the Justice Minister's comments, cannot be ignored; without an explicit amendment of section 1405 CCQ, which states "*Except in the cases expressly provided by law, lesion vitiates consent only in respect of minors and persons of full age under protective supervision*", they would consider it an error to interpret the Civil Code as allowing an adhesion or consumer contract to be revised due to lesion between persons of full age, i.e., because the contract's essential clauses disadvantage the adhering party.

Sixteen years after the effective date of sec. 1437, we might think that the courts could have settled this doctrinal controversy. In fact, the authors who have analysed the caselaw note that the majority of clauses that have been the object of a legal examination were ancillary clauses.

⁵⁶ Nathalie CROTEAU, *Le contrôle des clauses abusives dans le contrat d'adhésion et la notion de bonne foi*, (1996) 26 R.D.U.S., p. 403.

⁵⁷ *Directive 93/13/EEC of 5 April 1993* (Official Journal L 095 of April 21, 1993), sec. 4.

Many judgements still pertain to certain essential clauses of a contract, the court having, intentionally or through error, examined their abusive nature.

The example most often cited in this regard is the Kabakian judgement⁵⁸, rendered by the Appeal Court of Québec. In that case, the Court had to examine immigrant sponsorship agreements, which are adhesion contracts. Under those contracts, people who want to sponsor their parents for immigration must pledge to the government of Québec to vouch for them for a period of ten years. One of the arguments raised to counter a claim made on the basis of such a pledge was that such a clause was abusive, given its duration. Writing for the Court, Judge Beaudoin first notes the controversy regarding the scope of section 1437:

Les auteurs ne s'entendent pas, au niveau théorique, sur le concept même de la clause abusive. Pour certains, il s'agit d'une simple illustration particulière de la lésion, notamment de la conception retenue en droit de la consommation, pour d'autres d'un concept différent et séparé, alors que d'aucuns y verront une simple conséquence ou application particulière de la notion de bonne foi consacrée par le législateur pour l'ensemble de la vie du contrat.

Then he explains why the clause analysed is not excessive and unreasonable:

La clause vise à permettre à certaines personnes liées au parrain par des liens familiaux ou amicaux d'accéder à l'immigration, alors qu'elles n'auraient, très probablement, jamais pu y prétendre. En outre, l'immigration confère à ces mêmes personnes une série d'avantages dont elles n'auraient pas pu autrement bénéficier (accès au système de santé de l'État, sécurité du revenu, accès à l'aide juridique, etc.). C'est, en quelque sorte, un prix minime à payer pour l'exercice d'un privilège permettant, d'une part, la réunification des familles et, d'autre part, l'accessibilité aux divers services de l'État.

So the Court did not hesitate to examine the clause, even though it was manifestly not ancillary – on the contrary, it was the contracting sponsors' primary obligation, which the Court assessed in terms of the advantages obtained by the contractor in counterpart of this “minimum price to pay”. For some, this analysis by the Appeal Court clearly indicates its acceptance of the possibility of examining an essential clause in accordance with sec. 1437 CCQ. By the same token, since the Court examined whether the clause could be qualified as abusive on this basis, we find that the courts would be justified in considering that unforeseeability is a receivable argument when a contractor considers himself wronged and the disputed clause abusive.

At the very least, it seems to us that this Appeal Court invites a broad interpretation of sec. 1437 CCQ. But the debate is certainly not settled for all that.

B) The Excessive and Unreasonable Nature

Section 1437 defines an abusive clause as one “*which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith.*”

But what is excessively detrimental? When does it become unreasonable? And when is it not in good faith?

⁵⁸ *P.G. Québec v. Kabakian-Kechichian*, [2000] R.J.Q. 1730, 1739 (C.A.).

First, we note that a contractual clause must be interpreted in the context of the contract. Indeed, sec. 1427 CCQ tells us that “*Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.*” Therefore, a clause that might appear abusive *per se* (such as a clause for selling a good “without warranty”, for example) might not be deemed excessive or unreasonable if, in compensation, the contract provided for a substantial price reduction, for instance. In fact, the Appeal Court has recognized this principle in the *Janin Construction*⁵⁹ decision.

It should also be noted that majority doctrine and caselaw agrees in considering that the assessment criterion resides mainly in the “excessive and unreasonable” nature of the clause. As for good faith, it is said to be the basis for the rule, and its mention is not considered an additional criterion of analysis.

Some judges have decided nevertheless that the stronger contractor’s bad faith should be demonstrated in order to establish the abusive nature of a given clause. Although we agree with the authors who estimate that those decisions incorrectly interpret sec. 1437, it may be opportune to clarify the text on this subject so as to remove all ambiguity. This is also the conclusion of the Groupe de Recherche et d’étude en droit comparé international de la consommation (GREDICC), which, in its report titled “Jalon vers un code de la consommation”, proposes a different text where the reference to good faith is excluded⁶⁰.

For a clause to be judged abusive, the disadvantage it carries must be excessive and unreasonable; these are two distinct and cumulative conditions. Judge Beaudoin wrote on this subject in the *Kabakian* decision cited above⁶¹:

Le législateur impose donc deux conditions à l'existence du caractère abusif de la clause, soit qu'elle désavantage l'adhérent d'une façon excessive, mais aussi d'une façon déraisonnable.

For the Court, the excessive nature may be appreciated according to objective as well as subjective criteria:

Le caractère excessif d'une clause peut être apprécié soit en fonction d'un critère objectif (par exemple, exiger du contractant l'exécution d'une obligation pratiquement impossible à remplir ou totalement disproportionnée par rapport à l'obligation corrélative), soit en fonction d'un critère subjectif (c'est-à-dire en tenant compte de la situation particulière du contractant) et des difficultés auxquelles il peut faire face dans l'exécution de celle-ci. Dans ce dernier cas, ce qui pourrait être excessif pour l'un ne le sera pas nécessairement pour un autre.

As for the unreasonable nature, its analysis was declared strictly objective.

But does the subjective analysis of the excessive nature of the disadvantage, while taking into consideration the specific characteristics of the weaker contractor, examine the situation of this

⁵⁹ *Régie d'assainissement des eaux du Bassin de la Prairie v. Janin Construction (1983) Ltée*, [1999] R.J.Q. 929 (C.A.).

⁶⁰ Thierry BOURGOIGNIE, Pierre-Claude LAFOND and Lindy ROUILLARD. *La réforme de la Loi sur la protection du consommateur du Québec. Jalons pour un Code de la consommation du Québec*. Montreal, 2011.

⁶¹ *P.G. Québec v. Kabakian-Kechichian*, [2000] R.J.Q. 1730, 1739 (C.A.).

co-contractor at the moment when the injustice is noticed or at the moment when the contract is entered into?

Again in the *Kabakian* case, Judge Beaudoin writes the following on this subject:

[...] en matière de clauses abusives, on doit évaluer principalement celles-ci au moment de la conclusion de l'engagement. Revoir le contrat au moment de son exécution et réduire l'obligation du parrain en tenant compte de sa capacité de payer me paraît alors n'être rien d'autre qu'une révision de la convention par le juge pour imprévision, notion qui n'est pas acceptée dans notre droit comme principe général (art. 1439 CCQ), mais simplement dans certains cas particuliers (art. 771, 1294, 1834 CCQ). (Our emphasis)

Thus, it appears that the Court, while favouring an analysis focusing on the moment when the contract is entered into, does not close the door completely to an examination that would take into account aspects that arise at the moment when the clause is applied⁶².

The doctrine seems to agree on the importance of not strictly limiting an examination of the clause to conditions prevailing at the moment when the contract is entered into. Professor Moore writes in this regard:

[...] on doit tout de même éviter, comme nous y invite en quelque sorte la Cour d'appel, de refuser péremptoirement de prendre en compte des événements particuliers pouvant "corroborer" ou révéler le caractère abusif d'une clause. En ce sens, il faut adopter une approche pragmatique de la notion de clause abusive⁶³.

That being said, this theoretical analysis finds little echo in most of the decisions rendered under sec. 1437. There is also not much discussion of the concept of good faith during the application of this section. However, the courts appear open to intervene in order to ensure that the commitment is fair and that good faith is present. In fact, a clause is often considered abusive, as the case may be, without the decision providing real explanations. The judges intervene when a situation is truly "shocking" and not just regrettable.

In this respect, the objective set by the legislation is reportedly attained. As explained by Judge Beaudoin in *Kabakian*:

De façon sous-jacente, on trouve donc au cœur même de l'article 1437 CCQ l'idée fondamentale que, parce qu'il s'agit d'un contrat d'adhésion, celui-ci ne doit pas devenir un instrument d'exploitation du plus fort pour le plus faible.

C) The Consumer Protection Act

As mentioned above, Quebec adopted in 1971 its first *Consumer Protection Act*, amended for the first time in 1978. Although the Act provides no specific measure for making it possible to counter abusive clauses, section 8 pertains notably to the possibility for a consumer to ask the courts to cancel the contract or reduce its resulting obligations if there is an imbalance between the parties' obligations that constitutes an exploitation of the consumer.

⁶² *Papineau v. La Survivance, Compagnie mutuelle d'assurance-vie*, [2001] R.R.A. 277 (C.Q.).

⁶³ Benoît MOORE, *Les clauses abusives : Dix ans après*, Revue du Barreau, tome 63, spring 2003.

We discern in section 8 of the *CPA* the same intention as in foreign provisions to protect consumers against the harmful effects of abusive contract clauses. Despite the absence of a specific provision on abusive clauses, Quebec's *Consumer Protection Act* prohibits the use of certain clauses in consumer. For example, section 19 prohibits inserting in a consumer contract a clause that would make the contract in whole or in part subject to another Quebec or Canadian law⁶⁴. Moreover, section 11.1 prohibits the use of contract clauses that would oblige consumers to submit an eventual dispute to arbitration or would prevent him from launching a class action or participating in such a proceeding, or that would restrict in any other manner his right to be heard in court⁶⁵. This type of clause being among those prohibited by jurisdictions adopting lists of clauses declared or presumed abusive, we note here the legislators' concern for countering the use of abusive clauses, even though the Law does not name or define them in those terms⁶⁶.

In addition, to continue monitoring the insertion of new potentially abusive contract clauses in consumer contracts, Quebec legislation has granted the power to establish through regulations lists of clauses that would be prohibited in consumer contracts⁶⁷. Some will find in the Quebec approach a lack of vigour in countering abusive clauses, and will worry that consumer protection against this type of clause is insufficient. In contrast to Quebec, certain European countries, as part of their regulation of abusive clauses, have instead developed for some time lists of problematic clauses to establish assumptions that may be irrefragable – lists added to a general provision prohibiting abusive clauses or depriving them of any effect. Indeed, as we will see below, this practice has been adopted in turn in a European Union directive that compels all Member States to adopt this approach⁶⁸.

Should this different approach to regulating contract clauses by means of the *CPA* lead to the conclusion that Quebec offers consumers inadequate remedies for ensuring optimum protection?

D) Remedies against Abusive Clauses

We recall that Quebec consumers who enter into a consumer contract also benefit from the application of the *Consumer Protection Act*, in using section 8 (which, again, does not pertain to abusive clauses, but rather to lesions) as well as the *Civil Code*, whose section 1437 provides for countering abusive clauses.

Without detailing the necessary elements of proof for the various legal actions regarding abusive clauses, and without conducting a more in-depth study of the continuing debate in Quebec law about certain aspects of section 1437 *CCQ*⁶⁹, here is a brief overview of remedies available to consumers under the *Civil Code* and other Quebec laws.

⁶⁴ Sec. 19 *CPA*.

⁶⁵ Sec. 11.1 *CPA*.

⁶⁶ We will see below that German legislation also prohibits abusive clauses without qualifying them.

⁶⁷ Sec. 350 *CPA*.

⁶⁸ We will discuss below European Council Directive 93/13/EEC and its application in member countries.

⁶⁹ Élise CHARPENTIER, *L'article 1437 du Code civil du Québec: L'art de lire un article qui surprend*, in *Mélanges Jean Pineau*, under the direction of Benoît Moore, p. 233 to 249, les Éditions Thémis, 2004, <https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/2233/1/L%27article%201437%20CCQ%20-%20De%20l%27art%20de%20lire%20un%20article%20qui%20surprend.pdf> (Page consulted on September 25, 2011). *Op. cit.* Jobin, *Deux lacunes de la justice contractuelle dans le Code civil du Québec*.

The remedy provided for in section 1437 of the *Civil Code of Québec* enables a consumer to initiate a proceeding for an abusive clause in a contract to which he is a party to be declared null. We also pointed out above that certain provisions pertaining to specific fields allow the weaker contractor to request a reduction of his obligations or the cancellation of the contract or provision in dispute⁷⁰.

As it appears in section 1437, a consumer may request that the clause he considers abusive be declared null or that his obligations be reduced. What about the circumstances where a consumer has suffered damage following a merchant's application of an abusive clause? In such cases, Quebec consumers have a civil liability remedy; he must show proof of the damage, but also of the merchant's fault and the causal link between that fault and the damage⁷¹.

In addition, a consumer victimized by a lesion may, under section 8 of the CPA, ask the court to declare the contract null or order the obligations reduced.

As we will see below, many countries grant consumer associations the right to act in various ways in the collective interest of consumers against abusive clauses⁷².

The application of an abusive contract clause may lead in Quebec to a class action against the merchant⁷³. The class action pools the interests of consumers who have entered in a similar contract with the merchant in question. That class action "*permet d'intenter au bénéfice de l'ensemble des consommateurs un recours qui vise à les indemniser ou, pour reprendre l'expression du professeur Pierre-Claude Lafond, qui permet la représentation collective des intérêts individuel*"⁷⁴. Although this procedural tool has proven very useful to date in defending consumer rights, it is not without shortcomings. First, the number of consumers who claim to have victimized by the application or existence of an abusive clause in a consumer contract, and the total amount in question (in case damage can be claimed) may be determinant in the decision to undertake this cumbersome process. Fortunately, the Code of Civil Procedure allows a consumer association to launch a class action. However, there are certain limitations to making such an intervention effective against abusive clauses. In particular, such a proceeding cannot be initiated on the basis of consumers' collective interest, if only because Quebec law allows a consumer association to launch a class action only to the extent that one of its own members has a right of action against the defendant. Indeed, the restrictions mentioned above, to which is added the necessity of establishing the damage to the group members on behalf of whom the remedy is undertaken, impose serious limitations.

⁷⁰ For example, section 1623 pertains to the amount provided for in a penal clause; that amount may be reduced if the penal clause is deemed abusive.

⁷¹ Sec. 1457 CCQ

⁷² The establishment of this type of remedy conferred to consumer associations follows, for European Union member countries, from *Directive 93/13/EEC of 5 April 1993* (Official Journal L.95 of April 21, 1993), sec. 7.

⁷³ An Act respecting the class action, RSQ, c R-2.1; sections 999 and following of the Code of Civil Procedure of Québec, RSQ c.C-25.

⁷⁴ Geneviève Duchesne and Yannick Labelle, *Les associations de consommateurs et la défense de l'intérêt collectif des consommateurs : réflexions sur l'introduction d'un nouveau recours en droit québécois*, in *L'accès des consommateurs à la justice sous la direction de Pierre-Claude Lafond*, Éditions Yvon Blais, Cowansville, 2010, p. 53.

In the absence of a consumer wronged by an abusive clause, a class action that would lead to the discontinuation of said clause is thus impossible. In addition, a class action against all (or several) professionals who would use the same type of clause is made difficult by this requirement of a legal bond between a member of the organization and the defendant: the consumer is unlikely to be a customer of all the merchants who use the same abusive clause. Since the decision rendered in the *Agropur* case⁷⁵ by the Appeal Court of Québec, it seems to us that the class action's effectiveness is in fact limited, since sectoral actions are prohibited for all practical purposes. This new requirement unfortunately hinders the large-scale curative effect that class actions might have.

And yet, such actions do exist. *Directive 93/13/EEC of 5 April 1993* (Official Journal L.95 of April 21, 1993) obliges member countries to adopt provisions stating that “*organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.*” The Directive adds that class actions “*may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms*”⁷⁶.

These actions, initiated in consumers' collective interest, can usually be initiated even preventively, independently of any actual damage done to consumers.

Other than individual or class actions, Quebec law provides for another remedy, which consumer associations share with the OPC president: this remedy was recently established in the *Consumer Protection Act*: section 316, introduced in 2010, allows consumer organizations under certain circumstances to request an injunction against a merchant who “has included or includes in a contract a stipulation prohibited by this Act or a regulation, or has included or includes a stipulation inapplicable in Québec that is referred to in section 19.1 without complying with that section”⁷⁷. (The requirements of section 19.1 indicate the inapplicability of a prohibited clause that has been inserted in a contract). In reading this section, we observe that it does not pertain to an action against abusive clauses in the sense, for example, of the EU directive, but rather to an action that may be initiated against a merchant who applies stipulations that have already been prohibited by the *CPA* (and that the merchant may nevertheless insert in his contracts, on condition of disclosing their inapplicability). As opposed to actions for discontinuance that are found in European jurisdictions, that can force merchants to physically withdraw from their contracts clauses declared abusive, and that can prohibit the merchants from recidivating, the actions provided for in the *CPA* only allows for finding a double infraction (using a prohibited clause and the fault of disclosing its inapplicability) and would only have the effect of obtaining a court decision compelling the merchant to indicate that the disputed clause is... which is what the Act already compels him to do.

⁷⁵ *Bouchard v. Agropur*, [2006] R.J.Q. 2349 (C.A.). This signature decision of the Court of Appeal of Québec pertains mainly to the legal bond that the claimant must have with the defendant. Beforehand, a class action was allowed to involve several defendants having similar illicit practices, even though the claimant had no legal bond with each of the defendants. Since the *Agropur* decision, a consumer can no longer initiate a class action against a merchant with whom he has not concluded a contract or who has not committed a fault against him.

⁷⁶ *Directive 93/13/EEC of 5 April 1993* (Official Journal L.95 of April 21, 1993), sec. 7.

⁷⁷ Sec. 316 *CPA*.

The effectiveness of this measure is doubtful; given its recent introduction in the Act, it may be too early to tell. At Parliamentary Committee hearings prior to the adoption of the bill introducing the measure, our organization expressed its concern about an aspect of the action that was being considered at the time (and that resembled the actions for discontinuance prevailing notably in Europe). We cautioned that:

Le projet de loi ne prévoit pas de mode de financement distinct qui faciliterait pour les organismes de défense des droits des consommateurs l'accès à ce nouveau recours. Vu les ressources limitées dont disposent généralement les associations de consommateurs québécoises, il sera sûrement nécessaire d'étudier les mécanismes de financement qui permettront aux organismes de faire un usage optimal de ce nouveau moyen d'assurer une meilleure protection du consommateur⁷⁸.

To our knowledge, no association to date has filed with the court a claim for an injunction under section 316 of the CPA.

There is another possible remedy to protect consumers. The state may, through the Office de la protection du consommateur (OPC), initiate certain proceedings, including criminal proceedings. Other than the claim for an injunction mentioned above, the OPC may initiate a penal action against a merchant who uses prohibited stipulations in his contracts⁷⁹. A person found guilty of violating the Law or its regulations is subject to a fine of at least double the fines provided for in section 279 of the Act⁸⁰. In addition, the court may order that a person found guilty of violating the Act publish the findings of the decision rendered against him⁸¹.

⁷⁸ Union des consommateurs, *Mémoire sur le projet de loi no. 60*, October 19, 2010, p. 15.
http://www.consommateur.qc.ca/union-des-consommateurs/docu/protec_conso/UCLoi60091020.pdf
(Page consulted on September 25, 2011).

⁷⁹ Sec. 277, par. a, CPA.

⁸⁰ Sec. 279 CPA.

⁸¹ Sec. 288 CPA.

4 Protection against Abusive (Unfair) Clauses in Canada

Common law is the private law system in effect in all Canadian provinces and territories except Quebec, the only Civil Law province. Common law is a legal system whereby caselaw plays a central role. Over the centuries, many rules constituting the heart of common law have been based on dispute settlements. Although this process of caselaw creation is evolutionary, legislators intervene when they want a change in customs, technology or politics to be reflected quickly in the law.

Given that property law and civil law are a provincial jurisdiction, each province is responsible for legislating in these matters to establish more-precise rules, or to codify, with or without modification, common law rules that apply by default in each of those provinces.

4.1 ABUSIVE (UNFAIR) CLAUSES IN COMMON LAW

Common law does not contain specific rules regarding abusive clauses. Without using that qualification, common law has nevertheless established mechanisms for countering clauses or contracts which involve an excessive and unreasonable imbalance or lead one to believe upon examination that there could not have been true consent, so that they flatly contradict classic contract theory and lead to the conclusion that the contract cannot be valid.

As a general rule, “*la common law canadienne ne sanctionnera l’injustice que si elle revêt à la fois un aspect processuel et un aspect substantiel*”⁸². We will list here a few general rules for applying contract theory (Contract Law) and a few recent developments in this regard that counter certain contractual injustices.

A) Contract Preparation and Interpretation

The application of fairness rules for contracts is not new in common law. Beyond the traditional hesitation to intervene in an agreement constituting the law between the parties, and despite the primary task in interpreting contracts, which consists of trying to detect the parties common intention, several well-established principles are an integral part of any examination of contracts and are applied systematically by the courts.

i) *Verba fortius accipiuntur contra proferentem*

This rule of interpretation is among the 25 common law rules compiled in 1630 by Sir Francis Bacon⁸³. The contract text is interpreted against its author; this well-known rule of “*contra proferentem*” stipulates that any ambiguity in the contract text must be interpreted in favour of the adhering party or consumer – between two possible meanings, the one favouring the adhering party must be favoured. This general rule of interpretation, which was developed in insurance law⁸⁴, easily finds application in adhesion contracts or pre-formulated contracts,

⁸² Sébastien GRAMMOND, *La règle sur les clauses abusives sous l’éclairage du droit comparé*, (2010) 51 Cahiers de droit 83-116.

⁸³ Francis BACON, *A Collection of some principall rules ans maximes of the common lawes of England with their latitude and extent*. London, 1630.

⁸⁴ We also find this consolidated rule in Quebec in sections 1432 CCQ and 17 CPA.

which are practically the object of no negotiation. The reading favourable to the consumer or adhering party is justified by the idea that the one who has mastered the formulation of clauses should face the consequences of defective formulation. This rule, which consists of “*privilégier sans vergogne les intérêts d’une partie*”, is not actually a rule of interpretation: it provides that doubt must, ultimately be resolved in a meaning favourable to a contractor designated by law⁸⁵.

ii) **Consensus – ad idem**

Borrowed, as the first rule, from the contract law principles of ancient Rome, this rule simply refers to consent, to the meeting of wills: the parties understood and accept the respective contractual commitments – they are *ad idem*⁸⁶ when the agreement, in the parties’ understanding, pertains to the same object and is to the same effect. The parties agree on the same thing. This is a basic requirement for there to be a contract. Under traditional contract theory, without such a consensus, there is no contract⁸⁷.

iii) **Non est factum – mistake**

Common law recognizes that a mistake can justify a judge in intervening to cancel a contract. Caselaw has dealt with the various possible types of mistakes⁸⁸ for applying the common law rule *non est factum*, which means that the act is not what was thought by the person invoking this rule. Thus, a party may obtain the cancellation of a contract if it successfully demonstrates that the contract was signed by mistake, without an understanding of its nature or scope, but without this mistake resulting from negligence by the party invoking the rule. This doctrine is based on absence of consent and is applied to the extent that the party invoking it is beyond reproach (clean hands doctrine).

Failure to read the contract before signing it can generally not be invoked to plead a mistake in common law jurisdictions. Canada is an exception to this, since the decision *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 DLR (3d) 400⁸⁹, rendered by the Court of Appeal for Ontario and pertaining to standard contracts, established that signing such a contract could not lead us to assume the adhering party’s true intention. The Court insisted on the fact that a process (in that case, a car rental) designed to be expeditious does not usually give the contractor a chance to

⁸⁵ Didier LUELLES, *Les règles de lecture forcée “contra proferentem” et “contra stipulatorem” : du rêve à la réalité*, (2003) 37 *R.J.T.* 235.

http://www.editionsthemis.com/uploaded/revue/article/rjtvol37num3/01_regles_lecture.pdf (Page consulted on September 25, 2011).

⁸⁶ According to certain lexicographers, the term **consensus**, meaning the agreement or consent of two or more persons about something, *consensus ad idem* is pleonastic: *consensus* alone reportedly suffices to express the concept. See: Translation Bureau – Public Works and Government Services Canada.

http://www.btb.termiumplus.gc.ca/tpv2guides/guides/juridi/index-eng.html?lang=eng&lettr=indx_catlog_a&page=268.html (Page consulted on September 25, 2011).

⁸⁷ German jurist Friedrich Carl von Savigny, in his work *System of Modern Roman Law (System des heutigen römischen Rechts*, 8 volumes, 1840-1849), is credited for this contract intention theory, whereby a contract is not presumed valid unless all parties have voluntarily agreed to its terms, explicitly or tacitly, and without duress.

⁸⁸ See: *Seppanen v. Seppanen*, 59 BCLR 26, in which the Supreme Court of British Columbia summarize this doctrine: “In *common mistake*, both parties make the same mistake. Each knows the intention of the other and accepts it but each is mistaken about some underlying and fundamental fact. In *mutual mistake*, the parties misunderstand each other and are at cross purposes. In *unilateral mistake*, only one of the parties is mistaken. The other knows, or must be taken to know, of his mistake.”

⁸⁹ *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400 (C.A. Ont.); in British law, see *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1985] 3 All E.R. 513 (C.A.).

take cognizance of all the clauses of an imposing contract, so that it could not be assumed that he has consented to each of them.

B) Onerous Clauses and the Obligation to Inform

By “onerous clause” is meant a provision that is disadvantageous to the contractor (i.e., the opposite of an “advantageous clause”); the price in question, i.e. the disadvantage, may be monetary, but also immaterial. The rule of onerous clauses was developed for adhesion contracts and formulated as follows in the *Tilden* decision⁹⁰.

In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum⁹¹.

There is here a presumption of non-negligence and non-awareness in favour of the weaker contractor, who reportedly did not take cognizance of the contract terms. Based on this rule, the courts will try to ensure that consent is real in circumstances where there is doubt on the subject.

Ainsi, lorsqu'un consommateur signe un contrat pré-imprimé que lui présente une grande entreprise sans le lire et sans qu'il y ait possibilité de discussion, la situation présente un risque d'erreur du consommateur quant au contenu du contrat, voire un risque de dol de la part de l'entreprise. Si l'on retrouve, dans ce contrat, une clause nettement défavorable au consommateur, on présumera que celui-ci n'en a pas compris la portée et que son consentement n'était pas éclairé⁹².

⁹⁰ *Ibid.*

⁹¹ *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 R.C.S. 1186; *Hoffman c. Sportsman Yachts Inc.* (1992), 89 D.L.R. (4th) 600 (C.A. Ont.); *1560032 Ontario Ltd. v. Arcuri* (2006), 37 B.L.R. (4th) 233 (C.A. Ont.); *Canadian General Insurance Co. v. Ayre* (2001), 204 Nfld. & P.E.I.R. 76 (C.A.T.-N.); *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (C.S.); *Mayer v. Big White Ski Resort Ltd.* [1998] B.C.J. No. 2155 (C.A.); *Fletcher v. Manitoba Public Insurance Co.* [1990] 3 R.C.S. 191.

⁹² Sébastien GRAMMOND, *Les règles abusives sous l'éclairage du droit comparé*, in *Les Cahiers de Droit*, vol. 51, No. 1, March 2010, p. 83-116 (2010) 51 *Les Cahiers de Droit* 83, p. 10.

C) Unfairness

Another rule frequently used in common law to determine the problematic nature of a given clause is that of unconscionability – a concept very similar to that of lesion as found in civil law.

As the word implies, a court may declare “unconscionable” what troubles the conscience, is excessively unfair or inequitable, to the point of being outrageous. Once this unfairness is detected, there is a presumption of fraud, and the party defending the validity of the clause or transaction is obliged to establish that it is fair and reasonable. “Unconscionability” can be invoked only by the weaker party in a transaction where there is a substantial inequality in the parties’ bargaining power.

The doctrine of unfairness thus allows a party to escape from its contract obligations when the transaction as a whole “*diverge suffisamment des normes de la société en matière de moralité commerciale qu’elle doit être rescindée*”⁹³. In Canada, the landmark decision is found in that of the Court of Appeal of British Columbia in the *Harry v. Kreutziger* case, in which Judge McIntyre summarized as follows the rule of unconscionability:

*Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable*⁹⁴.

We note here that the test must pertain both to the process – there is inequality, one of the parties being in an inferior position – and to the substantial unfairness, i.e., a disproportion in the respective obligations that disadvantages the co-contractor in a position of weakness⁹⁵. While the Supreme Court has never provided a precise definition of the concept of unconscionability, Judge LeBel, in his dissenting reasons in the *Miglin v. Miglin* decision⁹⁶, wrote as follows about unconscionability, by emphasizing “*l’exigence de la preuve d’une injustice à deux volets*”⁹⁷:

⁹³ Charles GONTHIER, *Les Chartes – nos rôles et défis -- Valeurs, droit et éthique*, XVIIe Conférence des juristes de l’État, p. 99.

⁹⁴ *Harry v. Kreutziger* (1979), 95 D.L.R. (3d) 231 (C.A.C.-B.); another oft-cited decision is *Morrison v. Coast Finance Ltd. and Vancouver Associated Car Markets Ltd.* (1966), 54 W.W.R. 257 (C.A.C.-B.).

⁹⁵ This definition corresponds to the scope of section 1437 CCQ, as explained by Judge Beaudoin in the Kabakian ruling: “Le contrat ne doit pas devenir un instrument d’exploitation du plus fort pour le plus faible.”

⁹⁶ *Miglin v. Miglin*, [2003] 1 R.C.S. 303, in par. 208 (j. LeBel, dissident); *ABB Inc. v. Domtar Inc.*, [2007] 3 R.C.S. 461, in par. 82. In this affair that, regarding divorce, pertained to a pre-nuptial agreement that one of the parties was attempting to set aside, the majority concluded as follows: “Le tribunal ne devrait faire abstraction des désirs exprimés par les parties dans un accord préexistant que si le requérant démontre que l’accord n’est pas conforme, pour l’essentiel, aux objectifs généraux de la Loi. Nous avons vu qu’ils comprennent non seulement ceux de l’art. 15.2, mais également les objectifs de la certitude, du règlement définitif et de l’autonomie.” Judge LeBel, for the dissidents, estimated that the rule of unconscionability could be invoked.

⁹⁷ Sébastien Grammond, *La règle sur les clauses abusives sous l’éclairage du droit comparé*, (2010) 51 Cahiers de droit 83-116.

Suivant le modèle contractuel privé, on ne peut écarter les contrats que s'ils sont abusifs en ce qu'ils choquent la conscience du tribunal. Pour qu'un contrat soit jugé tel, il faut retrouver à la fois une forte inégalité de pouvoir de négociation entre les parties, dont tire profit la partie en position de force qui exploite la partie plus faible, et une grave iniquité ou imprévoyance dans les dispositions de l'accord (voir Bala et Chapman, loc. cit., p. 1-7 et 1-8; Munding c. Munding (1968), 3 D.L.R. (3d) 338 (C.A. Ont.), conf. par (1970), 14 D.L.R. (3d) 256n (C.S.C.)). La rigueur du critère du caractère abusif reflète fortement une présomption que les individus agissent dans leur intérêt, de manière rationnelle et autonome, lors de la conclusion d'ententes privées. La non-exécution de l'entente des parties ne peut se justifier que si l'inégalité du pouvoir de négociation a faussé la transaction à tel point que cette présomption s'en trouve réfutée⁹⁸.

In this view, judges should be interested in contract injustice in the event that it is possible to confirm in this way that there has been an absence of consent due to an imbalance of power during the negotiations between the parties.

Plusieurs théoriciens du droit des contrats considèrent que la manière dont la règle de l'iniquité est habituellement décrite par les tribunaux peut s'expliquer par l'impossibilité pratique de prouver un vice de consentement dans de nombreux cas. Les tribunaux se satisfont alors de la preuve d'un simple risque de vice processuel — par exemple, l'inégalité du pouvoir de négociation des parties — et considèrent l'injustice substantielle comme une démonstration de la réalisation de ce risque dans le cas à l'étude⁹⁹.

From this analysis we can conclude that court intervention is justified if, when the contract is entered into, the weaker party has not acted “*dans son intérêt, de façon rationnelle et autonome*”¹⁰⁰.

D) Unequal Bargaining Power

The possibility of unequal bargaining power between the parties to a transaction contravenes the classic foundation of contracts, which is that both co-contractors are equally autonomous persons who meet at equal strength for a mutual agreement.

The unequal bargaining power is not in itself a defence or a means for obtaining redress; rather, it is a concept accepted by the courts and used as for unifying certain common law defences that normally are separate and used independently from one another, but are all based on the same situation of fact.

Lord Denning of the British Court of Appeal wrote in 1974 in the *Lloyds Bank Ltd. v. Bundy* case:

⁹⁸ See, for example, *Norberg v. Wynrib*, [1992] 2 R.C.S. 226, pp. 247-250; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 R.C.S. 426, pp. 462-464; *Miglin v. Miglin*, [2003] 1 R.C.S. 303; *Rick v. Brandsema*, 2009 CSC 10, in par. 42. It will be noted that Judge LeBel puts unfairness and unforeseeability on the same footing as evidence of exploitation.

⁹⁹ Sébastien GRAMMOND, *La règle sur les clauses abusives sous l'éclairage du droit comparé*, (2010) 51 Cahiers de droit, pp. 83-116.

¹⁰⁰ Grammond, *Op. cit.*, p. 10.

I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other¹⁰¹.

As stated by Judge Sopinka in the *Norberg v. Wynrib* case, this concept, which demonstrates the evolutionary aspect of common law, is not yet fully defined in Canadian law:

Il existe une différence fondamentale entre la question du consentement en matière de responsabilité délictuelle et le principe de l'iniquité. Il ressort de façon prépondérante de la doctrine et de la jurisprudence que le principe de l'iniquité s'applique pour annuler des opérations même s'il a pu y avoir consentement ou entente à l'égard des modalités du marché. Ce n'est pas que ce principe vicie le consentement, mais plutôt que l'équité exige que l'opération soit annulée nonobstant le consentement. Le principe de l'iniquité et le principe connexe de l'inégalité du pouvoir de négociation continuent d'évoluer et ne constituent pas encore un domaine du droit des contrats entièrement établi¹⁰².

We conclude that these common law rules allowing a contract or its provisions to be questioned do not apply when no procedural injustice has been committed. Even if one of the parties is particularly vulnerable, common law does not allow court intervention if the co-contractor, despite his dominant position, has acted in good faith. This is why, for example, that even qualifying an act as "unconscionable" does not entail an irrefragable presumption.

Accordingly, in the *Hart v O'Connor* case, the Court wrote:

"... in the opinion of their Lordships, the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of "unfairness" unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane¹⁰³.

Evolutionary though it may be, common law has not been able to develop quickly enough to respond to the new contract reality resulting from the multiplying adhesion contracts. Judge Reid, in the *Suisse Atlantique* case, already expressed in 1967 his frustration regarding the state of contract law in common law, and the fiction that so-called freedom of contract has come to be:

In the ordinary way the customer has no time to read [the contracts], and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to

¹⁰¹ [1974] 3 All E.R. 757 (C.A.).

¹⁰² *Norberg v. Wynrib* [1992] 2 R.C.S. 226.

¹⁰³ *Hart v O'Connor* [1985] AC 1000 (PC): "... in the opinion of their Lordships, the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of "unfairness" unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane."

*another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining*¹⁰⁴.

These shortcomings have obliged legislators, in the common law jurisdictions, to regulate abusive clauses and make it permissible, at least regarding adhesion contracts, to have the validity of those clauses reassessed beyond the straightjacket of caselaw.

4.2 STATUTORY LAW IN COMMON LAW PROVINCES

The Department of Justice Canada describes common law as the unwritten law, based on caselaw, as opposed to the rules of statute law, which are based on legislation¹⁰⁵.

*“La règle de l'interprétation stricte des lois dérogoires au droit commun renvoie à l'opposition common law et statute law. Historiquement, la common law a été le droit commun et la statute law, le droit d'exception [...]”*¹⁰⁶.

Given the limits of common law rules with regard to an effective intervention against abusive clauses, all Canadian common law provinces have adopted one or more laws to protect consumers against contractual unfairness. For example, on the basis of the common law principle of unconscionability, the majority of provinces, apart from Quebec, have a law called the *Unconscionable Transactions Relief Act*¹⁰⁷. This law allows the courts to intervene in loan agreements if the borrowing cost proves excessive and the obligations exorbitant. Contract terms that might have unfair results for consumers are thus regulated. Certain consumer protection laws contain provisions against consumer contract terms whose application would constitute an unfair or bad faith practice. The following is a quick overview of those laws¹⁰⁸.

¹⁰⁴ *Suisse Atlantique Société d'Armement Maritime SA v. Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406.

¹⁰⁵ Department of Justice Canada, *Some Thoughts on Bijuralism in Canada and the World*, on p. 5.

<http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b2-f2/bf2.pdf> (Page consulted on September 25, 2011)

¹⁰⁶ P.-A. COTE, *Interprétation des lois*, 3e éd., Montreal, Les Éditions Thémis, 1999, p. 644.

¹⁰⁷ For example: *Unconscionable Transactions Relief Act*, R.S.S 1978, c U-1 in Saskatchewan; *Unconscionable Transactions Relief Act*, R.S.N.S 1989, c 481 in Nova Scotia; *Unconscionable Transactions Relief Act*, C.C.S.M c U20 in Manitoba; *Unconscionable Transactions Relief Act*, R.S.O 1990, c U.2 in Ontario; *Unconscionable Transactions Relief Act*, R.S.N.B 2011, c 233 in New Brunswick; and the *Unconscionable Transactions Relief Act*, R.S.P.E.I 1988, c U-2 in Prince Edward Island.

¹⁰⁸ To demonstrate the variations in regulations against unfair clauses from one province to another, we have chosen to analyse the legislative provisions of Ontario, Alberta, British Columbia and Saskatchewan. In our view, the laws of these four provinces adequately reflect the approach preferred in the other common law provinces in Canada.

A) Ontario

In Ontario, many laws protect consumers in their transactions, in a great variety of fields¹⁰⁹. The *Consumer Protection Act, 2002*¹¹⁰, which came into effect on July 30, 2005, combined and updated six consumer protection laws.

Section 2 of this Act applies to “all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place,” the “consumer transaction” being “any act or instance of conducting business or other dealings with a consumer, including a consumer agreement” (sec.1). A “consumer agreement” is “an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment” (sec. 1).

With regard to the abuses against which the Act intervenes, sections 14 and following prohibit using unfair practices, including “unconscionable representation¹¹¹”, and deals with aspects that the courts may particularly consider in order to determine whether a given representation is unconscionable.

15. (1) *It is an unfair practice to make an unconscionable representation.*

(2) *... in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know:*

- a) *that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors;*
- b) *that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;*

¹⁰⁹ Consumer protection laws:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, chap. 3; *Athletic control Act*, RSO 1990, chap. A.34; *Bailiffs Act*, RSO 1990, chap. B.2; *Cemeteries Act (Revised)*, RSO 1990, chap. C.4; *Collection Agencies Act*, RSO 1990, chap. C.14; *Condominium Act, 1998*, S.O. 1998, chap. 19; *Consumer Reporting Act*, RSO 1990, chap. C.33; *Collection Agencies Act*, RSO 1990, chap. D.4; *Discriminatory Business Practices Act*, RSO 1990, chap. D.12; *Electricity Act, 1998*, S.O. 1998, chap. 15, Schedule A, Part VIII; *Film Classification Act, 2005*, S.O. 2005, chap. 17; *Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, chap. 33; *Funeral Directors and Establishments Act*, RSO 1990, chap. F.36; *Gaming Control Act, 1992*, S.O. 1992, chap. 24; *Horse Riding Safety Act, 2001*, S.O. 2001, chap. 4; *Liquor Licence Act*, RSO 1990, chap. L.19; *Motor Vehicle Dealers Act*, RSO 1990, chap. M.42; *Motor Vehicle Dealers Act, 2002*, S.O. 2002, chap. 30, Schedule B; *Ontario New Home Warranties Plan Act*, RSO 1990, chap. O.31; *Paperback and Periodical Distributors Act*, RSO 1990, chap. P.1; *Racing commission Act, 2000*, S.O. 2000, chap. 20; *Real Estate and Business Brokers Act, 2002*, S.O. 2002, chap. 30, Schedule C; *Retail Business Holidays Act*, RSO 1990, chap. R.30; *Travel Industry Act, 2002*, S.O. 2002, chap. 30, Schedule D; *Wine content and Labelling Act, 2000*, S.O. 2000, chap. 26, Schedule P.

http://www.sse.gov.on.ca/mcs/en/Pages/Consumer_Protection_Legislation.aspx (Page consulted on September 25, 2011)

¹¹⁰ *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A.

¹¹¹ Section 1 of the *Consumer Protection Act, 2002* defines the term “representation” as follows:

- a representation, claim, statement, offer, request or proposal that is or purports to be:*
- a) *made respecting or with a view to the supplying of goods or services to consumers, or;*
 - b) *made for the purpose of receiving payment for goods or services supplied or purporting to be supplied to consumers; (“assertion”).*

- c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;*
- d) that there is no reasonable probability of payment of the obligation in full by the consumer;*
- e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;*
- f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;*
- g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or*
- h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.*

It should be noted that the presence of one or more of the aspects listed is not sufficient in leading the courts to conclude that a representation is unconscionable, since the text specifies that the courts must take into account the awareness, by the person making that representation, of the existence or presence of these aspects (barring culpable ignorance). But the use of the word “includes” indicates that the courts may take other aspects into account. Moreover, the list of considerations drawn in the legal text mixes objective and subjective aspects.

It should also be noted that contract terms are not discussed in this provision, but representations made by the merchant. This provision thus does not apply to a contract's terms, but rather to the representations made before or during the conclusion of a consumer contract. It pertains only to the process, not the content of a contract.

Certain laws, which do not apply specifically to consumers, protect against contract unfairness. For example, the *Unconscionable Transactions Relief Act*¹¹² allows a court to reopen a loan agreement. Under section 2 of this Act, “in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable.”

If the court reaches that conclusion, it may:

reopen the transaction and take account

- a) reopen the transaction and take an account between the creditor and the debtor;*

reopen former settlements

- b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;*

order repayment of excess

- c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;*

¹¹² *Unconscionable Transactions Relief Act*, RSO 1990, c. U.2.

set aside or revise contract

*d) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order the creditor to indemnify the debtor*¹¹³.

B) British Columbia

In British Columbia, the main consumer protection law is the *Business Practices and Consumer Protection Act* (hereinafter *BPCPA*)¹¹⁴. Part 2 of this Act, which covers unfair practices, applies to unconscionable terms in “consumer transactions”, notably “a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household” (sec.1).

Section 4, in the Act’s Part 2, titled *Unfair practices*, defines a “*deceptive act or practice*” as well as a “*representation*”.

4 (1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

- (a) an oral, written, visual, descriptive or other representation by a supplier, or*
- (b) any conduct by a supplier that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;*

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

In contrast to the Ontario law, the BPCPA applies both to verbal representations, such as the merchant’s declarations, and to visual representations such as advertising and the terms of the contract themselves.

Section 8 incorporates in a legal text the concept of unfairness taken from common law, and draws a non-exhaustive list of the circumstances that the court may consider in determining the unfair nature of an act or practice; the list mixes objective and subjective considerations:

8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

- (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;*
- (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to*

¹¹³ *Unconscionable Transactions Relief Act*, RSO 1990, sec. 2.

¹¹⁴ *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

(f) a prescribed circumstance.

(Our emphasis)

Section 10 provides that a consumer who is or has been victimized by such a practice will not be bound by the transaction. (More limited and detailed reparations are provided for in the case of mortgages¹¹⁵.)

Like Quebec's *Consumer Protection Act*, this Act also specifically and expressly regulates a certain number of contract types that have been problematic for consumers in the past. Thus are regulated contracts that pertain to: direct sales, future performance, time sharing, the various funeral services, and distance selling.

Other laws of general application also seek to regulate unconscionable clauses. The *Sale of Goods Act*¹¹⁶ imposes on sales contracts implicit warranties and restricts the use of clauses intended to limit or lessen the scope of those warranties.

The *Law and Equity Act*¹¹⁷ regulates certain penal and forfeiture clauses as well as certain clauses specific to mortgage deeds. According to British Columbia's law reform commission, this law only reprises and codifies rules already known and originating in common law¹¹⁸.

C) Alberta

The Alberta provisions found in the *Fair Trading Act* prohibit the use of unfair practices¹¹⁹. More specifically, the law defines an unfair practice as follows: "*to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided*¹²⁰."

¹¹⁵ (a) *reopen the transaction and take an account between the supplier and the consumer or guarantor;*

(b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;

(c) order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;

(d) set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;

(e) suspend the rights and obligations of the parties to the transaction.

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, sec. 10.

¹¹⁶ *Sale of Goods Act*, R.S.B.C. 1996, c. 410.

¹¹⁷ *Law and Equity Act*, R.S.B.C. 1996, c. 253.

¹¹⁸ British Columbia Law Institute, *Unfair Contract Terms: An Interim Report*, BCLI Report No. 35, February 2005.

The Alberta Act stands out from other Canadian laws particularly in the remedies available to consumers.

Any consumer whose contract with a merchant includes a clause that has been recognized by a tribunal as “harsh, oppressive or excessively one-sided” can unilaterally terminate the contract simply by notifying the merchant, within the year following his discovery of the unfair practice that has victimized him – the contract will be cancelled free of charge or penalty. The second paragraph of section 7 reads as follows:

Where a supplier has been found to have engaged in an unfair practice, any consumer who entered into a consumer transaction that was subject to the unfair practice with the supplier who engaged in the unfair practice may cancel the consumer transaction at no cost or penalty to the consumer¹²¹.

It is thus a judgement obtained by a third party that authorizes the consumer to cancel *ipso jure* his contract in the wake of unfair practices. The latter may be those that occurred before, during or after the contract was entered into.

The *Fair Trading Act* protects consumers even more that providing that a consumer’s exercise of the right conferred to him by this provision lead, first, to the contract itself being cancelled as though it had never existed, but leads also, among other things, to the cancellation of any ancillary contract, including the credit agreement reached in relation to the main contract¹²². A consumer who decides to have a contract cancelled in this manner is also entitled to a refund of any amount he has paid under this contract¹²³.

If the merchant refuses to cancel the contract on receipt of the notice sent by a consumer, the latter may initiate a civil action before the *Court of Queen’s Bench*¹²⁴. Other than the Court’s option to grant punitive and exemplary damages¹²⁵, the law provides that any other person who participates in committing an unfair practice shares a joint and several liability with the merchant who has entered with the consumer into the contract containing problematic provisions¹²⁶. The Court may either issue an injunction against the merchant that orders him to stop using such a clause, or issue any other order it deems appropriate¹²⁷.

Moreover, if the public interest demands it, the government organization assigned to consumer protection may also launch the same actions as those available to consumers under section 13¹²⁸. And it may bring to term an action already undertaken by a consumer¹²⁹.

Finally, the *Fair Trading Act* allows a consumer rights organization or a consumer group to “commence and maintain an action in the Court of Queen’s Bench against a supplier or any

¹¹⁹ Sec. 6, par. 1.1, *Fair Trading Act*, RSA 2000 c. F-2.

¹²⁰ *Ibid*, sec. 6(3)c).

¹²¹ Art. 7.1, *Fair Trade Act*, RSA 2000, c. F-2.

¹²² *Ibid*, sec. 7(4).

¹²³ *Ibid*, sec. 7(4)c) and d) and 7(3).

¹²⁴ *Ibid*, arts. 7.1(5). and 13.

¹²⁵ *Ibid*, sec. 7.2(1).

¹²⁶ *Ibid*, sec.7.3.

¹²⁷ *Ibid*, sec. 13.

¹²⁸ *Ibid*, sec. 14.

¹²⁹ *Ibid*.

principal, director, manager, employee or agent of a supplier who is engaging in or has engaged in an unfair practice¹³⁰.” The Court of Queen’s Bench may declare unfair the clause or practice in dispute and issue an injunction ordering the merchant to cease the unfair practice.

In addition, the law specifies that a consumer rights organization that wants to go to court does not have to demonstrate an interest other than that conferred by the *Fair Trading Act*; nor does it have to establish that it would have been affected directly by the unfair practice in dispute¹³¹.

In the section above on Quebec legal remedies, we expressed our concerns regarding consumer groups’ available resources. The latter’s rarity could suffice to dissuade those groups, in the absence of funding for such remedies or of any possibility of being compensated through damages for harm to the collective interest of consumers, for example by obtaining an injunction against a merchant. Regardless of the effectiveness of an action undertaken by consumer associations in Alberta, the Act’s provision that the Court may order a consumer organization initiating such an action to furnish security for costs¹³² suffices to melt any desire to undertake such an action.

D) Saskatchewan

Like that of the other common law provinces, Saskatchewan’s *Consumer Protection Act* provides that:

5 It is an unfair practice for a supplier, in a transaction or proposed transaction involving goods or services, to:

(a) do or say anything, or fail to do or say anything, if as a result a consumer might reasonably be deceived or misled;

(b) make a false claim;

(c) take advantage of a consumer if the person knows or should reasonably be expected to know that the consumer:

(i) is not in a position to protect his or her own interests; or

(ii) is not reasonably able to understand the nature of the transaction or proposed transaction; [...]¹³³.

As for contract clauses, the law considers it an unfair practice to take “advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one-sided¹³⁴.”

This formulation is quite similar to that of Alberta and Ontario law. A consumer wronged by the use of an unfair practice (which thus includes the fact of inserting an unfair clause into a contract) may initiate a civil action under section 14 of the Act. That action may result in a court order that the merchant refund any amount paid by the consumer, or in the granting of damages, including punitive and exemplary damages, or in an injunction against the merchant.

¹³⁰ *Ibid*, sec. 17.

¹³¹ *Ibid*, sec. 17(3).

¹³² *Ibid*, sec. 17(4).

¹³³ Sec. 5, *Consumer Protection Act*, S.S. 1996, c. C-30.1.

¹³⁴ *Ibid*, sec. 6, par. q.

Here also, the “*director for consumers*”, the organization charged with applying the law, may initiate the same actions as the consumer, if it considers such an action in the public interest. It may also pursue an action initiated by a consumer¹³⁵. The Saskatchewan Act contains some of the same elements as the Alberta Act, The Saskatchewan Act contains some of the same elements as the Alberta Act, though with less details and a weaker protection.

¹³⁵ *Ibid*, sec. 15.

5 Protection against Abusive (Unfair) Clauses Internationally

Internationally, we find the same two traditions as in Canada, i.e., civil law and common law. As opposed to civil law countries, where the law is based on legal texts – and where, however inspired their texts may be by legislation in other civil law countries, only national law is applied – common law countries share the broad corpus of rules and principles developed over the centuries by British court decisions and then imported by British colonies across the world, which nourish in turn the common heritage.

Accordingly, all the common law principles we studied above find application in countries with this legal tradition. We will not detail here the various remedies against problematic clauses.

5.1 COMMON LAW COUNTRIES

A) Australia

Australia (officially the Commonwealth of Australia) is a federation of 6 States and several territories. Its common law legal system contains the protections described above to counter contractual injustices found in any type of contract.

The government had considered in 2008 the adoption of a general provision against unconscionability. The Productivity Commission's report, despite the benefits outlined by this prohibition, proposed instead to postpone such an initiative:

The prohibition of unconscionability in the generic legislation represents a general prohibition of unfairness, but usually only for unfairness that crosses a high threshold of severity. Other Australian provisions relating to unfair conduct only deal with specific instances of unfair practices, such as deceptive conduct. As a result, there is no broad prohibition on unfair practices by business in Australia, unlike the USA, which bars unfair or deceptive acts and practices, or Europe, which applies an Unfair Commercial Practices Directive. Several participants suggested the adoption of a similar provision in Australia (Queensland Government, sub. 87, pp. 52ff; Luke Nottage, sub. DR114, p. 7; and the Consumer Action Law Centre, sub. DR241, p. 6), while Frank Zumbo suggested the introduction of a general standalone duty of good faith (sub. DR217, pp. 4ff).

Conceptually, a broad provision against unfairness is attractive because it can avoid prescription of specific types of unfairness and, in theory, does not need to be continually adapted as new commercial expressions of unfairness are discovered. For example, the USA has used its general provisions to bar emerging threats, such as spyware and unauthorised telephone billing.

However, in practice, the application of the US provisions — the most mature broad law against unfairness — has periodically raised major concerns, due to changing interpretations of unfairness.

[...]

In that context, introducing a general provision against unfairness might be more conceptually neat than practically useful for consumers. Nevertheless, the Commission agrees with the ACCC (sub. 80, p. 72) that it would be prudent for Australian policymakers to see how the European model develops, and only to consider the option of pursuing a general unfair practices provision at a later time if warranted by strong evidence in its favour¹³⁶.

The Commission then focused on a specific request from consumer groups to regulate unfair clauses, and before making its recommendation (*Recommendation 7.1*) on this subject, explained:

The Commission accepts that there is a rationale for addressing unfair contract terms. The strongest argument for doing so is ethically based — and is merely the extension of existing ethical principles about fairness in contracts, to cover substantive terms that appear to be manifestly unfair in most circumstances.

There is a conventional economic rationale too, but it is more complicated and depends on the nature of risk appraisal by consumers and the difficulties that ‘good’ firms have in signalling that they will act in good faith with their customers compared with ‘bad’ firms.

There are also counter-arguments against a blanket ban of apparently unfair terms based on understanding why these terms are so prolific across all types of contracts, including in competitive industries [...] One explanation is that ‘one-sided’ contracts can actually be beneficial to consumers as a whole by providing them — through the business — with a way of deterring problematic behaviour by small groups of consumers. In particular, just as some businesses behave in bad faith or otherwise inappropriately, so too do some consumers¹³⁷.

¹³⁶ Australian Government, Productivity Commission. *Review of Australia’s Consumer Policy Framework - Inquiry Report*. No. 45, 30 April 2008, Volume 2 – Chapters and Appendixes. p. 140 and following.

¹³⁷ *Ibid.*, p. 151. Recommendation 7.1 reads as follows:

RECOMMENDATION 7.1

A provision should be incorporated in the new national generic consumer law that addresses unfair contract terms. The Commission’s preferred approach would have the following features:

- a term is established as ‘unfair’ when, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract;
- there would need to be material detriment to consumers (individually or as a class);
- it would relate only to standard-form, non-negotiated contracts;
- it would exclude the upfront price of the good or service; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment, with suppliers also potentially liable to damages for that detriment. The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms.

Transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts.

The operation and effects of the new provision should be reviewed within five years of its introduction.

According to that country's constitution, the federal government has the power to legislate on a matter of State jurisdiction if the matter was referred to it by a State¹³⁸. Through this mechanism, the federal government adopted a national consumer protection law, the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*, which took effect on July 1, 2010 and tabled two complementary bills¹³⁹ scheduled to take effect on January 1, 2011¹⁴⁰.

The adoption of those three laws created a consumer protection system that replaced the 17 consumer protection laws currently in effect and differs on some points from one State to another.

The *Trade Practices Amendment (Australian Consumer Law) Act (N° 1) 2010* contains two chapters regulating the use of unfair clauses. Here is a summary of those regulations:

Protection against unfair clauses applies only to pre-formulated consumer contracts. Moreover, certain consumer contracts are excluded from the Act's application – notably, insurance contracts¹⁴¹.

The following consumer contracts are excluded:

- *certain shipping contracts*
- *contracts that are constitutions of companies, managed investment schemes or other kinds of bodies or*
- *contracts covered by the Insurance Contracts Act 1984*¹⁴².

Only ancillary clauses may be declared abusive. To counter the main clauses, consumers must continue using the means offered by common law.

The Act considers a clause unfair when it creates a significant imbalance between the parties' rights and obligations; when it is not reasonably necessary for protecting the merchant's legitimate interests and when it harms the consumer (monetarily or otherwise). For its part, the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* specifies that the

¹³⁸ Section 51(xxxvii) of the *Commonwealth of Australia Constitution Act*.

¹³⁹ Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010; Competition and Consumer Legislation Amendment Bill 2010.

¹⁴⁰ As the present report was being written, the Australian government's website is still relegating to the future the effective date of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*, but also mentions at the adoption of *Competition and Consumer Legislation Amendment Bill 2010* has been postponed due to the dissolution of the *House of Representatives* and the prorogation of the Senate. Source: Australian Government; The Treasury. An Australian Consumer Law. <http://www.treasury.gov.au/consumerlaw/content/legislation.asp> (Page consulted on September 25, 2011).

¹⁴¹ This exclusion constitutes the main critique that consumer protection organizations make of the Australian Consumer Law. Consumer Action Law centre, Submission to Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009, July 30, 2009. <http://www.consumeraction.org.au/publications/policy-reports.php> (Page consulted on September 25, 2011).

¹⁴² Australia Consumer Law, *A guide to the unfair contract terms law*, Australian Competition and Consumer Commission, ISBN 978 1 921581 59 5. [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/Guide-to-the-unfair-contract-terms-law-28052010.pdf/\\$file/Guide-to-the-unfair-contract-terms-law-28052010.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/Guide-to-the-unfair-contract-terms-law-28052010.pdf/$file/Guide-to-the-unfair-contract-terms-law-28052010.pdf) (Page consulted on September 25, 2011).

protection against unfair practices applies both to the process leading to the contract and to the contract's terms and the parties' subsequent behaviour.

To determine whether a clause is abusive, the judge may assess all the circumstances of the contract, including its intelligibility and readability¹⁴³.

Under the *Australian Consumer Law*, a court that considers a clause unfair may declare it null, so long as the contract can subsist without that clause, or the court may cancel the contract if the contract no longer is of the same nature without the clause.

Among the remedies granted by the Act: the merchant may be sanctioned by an administrative or penal fine; a judge may also declare a person unable to manage a company or practice certain company management activities.

In the case of financial services, monitoring organizations, i.e., the *Australian Competition and Consumer Commission (ACCC)* and the *Australian Securities and Investments Commission (ASIC)*, have the power to investigate and oblige a merchant to provide information or documents required for deciding whether a clause or practice is unfair.

The ACCC and ASIC may also publish notices informing the public of the presence, in a business, of potentially unfair practices or clauses, without obtaining a court's prior authorization.

The ACCC and ASIC may also address a court to have a merchant reimburse, repair, modify contract terms, cease an unfair practice, or take other measures affecting a large number of consumers who are not party to the dispute.

The Act contains a list of potentially abusive clauses. The list is given only as an example; the Act establishes no presumption that might constitute or facilitate a proof of unfairness. In every case, consumers bear the burden of demonstrating that a clause creates a significant imbalance in favour of the merchant and does them harm. Following such proof, the merchant must demonstrate that the disputed clause is reasonably necessary to protect his legitimate interests.

The regulatory power provided for by the Act allows the creation of a list of clauses considered unfair; no draft regulation has been announced to that effect.

As for codifying common law rules, the *Trade Practice Act 1974* already provided in section 51A(1) for protection against unconscionability, which may be invoked by any co-contractor, whether consumer or merchant:

A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

¹⁴³ *Ibid.*

Already in 2002, the Deakin Law Review noted the vast scope of this protection, and the recent rapid development of this concept of unconscionability:

The judicial and legislative development of sections 51AA, 51AC, and 52 of the Trade Practices Act mirrors that Act's transformation from an Act primarily regulating anti-competitive conduct and abuse of market power to one which equally regulates commercially unfair, self-interested, and opportunistic conduct whatever its impact on competition and markets.[18] The recent extension of unconscionability to embrace "situational" disadvantage based on a party's legal and financial position as well as "constitutional" (or inherent) disadvantage arising from a person's health or lack of understanding has as much potential to interrupt corporate and commercial dealings as the expansion of indicia of statutory unconscionability and ACCC test cases on its scope. The expanded indicia of unconscionability in section 51AC clearly extend unconscionability even further beyond its orthodox equitable boundaries and its meaning in section 51AA.

Inherent personal difficulties relating to language difficulties, infirmity, and other hardships which characterise the link between unconscionability and notions of special disability or special disadvantage [...] do not exhaust unconscionability's reach in banking and commercial contexts. [...]

Regulating unconscionable, unfair, and other forms of self-interested conduct is a mushrooming area of statutory and judge-made regulation and also an area of growing concern for directors of government and non-government corporations alike. New developments in unconscionability, good faith, and statutory reform of trade practices and financial services regulation make it easier to hold banks and other corporations in the private and public sectors legally accountable. A number of statutory and non-statutory developments combine to limit abuse of corporate and public power and self-interested behaviour by corporations and governments in ways which might not have been imagined a decade ago. Particular interest focuses on procedural fairness, unconscionability, good faith, and other fairness-based arguments as well as rights-based arguments, in situations where the law enhances the legal imperative for one party – often a governmental or business organization wielding significant public or commercial power – to take account of the interests of another party¹⁴⁴.

The authors already concluded from this modern approach and recent decisions that the commercial party, which generally has more bargaining power, was at risk of seeing certain clauses or contracts nullified not only because the co-contractor was disadvantaged by a personal condition (illness, intoxication, deficient education), but even when it was in a disadvantageous position due to its legal or financial situation.

¹⁴⁴ Bryan HARRIGAN, Unconscionability Breaks New Ground -- Avoiding and Litigating Unfair Client Conduct After the ACCC Test Cases and Financial Services Reforms [2002] DeakinLawRw 4; (2002) 7(1) Deakin Law Review 73.

B) The United Kingdom

i) Individual protection against unfair clauses

Until 1994, only liability limitation or exemption clauses were regulated in the United Kingdom. Since 1973, the *Supply of Goods (Implied Terms) Act 1973* (SOGITA) limited such clauses or made them illegal, particularly in consumer contracts and, in eligible cases, the burden of proving the disputed clause to be fair and reasonable in the context of the contract was borne by the merchant.

In 1977, the *Unfair Contract Terms Act 1977* (UCTA) was adopted. This Act incorporated SOGITA's regulation of liability limitation or exemption clauses and extended the law's scope to adhesion contracts between merchants. (We will return below to this Act's scope and field of application.)

On April 5, 1993, the European Economic Community (EEC) adopted *EEC Directive 93/13 on unfair terms in consumer contracts*¹⁴⁵ and, in 1998, *EEC Directive 98/27 on injunctions for the protection of consumers' interests*¹⁴⁶.

Rather than integrate those directives in the UCTA, British legislation has reproduced them, almost word for word, in a separate law, the *Unfair Terms in Consumer Contracts Regulations* (UTCCR), first in 1994¹⁴⁷ and then in 1999¹⁴⁸.

The UTCCR's adoption has had the effect of creating two protection systems against unfair clauses; the two systems overlap on certain points, but are not absolutely coherent between each other. Here is a short summary of the scope and field of application of each of the two laws:

ii) THE UCTA

The *Unfair Contract Terms Act 1977*:

- (1) applies to consumers as well as merchants;
- (2) targets only liability limitation or exemption clauses;
- (3) draws a list of clauses presumed to be unfair;
- (4) suggests certain criteria for performing a reasonableness test;
- (5) puts the burden on the party invoking the disputed clause the burden of proving that it is fair and reasonable;
- (6) applies to the majority of contracts, mutually negotiated or of adhesion;
- (7) excludes certain consumer contracts (e.g.: insurance contracts);
- (8) applies only to a contract examined as part of the proceeding and to the co-contracting parties to the dispute.

¹⁴⁵ *Directive 93/13/EEC of 5 April 1993 (Official Journal L.95 of April 21, 1993).*

¹⁴⁶ *Directive 98/27 on injunctions for the protection of consumers' interests.* Official Journal L.166 of 11/06/1998, pp. 0051 – 0055.

¹⁴⁷ *Unfair contract Terms Act 1977*, SI 1994 No. 3159.

¹⁴⁸ *Unfair Terms in Consumer Contracts Regulations* SI 1999 No. 2083.

iii) THE UTCCR

Unfair Terms in Consumer Contracts Regulations:

- (1) applies only to consumer contracts (whatever their form);
- (2) applies only to ancillary clauses; does not apply to a contract's "essential obligations";
- (3) proposes a list of clauses presumed unfair; contains no list or example of clauses considered unfair;
- (4) proposes a test to verify that clauses are not unfair;
- (5) puts the burden of proof on the person alleging that a clause is unfair;
- (6) applies only to clauses that have not been negotiated;
- (7) allows authorized organizations to take measures for preventing the use of unfair clauses¹⁴⁹.

The complexity of this double system is such that some authors have suggested that the United Kingdom does not meet its commitments toward the European Union by not fulfilling the obligation created by the directives to make the law accessible to consumers.

This situation has been severely criticized by consumer associations, because the double system, which has proven too complex even for lawyers and judges, does not make it possible to publicize and inform consumers adequately of their rights in this field.

iv) Collective protection against unfair clauses

Section 7 of the 1993 Directive states in paragraph 2:

The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms¹⁵⁰.

This section, as integrated in the UTCCR, has been interpreted restrictively, with the consequence of conferring to the *Office of Fair Trading* (OFT, created in 1973 by the UCTA) exclusive power to act on behalf of consumers to have a clause declared abusive.

However, during the integration, in 1999, of the European Directive of 1998¹⁵¹, this power was conferred by the law to several organizations: to public bodies for the most part, but also to a unique consumer association, the Consumers' Association (also known by the name of the organization's publication, "Which?").

¹⁴⁹ The Law Commission, Consultation Paper No. 166; The Scottish Law Commission, Discussion Paper N° 119, *Unfair Terms in Contracts; A Joint Consultation Paper*, London: TSO.

¹⁵⁰ Directive 93/13/EEC of 5 April 1993 (Official Journal L.95 of April 21, 1993) "on unfair terms in consumer contracts".

¹⁵¹ Directive 98/27 on injunctions for the protection of consumers' interests. Official Journal L.166 of 11/06/1998, pp. 0051 – 0055.

A 2002 law, the *Enterprise Act 2002*, conferred additional powers to those organizations. Under that law, they can complain to the OFT according to an accelerated and priority procedure: the “super complaint”¹⁵². They also received the power to investigate a merchant or company regarding prohibited practices. Companies under investigation must cooperate and may be legally compelled to do so. On the other hand, organizations obtaining information that may be considered confidential have a duty of confidentiality and are subject to restrictions preventing them from using, in legal actions, some of the information gathered during those investigations.

v) The OFT’s powers

One of the *Office of Fair Trading’s* mandates is to examine any complaint about the unfair nature of a clause contained in a pre-formulated consumer contract. The OFT may initiate an action for discontinuance against a company with regard to such a clause¹⁵³.

The OFT considers one of its primary roles to educate and persuade companies to meet reasonable transaction standards; it will go to court only as a last resort¹⁵⁴.

Our approach to compliance and enforcement

2.3 Consumers are best served by competitive markets where businesses compete fairly for custom in compliance with the law. We believe that most businesses want to treat their customers fairly and to comply with the consumer protection law that the OFT enforces (see Annexe A). We aim to enable and encourage them to do so, and to take enforcement action only where there is no better route to securing compliance.

In fact, the OFT has gone to court only in two cases, both concerning banking agreements: the *First National Bank*¹⁵⁵ and *Abbey National plc* cases¹⁵⁶. The arguments made by the OFT (the *Director General of Fair Trading* at the time of the *First National Bank* case) were accepted in neither case.

In the *Abbey National plc* case, The British Supreme Court decided that overdraft banking fees were not ancillary to the contract, but belonged to its very essence, so that they could not be the object of a remedy under the UTCCR.

In the *First National Bank* case, the court ruled that the clause in dispute, which aimed to guarantee the lender its interest rates despite any court action by the debtor in default to establish a reimbursement plan, did not constitute an essential clause, even if it affected the bank’s remuneration. But the court also ruled that the clause was not unfair either, because the rules of good faith transaction had been followed given the transparency of the process, and the debtor’s obligation to repay with interest could not be considered disproportionate or prejudicial, whereas the absence of such a clause would be prejudicial to the lender.

This decision at least had the merit of specifying that the provisions regarding unfair clauses covered a transaction’s procedural aspect as well as its substantial unfairness, since good faith was associated with a transparent process¹⁵⁷.

¹⁵² OFT, *Super-Complaints, Guidance for designated consumer bodies* (July 2003) par. 2.4.

¹⁵³ *1999 Regulations*, reg. 10-3.

¹⁵⁴ *Statement of consumer protection enforcement principles*, December 2008, OFT964.

¹⁵⁵ *Director General of Fair Trading v. First National Bank plc* [2001] UKHL 52.

¹⁵⁶ *Office of Fair Trading v. Abbey National plc and Others* [2009] UKSC 6.

¹⁵⁷ See in this regard: Andrew BURROWS, *A Casebook on Contract* (Hart 2007) 298.

vi) The Consumers' Association

The Consumers' Association, for its part, has not availed itself of this power to go to court, for three main reasons:

- 1) For financial reasons: its recognition as a monitoring organization has been accompanied by no financial assistance from the government;
- 2) Since the 2002 Act, the association can have any unfair clause or behaviour examined by the OFT, by using a fast procedure, the "super complaint". The OFT has 90 days to handle the complaint and decide on its receivability and how to handle it;
- 3) The Association is subject to the common law restriction on disclosure of information gathered in the course of its public activities¹⁵⁸.

It should be noted that the legislative recognition given to the Consumers' Association, and the ensuing legal powers, have created tension between the traditional role of the Consumers' Association to provide consumers with information and advice, on one hand, and the fact that it is prohibited from disclosing what it learns in the course of its public function to monitor unfair clauses in consumer contracts, on the other hand¹⁵⁹.

C) The United States

The American legal system also originated from common law; common law defences against contractual unfairness are therefore found there, in all types of contracts.

Although private law is mainly a jurisdiction of the federated States (hereinafter the States) and not of the federal government (hereinafter the federal government), the American Constitution allows the federal government to legislate in regulating economic relations between the States¹⁶⁰.

i) Federal government laws

The federal government recognized, in the early XXth century, that common law was not protecting consumers adequately against certain unfair commercial practices. In an attempt to remedy those shortcomings, it adopted, in 1914, the *Federal Trade Commission Act*¹⁶¹ (FTCA). An unfair practice is defined as follows:

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial lesion to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence

¹⁵⁸ *Enterprise Act 2002* Part 9, esp. s. 238(3).

¹⁵⁹ Contributions of the symposium *The Abusive Clauses Commission in Action: 30th anniversary*, consumer protection against abusive clauses in Great Britain, Mr. Simon Whittaker, professor of European comparative law, St. John's College.

¹⁶⁰ The Interstate Commerce Clause: Constitution, Article I, Section 8, Clause 3: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

¹⁶¹ *Federal Trade Commission Act* of 1914, 15 U.S.C §§ 41-58.

*to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination*¹⁶².

The FTCA created an organization to regulate and promote consumer law, the *Federal Trade Commission* (hereinafter the FTC). This organization has a double mission: preserving competition and protecting consumers¹⁶³. There is no right to consumer private action in the *Federal Trade Commission Act*. However, section 5 explicitly calls illegal unfair or deceptive business practices as well as those that affect commerce, to the same extent as unfair means of competition. Still, the Act is mainly preventive¹⁶⁴.

*This section declaring unlawful [...] unfair or deceptive acts or practices in commerce provides no direct remedy, either explicitly or implicitly, to private persons; protection against unfair trade practices afforded by this section vests initial power solely in the Commission*¹⁶⁵.

The FTC's powers are found in section 5 of the FTCA¹⁶⁶. The FTC can, among other things, investigate and take preventive measures, for example order the parties to end their reprehensible acts (*cease and desist orders*), or initiate actions such as injunctions against unfair or deceptive business practices if it has reason to believe that the law is or has been violated¹⁶⁷. The FTCA also develops rules to determine whether behaviour is unfair, and defines certain terms or concepts, which are published afterward¹⁶⁸. However, it cannot make claims to companies or grant consumers damages, to the extent that it acts in the public interest and not to protect special interests.

On the other hand, the FTC has the power, in cases where its orders are not followed, to require that wronged consumers be indemnified for their losses and to ask the courts to impose fines.

The FTC has the duty to ensure compliance with other consumer protection laws, including: *Fair Debt Collection Practices Act (FDCPA)*¹⁶⁹, *Equal Credit Opportunity Act*¹⁷⁰, *Truth-in-Lending Act*¹⁷¹, *Fair Credit Reporting Act*¹⁷², *Do-Not-Call Implementation Act*¹⁷³, *Children's Online Privacy Protection Act*¹⁷⁴, *Fair and Accurate Credit Transactions Act (2003)*¹⁷⁵, *Controlling the*

¹⁶² 15 USC Sec 45. (n) (n) Standard of proof; public policy considerations.

¹⁶³ Prof. Dr. h.c. Norbert REICH, *Fair Trading with Consumers - Can the American Federal Trade Commission (FTC) be a model for effective consumer protection in a Single European Market?* – Issue paper for the 3rd annual meeting of non-governmental consumer associations, Brussels, November 23 and 24, 2000; http://ec.europa.eu/dgs/health_consumer/events/event32_wrks2-1_fr.html (Page consulted on September 25, 2011).

¹⁶⁴ Victor E. Schwartz et Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, *Kansas Law Review* [Vol. 54], p.1, 12.

¹⁶⁵ *Carlson v. Coca-Cola Co*, 483 F.2d 279 (9th Cir. 1973).

¹⁶⁶ 15 U.S.C. § 45 Unfair methods of competition unlawful; prevention by Commission:

¹⁶⁷ Articles 5 (l,m), 13 (b), 19 (b) FTCA, 15 USC § 45, 53, 57b.

¹⁶⁸ See *FTC POLICY STATEMENT ON UNFAIRNESS* Appended to *International Harvester Co.*, 104 FTC 949, 1070 (1984). See 15 U.S.C. § 45(n). FEDERAL TRADE COMMISSION, WASHINGTON, D. C. 20580, December 17, 1980.

¹⁶⁹ *Fair Debt Collection Practices Act (FDCPA)*, (15 U.S.C § 1692).

¹⁷⁰ *Equal Credit Opportunity Act*, 15 U.S.C. § 1691).

¹⁷¹ *Truth-in-Lending Act*, (15 U.S.C. § 1601).

¹⁷² *Fair Credit Reporting Act*, (15 U.S.C. § 1681).

¹⁷³ *Do-Not-Call Implementation Act*, 15 U.S.C. § 6101-6108.

¹⁷⁴ *Children's Online Privacy Protection Act*, 15 U.S.C. § 6501–6506.

¹⁷⁵ *Fair and Accurate Credit Transactions Act (2003)*, PUBLIC LAW 108–159—DEC. 4, 2003.

*Assault of Non-Solicited Pornography and Marketing Act*¹⁷⁶. Those laws particularly prohibit behaviours considered unfair or deceptive¹⁷⁷.

One of the FTC's main tools for applying and enforcing the fairness standard is its power to regulate¹⁷⁸. The *Cooling-off Rule for Sales made at Homes or at Certain Other Locations*, enacted in 1972¹⁷⁹, constitutes a good example of the importance of this power.

Consumer associations play a somewhat limited role in the FTCA's application. They can make demands before the FTC to incite it to adopt certain measures, but they have no means to compel it. However, groups that want to participate in the FTC's regulatory process have to be heard; they can present documents, testimonials, expert reports, and make cross-examinations. This place set aside for consumer associations in public proceedings contributes to the procedure's transparency and credibility.

The federal government has also established the *National Conference of Commissioners on Uniform State Laws* (hereinafter the *NCCUSL*), also called the *Uniform Law Commission*, responsible for developing model bills that can be integrated in State laws and thus harmonize certain rules of law across the country.

In 1952, the *NCCUSL* published the *Uniform commercial Code*¹⁸⁰ (*UCC*). This code, which contains the main applicable rules of commercial law in the United States, has no intrinsic legal value or enforcement power; still, it establishes the determining principles of American consumer protection.

Another predominant concern of consumer protection policy focuses on policing the terms of the consumer contract. Values used in support of such intervention include fairness issues, market or information regulation, or concerns over the validity of an agreement entered into in situations of unequal bargaining power. Under each view, some sort of legal intervention may be warranted, although in different degrees depending upon the espoused view. As discussed in this section, similar to deceptive advertising, federalizing and decentralizing constraints on lawmakers may affect the ultimate legal response.

In the United States, regulation of terms in the consumer contract largely occurs at the state level. Two very basic doctrines affecting use of terms are the obligation of good faith and fair dealing and the doctrine of unconscionability. The Uniform Commercial Code provides that "Every contract or duty within this Act imposes an obligation of good

¹⁷⁶ *Controlling the Assault of Non-Solicited Pornography and Marketing Act* (15 U.S.C. 7701).

¹⁷⁷ See the *FTC* website for a complete list of laws it must implement: <http://www.ftc.gov/ogc/stat3.shtm> (Page consulted on September 25, 2011).

¹⁷⁸ Art. 18 (a) (1) (B) (15 USC § 57a), whose provisions read as follows:

- The Commission may prescribe... interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce...
- Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

¹⁷⁹ *Cooling-off Rule for Sales made at Homes or at Certain Other Locations*, 6 CFR § 429.

¹⁸⁰ *UCC*: Uniform Commercial Code, © Copyright 2005 by The American Law Institute and the National Conference of Commissioners on Uniform State Laws; reproduced, published and distributed with the permission of the Permanent Editorial Board for the Uniform Commercial Code for the limited purposes of study, teaching, and academic research. <http://www.law.cornell.edu/ucc/> (Page consulted on September 25, 2011).

faith in its performance or enforcement.” Good faith can mean “honesty in fact in the conduct or transaction concerned,” but more importantly, in the case of a merchant, means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”¹⁸¹.

(References omitted)

All 50 American States have adopted a commercial code that is strongly inspired by the *UCC* and applies its principles.

Section 1-103(b) of the *UCC* incorporates common law protections, but section 2 contains the most important regulations for protection against unfair clauses and, more generally, the exceptions to the principle of contract freedom. Thus, this section codifies the doctrine of the obligation of good faith and of acting fairly, as well as the doctrine of unconscionability.

§ 1-103 Construction of code to promote its purposes and policies -- Applicability of supplemental principles of law -- Use of official comments.

(1) The Uniform Commercial Code shall be liberally construed and applied to promote its underlying purposes and policies, which are:

- (a) To simplify, clarify, and modernize the law governing commercial transactions;*
- (b) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and*
- (c) To make uniform the law among the various jurisdictions.*

(2) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause, supplement its provisions.

(3) Official comments to the Uniform Commercial Code, as published from time to time by the National Conference of Commissioners on Uniform State Laws, represent the express legislative intent of the General Assembly and shall be used as a guide for interpretation of this chapter, except that if the text and the official comments conflict, the text shall control¹⁸².

§ 2-302. Unconscionable contract or Term.

(1) If the court as a matter of law finds the contract or any term 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 term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

¹⁸¹ A. Brooke OVERBY, *An Institutional Analysis of Consumer Law, Comparative consumer protection*, Vanderbilt Journal of Transnational Law, Vol. 34, No. 5, November 2001.

<http://law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-35-number-1/download.aspx?id=2000> (Page consulted on September 25, 2011).

¹⁸² UCC § 1-103, 1 U.L.A. 109 (1999).

(2) *If it is claimed or appears to the court that the contract or any term 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*¹⁸³.

We note that the courts can apply the remedies provided for only if the clause was unconscionable at the moment when the contract was entered into.

The UCC also specifies that it applies to all contracts pertaining to goods, without however prevailing over laws specific to consumer sales.

§ 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

ii) State law

The FTC encourages the States to act in a concerted and complementary way in matters of consumer protection, to focus on the law's application, the definition and obtaining of adequate remedies for wronged consumers, and depend on the FTC for developing general policies and substantive law¹⁸⁴. In accordance with this proposed approach, most States have enacted what are called *little FTC-Acts* or *Consumer Protection Acts* (hereinafter CPAs), most of which repeat the protections provided for in section 5 of the *FTCA*.

For the States, these parallel jurisdictions in consumer protection are not considered counter-productive, since the measures established by the two levels of government add to one another. This is why the *FTC* and State attorneys general collaborate in common actions such as complaints, "sweep" operations, and other applications of the law.

In addition, all the States have repeated, in whole or in part, the text of section 2 of the *UCC* regarding consumer protection. Louisiana is the sole exception: this State (which, it should be recalled, is the only American State with a civil law tradition) has preferred to include in its Civil Code, in Title 51: *Trade and commerce*, consumer protection provisions¹⁸⁵. Section 51:1403 declares illegal and null consumer contracts that contravene the provisions found in that chapter.

¹⁸³ *Ibid.*

¹⁸⁴ Victor E. SCHWARTZ and Cary SILVERMAN, *Common-Sense Construction of Consumer Protection Acts*, KANSAS LAW REVIEW [Vol. 54], p.1, 16. The following is a Vermont CPA excerpt illustrating that effort at complementarity: STAT. ANN. tit. 9, § 2451 (2004) (recognizing that the purpose of the Vermont Consumer Fraud Act is to "complement the enforcement of federal statutes and decisions governing unfair methods of competition and unfair and deceptive acts or practices in order to protect the public, and to encourage fair and honest competition").

¹⁸⁵ *Louisiana Revised Statutes 51:1401 - Unfair Trade Practices and Consumer Protection Law.*

§ 51:1403 - *Prohibited contracts*

Any consumer contract, express or implied, made by any person, firm, or corporation in violation of this Chapter is an illegal contract and no recovery thereon shall be had.

Other than actions that may be initiated by the attorney general (through the appropriate Division, the Louisiana Attorney General's Office, Public Protection Division, Consumer Protection Section), the Unfair Trade Practices and Consumer Protection Law provides for consumer remedies as well as original remedies for companies that, if they have signed a voluntary compliance agreement, may initiate actions against competitors to compel them to follow the same rules:

§ 51:1409 - *Private actions*

A. Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. Upon a finding by the court that an action under this Section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.

[...]

D. If any person is enjoined from the use of any method, act, or practice or enters into a voluntary compliance agreement accepted by the attorney general under the provisions of this Chapter, such person shall have a right of action to enjoin competing businesses engaged in like practices¹⁸⁶.

Most States have also chosen to include, in their CPAs, non-exhaustive lists of prohibited clauses or practices¹⁸⁷.

The major difference between the federal system and that of the States is, however, the place that the States have reserved to a consumers' right of action, private or collective. As opposed to federal legislation, which does not allow a consumer or consumer group to go to court¹⁸⁸ under the FTCA (or, of course, the UCC), State legislations not only give the appropriate government organizations a right to go to court, but also promote the use of courts by

¹⁸⁶ Louisiana Revised Statutes 51:1409 - *Unfair Trade Practices and Consumer Protection Law – Private Actions*.

¹⁸⁷ See: Alaska Stat. Ann. § 45.50.471(b); ARK. CODE ANN. §§ 4-88-107(a); COLO. REV. STAT. § 6-1-105(1)(a)–(ww) (2004); D.C. CODE ANN. § 28-3904(a)–(ee); GA. CODE ANN. § 10-1-393.1 (2000); IDAHO CODE ANN. § 48-603 (2003); IOWA CODE ANN. § 714.16(2)(b)–(n) (West 2003); MINN. STAT. ANN. § 325D.44(1) (West 2004); MISS. CODE ANN. § 75-24-5(2); OHIO REV. CODE ANN. § 1345.02(B)

¹⁸⁸ Except for damages in certain cases of false or misleading advertising (Lanham Act, title 15, chapter 22 of the USC).

consumers and consumer groups to help discipline delinquent merchants, professionals or sellers.

As opposed to government consumer protection organizations, a consumer who sues has not to demonstrate that his cause is in the public interest. In many States, he also has not to demonstrate that he has been wronged personally, but only that the merchant has acted unfairly. In fact, the CPAs not only allow the actions, they encourage them in various ways, for example by making it possible to claim counsel fees, by imposing minimum damages, or even by allowing the judge to grant damages of up to double or triple the amount of the real damages (*double* or *treble damages*), by allowing the attribution of expenditures, punitive damages and moral damages¹⁸⁹.

California legislation, by proposing the adoption of class action procedures, wrote that those procedures would encourage consumer associations to participate more actively in applying the legislation and the regulation of commercial practices.

But not all the States provide for class actions. The fact that the rights of actions and the remedies allowed under the various CPAs are not uniform over the entire territory of the United States involves two oft-mentioned issues. To avoid the application of stricter systems, merchants use choice of court clauses in certain consumer and adhesion contracts, thus choosing (and forcing consumers) to submit coming disputes to the jurisdiction of the States where sanctions are least severe.

For their part, lawyers representing consumers or consumer associations will be incited to do “*forum shopping*” in order to undertake their actions in the States that provide for the most advantageous remedies.

5.2 CIVIL LAW COUNTRIES

A) Germany

Germany has been a precursor in consumer law in Europe. As early as 1965, German legislation adopted the *Act against Misleading Advertising* (*Das Gesetz gegen den unlauteren Wettbewerb*, hereinafter called *UWG*).

In 1971, the German federal government filed the “Report on Consumer Policy¹⁹⁰”, which found that the consumer’s “market position” should be improved, and notably proposed the following:

*Mesure envisagée : Le gouvernement fédéral considère comme indispensable une protection efficace des consommateurs contre des conditions contractuelles inadéquates, qui concrétisent la poursuite abusive d'intérêts unilatéraux. Il consacrera donc à l'examen de ces questions une attention particulière...*¹⁹¹

¹⁸⁹ As an example, see above the provisions adopted in Louisiana.

¹⁹⁰ *Bericht der Bundesregierung zur Verbraucherpolitik*, Bundestags-Drucksache VI/2724.

¹⁹¹ Quoted by Alfred RIEG, *République fédérale d'Allemagne*, in: *Revue internationale de droit comparé*. Vol. 34, No. 3. July-September, pp. 905-958.

On December 9, 1976, this report was followed by the *General Conditions of Sale Act (Das Gesetz zur Regeland des Rechts des Allgemeinen Geschäftsbedingungen, hereinafter AGBG)*. This Act, which did not limit its protections to consumer contracts, protected natural as well as legal persons against unfair pre-formulated (standardized) contract clauses. Many provisions specifically target what the legislation calls “ineffective clauses” (*unwirksame Klauseln*), with one part of the Act containing substantive law provisions, and another procedural law¹⁹².

Section 9 of the *AGBG* states that a clause is null if, in violation of the principle of good faith, it is excessively unfavourable to the adherent or the user. (The law uses the word “ineffective”, which describes the effect resulting from recognition of its unfair nature: the clauses are then deprived of effectiveness.) To this general principle is added a “catalogue of clauses”, i.e., forty clauses divided in two lists (sections 11 and 12): a first list containing clauses presumed “ineffective”, with the stipulator having the burden of proof that, under all the surrounding circumstances, the clause should not be considered “ineffective”, at the judge’s discretion; and a second list of clauses considered “ineffective”, which are null in any event. As opposed to the general principle, the catalogue of clauses cannot be applied in all cases – exceptions include certain types of contracts (gas and electricity may be excluded), certain persons (legal persons established in the public interest, for example, in the case of the stipulator, and merchants to whom such a clause is imposed), etc.

As for the formulation of the general principle and the “catalogue”:

[...] la régularité des conditions générales d'affaires doit d'abord être appréciée au regard des §§ 10 et 11. Si les clauses incriminées ne figurent pas dans le « catalogue », il convient alors de procéder à un examen de régularité au regard du § 9. Ce même examen s'impose d'ailleurs au cas où les clauses figurent dans le « catalogue », mais sont considérées comme valables au regard des exigences posées par les §§ 10 et 11¹⁹³.

This system, which combines a general definition and one or more listings of specific clauses, was also adopted afterward by other European countries and has inspired the European directive¹⁹⁴.

The definition itself of clauses called “ineffective” is as follows:

§ 9 (1) Les dispositions des conditions générales d'affaires sont inefficaces lorsque, contrairement aux impératifs de la bonne foi, elles désavantagent le partenaire contractuel du stipulant de manière déraisonnable.

The German legislature’s approach is interesting with regard to the qualification of clauses it prohibits; the Quebec legislature has echoed this approach:

Le législateur allemand a renoncé à qualifier expressément d'abusives les clauses qu'il prohibe. Il ne faut cependant pas s'arrêter à la teneur littérale de la loi, ce qui est condamné correspond tout à fait aux clauses abusives au sens où l'entendent les autres législateurs (pays européens et Communauté européenne). Sur le fondement de la

¹⁹² Alfred RIEG, République fédérale d'Allemagne, les clauses abusives et le consommateur, in: *Revue internationale de droit comparé*. Vol. 34, N° 3. July-September, pp. 905-958.

¹⁹³ *Ibid.*

¹⁹⁴ Benoît MOORE, *Les clauses abusives : Dix ans après*, *Revue du Barreau*, Tome 63, spring 2003.

*bonne foi contractuelle, ce texte prohibe les clauses qui désavantagent le cocontractant de manière déraisonnable, notamment en méconnaissant les principes généraux des lois ou en dénaturant le contrat*¹⁹⁵.

The collective action of consumer associations was introduced in Germany as early as 1965 in the UWG; this regulatory model was transferred to the AGBG in 1976. The law thus recognizes that consumer associations have the right to initiate an action in order to have consumer contract clauses declared “ineffective” through actions for discontinuance or retraction: actions for discontinuance are issued against the general terms’ users, and actions for retraction against those (a business association, for example) who recommend that their members use the general terms¹⁹⁶.

This right to go to court that is granted to consumer associations (and business associations) is formulated in a particular way in Germany. The *a posteriori* judicial review is subordinated to the action of groups listed by the Act. Accordingly, a contractor who disputes a clause he considers unfair must not “go directly to court”, but must first obtain information from an association. The associations initiate actions against users of unfair clauses to have the use those clauses cease.

Judgements obtained by this means will have broadened authority: *“toutes les conditions générales antérieures ou postérieures contenant les clauses sanctionnées peuvent être interdites sur le fondement du jugement de sanction : il n’y a pas interdiction judiciaire d’utiliser les conditions générales sanctionnées, mais le cocontractant reçoit une exception dont il peut invoquer le bénéfice en se prévalant du jugement*¹⁹⁷.”

Incidental regulation of unfair clauses remains possible in the context of an action initiated by a consumer; but a judgement thus obtained cannot have a broadened application.

Given that actions initiated by associations absolutely must be preceded by a warning to the defendant enjoining him to stop using the clause in dispute, *“Dans la pratique, le litige va souvent prendre fin après cet avertissement alors que l'utilisateur aura obtempéré en déclarant cesser d'utiliser les clauses illicites, son engagement étant garanti par une clause pénale venant à application en cas de violation de cet engagement*¹⁹⁸.”

When transposing Community Directive 93/13, the German legislature introduced a new provision broadening the application¹⁹⁹. That new provision allows, for consumer contracts among others, the regulation of all contract terms unless they have been introduced by the consumer²⁰⁰.

¹⁹⁵ Kurt G. WEIL; Fabienne PUIS. Le droit allemand des conditions générales d'affaires revu et corrigé par la directive communautaire relative aux clauses abusives. *Revue internationale de droit comparé*. Vol. 46, No. 1, January-March, pp. 125-140.

http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1994_num_46_1_4814 (Page consulted on September 25, 2011).

¹⁹⁶ Alfred RIEG, République fédérale d'Allemagne, les clauses abusives et le consommateur, in: *Revue internationale de droit comparé*. Vol. 34, No. 3. July-September, pp. 905-958.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ Art. 24a of the AGBG (now art. 310(3) of the BGB.).

²⁰⁰ Adam-Caumeil law firm – Rechtsanwälte, *Les Conditions générales de vente en Allemagne*, <http://www.adam-caumeil-storp.com/anwaltskanzlei/pdf/geschaeftsbedingungen.pdf> (Page consulted on September 25, 2011).

The *AGBG* was abrogated in 2002, during the reform of German contract law, and its provisions were integrated in the Civil Code without substantive change²⁰¹.

The concept of general business terms is defined in section 305, paragraph 1 of the BGB (*Bürgerliches Gesetzbuch*), the German Civil Code: “*Les conditions générales d'affaires sont toutes les clauses contractuelles préformulées pour une multitude de contrats et qu'une partie (l'utilisateur) pose à l'autre partie du contrat lors de la conclusion d'un contrat.*”

The legislation maintained a general clause – today section 307 BGB – and reintroduced two lists of abusive clauses in compliance with European directives and German caselaw – today sections 308 and 309 of the BGB. The lists of sections 308 and 309 BGB and of schedules II and III of the draft directive are not identical.

Since the *AGBG*'s abrogation, a group's action for discontinuance, or class action, has been regulated by the *Loi sur les actions en cessation de 2001*, which groups provisions for various actions for discontinuance in consumer law and economic law, and also transposes Directive 98/27. Many actions for discontinuance have been initiated, but because of cuts to subsidies to consumer organizations, the latter are issuing many critiques claiming that this remedy has become illusory given the organizations' insufficient financial resources²⁰².

B) France

The *loi n° 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services* (called “*loi Scrivener*”)²⁰³ introduced in French law the concept of unfair clauses in contracts entered into by professionals and consumers²⁰⁴.

Section 35 of this law provided that such clauses could be prohibited, restricted or regulated by Council of State decrees when they appear to be imposed on non-professionals or consumers through the other party's abuse of economic power and to confer an advantage to that party:

Art. 35. -

Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, peuvent être interdites, limitées ou réglementées, par des décrets en Conseil d'État pris après avis de la commission instituée par l'article 36, en distinguant éventuellement selon la nature des biens et des services concernés, les clauses

²⁰¹ Martin EBERS, *Comparative Analysis. C. Unfair Contract Terms Directive (93/13)*. In *EC Consumer Law Compendium*. Universitat Bielefeld (2011). http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf (Page consulted on September 25, 2011).

²⁰² Olivier REMIEN, *Consumer Policy in Germany as Compared with the Other Member States of the European Union*, contributions of the symposium “La Commission des clauses abusives en action : 30ème anniversaire”. http://ec.europa.eu/consumers/reports/nat_folder/rappde_en.pdf (Page consulted on September 25, 2011).

²⁰³ *Loi N° 78-23 du 10 janvier 1978, Loi sur la protection et l'information du consommateur de produits et de services.*

²⁰⁴ The Act also pertained to consumer health and safety measures, the repression of fraud and falsification regarding products or services, the qualification of products, and false or misleading advertising.

relatives au caractère déterminé ou déterminable du prix ainsi qu'à son versement, à la consistance de la chose ou à sa livraison, à la charge des risques, à l'étendue des responsabilités et garanties, aux conditions d'exécution, de résiliation, résolution ou reconduction des conventions, lorsque de telles clauses apparaissent imposées aux non-professionnels ou consommateurs par un abus de la puissance économique de l'autre partie et confèrent à cette dernière un avantage excessif.

De telles clauses abusives, stipulées en contradiction avec les dispositions qui précèdent, sont réputées non écrites.

Ces dispositions sont applicables aux contrats quels que soient leur forme ou leur support. Il en est ainsi notamment des bons de commande, factures, bons de garantie, bordereaux ou bons de livraison, billets, tickets contenant des stipulations ou des références à des conditions générales préétablies.

Les décrets ci-dessus peuvent, en vue d'assurer l'information du contractant non professionnel ou consommateur, réglementer la présentation des écrits constatant les contrats visés au premier alinéa.

Unfortunately, in 17 years of existence, only one decree has been issued under this provision²⁰⁵. Many commentators declared this system a failure due to excessive complexity.

The *Cour de cassation*, in the *arrêt Kodak* of May 14, 1991²⁰⁶, estimated that the section was self-sufficient and that if, in contracts entered into between professionals and non-professionals or consumers, there are clauses revealing an imbalance to the detriment of the consumer, the judge could intervene and declare them unwritten despite the absence of a decree.

i) Code de la consommation

The *Loi du 26 juillet 1993*²⁰⁷ and the *Décret du 27 mars 1997*²⁰⁸ codified the legislative part and the regulatory part, respectively, of consumer law. The Code de la consommation constitutes only a simple compilation of existing legislative and regulatory texts, transposed with no modifications in substance or form. The legislature's effort should still be recognized for its attempt to put in a single code a great many measures, given that the dispersion was making the defence of consumer rights highly complex for non-experts²⁰⁹.

²⁰⁵ *Décret du 24 mars 1978 (N° 78-464) relatif notamment au droit à réparation ou de modification unilatérale du contrat.*

²⁰⁶ Cass. 1° civ, May 14, 1991, Bull. civ. 1, No. 153; D. 1991 p. 449.

²⁰⁷ *Loi N° 93-949 du 26 juillet 1993 relative au Code de la consommation.*

²⁰⁸ *Décret N° 97-298 du 27 mars 1997 relatif au Code de la consommation.*

²⁰⁹ Here are a few of the legislative texts that have been codified: *loi de 1972 relative au démarchage et à la vente à domicile; Loi de 1973 d'orientation du commerce et de l'artisanat; lois N° 78-22 et 78-23 de 1978 relatives au crédit à la consommation et aux clauses abusives; loi de 1979 sur le crédit immobilier; loi de 1988 sur la vente à distance; loi du 31 décembre 1989 (dite Loi Neiertz) sur le surendettement, telle que refondue notamment par la loi du 8 février 1995; loi du 18 janvier 1992 sur la publicité comparative; loi de 1998 relative à la lutte contre les exclusions; lois de 2003 instituant le rétablissement personnel et sur l'initiative économique; loi de 2004 pour la confiance dans l'économie numérique; loi de 2005 tendant à renforcer la confiance et la protection du consommateur; ordonnances du 17 février 2005 transposant en droit français la directive du 25 mai 1999 relative à la garantie de conformité dans la vente, ordonnances du 23 mars 2006 relative aux sûretés et réglementant le crédit garanti par une hypothèque rechargeable et le prêt viager hypothécaire; ordonnances 12 avril 2007*

Loi n° 95-96 du 1er février 1995

On April 5, 1993, the EEC adopted *EEC Directive 93/13 on unfair terms in consumer contracts*²¹⁰, of which articles 3 and 4 read as follows:

Article 3

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.

[...]

Article 4

1. [...] the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

*2. 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*²¹¹.

As for the effect of a determination of a clause's unfairness, the Directive provides for the following:

Article 6

1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

France was required to incorporate in its legislation a provision generally prohibiting the use of unfair clauses in contracts entered into between professionals and consumers, 1978 law's

transposant la directive du 21 avril 2004 relative aux marchés d'Instruments financiers (dite "directive MIF").

²¹⁰ Directive 93/13/EEC of 5 April 1993 (Official Journal L 095 of April 21, 1993).

²¹¹ Article 5 states: [...] *En cas de doute sur le sens d'une clause, l'interprétation la plus favorable au consommateur prévaut.*

provisions were reformed by the *Loi n° 95-96 du 1er février 1995*²¹². The French legislature took advantage of the opportunity to integrate in the new law the principles retained by the *Cour de cassation* in the *Kodak decision*. The *Loi n° 95-96* goes further than the EEC Directive in applying whether contract stipulations are negotiated freely or not.

This law does not completely break with the mechanism established by the 1978 law, because the possibility of the executive power's intervention is maintained. Sec. 132-1 states that the Council of State's decrees may determine the types of clauses to be considered unfair.

Art. 1er. - L'article L. 132-1 du code de la consommation est ainsi rédigé:

Art. L. 132-1. - *Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat.*

Des décrets en Conseil d'État, pris après avis de la commission instituée à l'article L. 132-2, peuvent déterminer des types de clauses qui doivent être regardées comme abusives au sens du premier alinéa.

Une annexe au présent code comprend une liste indicative et non exhaustive de clauses qui peuvent être regardées comme abusives si elles satisfont aux conditions posées au premier alinéa. En cas de litige concernant un contrat comportant une telle clause, le demandeur n'est pas dispensé d'apporter la preuve du caractère abusif de cette clause.

[...]

[...] caractère abusif d'une clause s'apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu'à toutes les autres clauses du contrat. Il s'apprécie également au regard de celles contenues dans un autre contrat lorsque la conclusion ou l'exécution de ces deux contrats dépendent juridiquement l'une de l'autre.

Les clauses abusives sont réputées non écrites.

L'appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l'objet principal du contrat ni sur l'adéquation du prix ou de la rémunération au bien vendu ou au service offert.

Le contrat restera applicable dans toutes ses dispositions autres que celles jugées abusives s'il peut subsister sans lesdites clauses.

Les dispositions du présent article sont d'ordre public.

In annex to the *Code de la consommation* appears a list, indicative and non-exhaustive, of such clauses, but with proof of unfairness still borne by consumers.

Thanks to these regulations, consumers no longer had to prove a merchant's abuse of economic power, because the words "*un abus de puissance économique de l'autre partie*" were

²¹² *Loi N° 95-96 du 1er février 1995*, O.J. of February 2.

been replaced with “*déséquilibre significatif entre les droits et obligations des parties au contrat.*”

However, this law had 2 major shortcomings:

- 1) The burden of proving a clause’s unfairness was still borne by consumers;
- 2) Certain unfair clauses returned very often in consumer contracts; the courts had to be informed on a case-by-case basis, each time one of those clauses is detected.

iii) **Loi n° 2008-776 du 4 août 2008**

Those problems led to the *Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie (1)* (also called *Loi L.M.E.*)²¹³.

This amended section L. 132-1 of the *Code de la consommation* reads as follows:

- Creation of a list of clauses presumed unfair (called *liste grise*); in a dispute, the professional has to prove the non-abusive nature of the clause in contention (thus reversing the burden of proof in favour of the consumer);
- Creation of a list of clauses that, given the gravity of their effect on contractual balance, must be considered abusive (called *liste noire*)²¹⁴.

There are henceforth 12 clauses in the *liste noire* and 10 clauses in the *liste grise*.

Other clauses that are not part of these lists may also be revealed to be abusive. The consumer is responsible for proving the unfairness of the clause he is disputing.

Section L. 132-2 of the *Code de la consommation* not having been amended, the *Commission des clauses abusives* is still responsible for making recommendations.

iv) **Action en justice par les associations de consommateurs**

The *Loi n° 88-14 du 5 janvier 1988* with respect to the legal actions of certified consumer associations and to consumer information created the possibility for qualified (“*qualifiées*”) associations to initiate certain actions in their members’ interests²¹⁵.

This codified law was amended several times, particularly in 1998 following the European Council’s adoption of *Directive 98/27 on injunctions for the protection of consumers’ interests*²¹⁶.

²¹³ *Loi N° 2008-776 du 4 août 2008 de modernisation de l'économie (1)*.

²¹⁴ *Loi N° 2008-776 du 4 août 2008 de modernisation de l'économie (1)*, Article 86.

I. – Les deuxième et troisième alinéas de l’article L. 132-1 du code de la consommation sont ainsi rédigés : “Un décret en Conseil d’Etat, pris après avis de la commission instituée à l’article L. 132-2, détermine une liste de clauses présumées abusives; en cas de litige concernant un contrat comportant une telle clause, le professionnel doit apporter la preuve du caractère non abusif de la clause litigieuse.

“Un décret pris dans les mêmes conditions détermine des types de clauses qui, eu égard à la gravité des atteintes qu’elles portent à l’équilibre du contrat, doivent être regardées, de manière irréfragable, comme abusives au sens du premier alinéa.”

²¹⁵ See L.421-1 to 421-6 and following in annex 1.

²¹⁶ *Directive 98/27 on injunctions for the protection of consumers’ interests*. Official Journal L.166 of 11/06/1998 p. 0051 – 0055. *Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* already contained a provision in this vein: section 7.

Sections L.421-1 to L.421-5 allow certified consumer associations to take legal action by exercising the rights recognized in the civil part “*relativement aux faits portant un préjudice direct ou indirect à l'intérêt collectif des consommateurs*” (art. L.421-1). The civil action's intent is essentially repressive and is intended both to convict the professional responsible for the penal infraction (L.421-2) and to obtain damages in reparation for the collective prejudice (L.421-1).

Chapitre Ier - Action exercée dans l'intérêt collectif des consommateurs

Section 1 - Action civile

[...]

Art. L.421-2 - *Les associations de consommateurs mentionnées à l'article L. 421-1 et agissant dans les conditions précisées à cet article peuvent demander à la juridiction civile, statuant sur l'action civile, ou à la juridiction répressive, statuant sur l'action civile, d'ordonner au défendeur ou au prévenu, le cas échéant sous astreinte, toute mesure destinée à faire cesser des agissements illicites ou à supprimer dans le contrat ou le type de contrat proposé aux consommateurs une clause illicite.*

With regard to unfair clauses, a qualified consumer association may also initiate an action for discontinuance (art L. 421-6²¹⁷) to have a judge order the abatement of an illicit or unfair clause in a model adhesion contract proposed to the consumer.

Art. L.421-6 - *Les associations mentionnées à l'article L. 421-1 peuvent demander à la juridiction civile d'ordonner, le cas échéant sous astreinte, la suppression de clauses abusives dans les modèles de conventions habituellement proposés par les professionnels aux consommateurs et « dans ceux destinés aux consommateurs et proposés par des organisations professionnelles à leurs membres »*

This action stands out by being preventive. Consumer associations may act as the main party, i.e., without a consumer having first requested an action; they may act without having to establish that a given contract's unfair clause(s) harmed the collective interest of consumers.

The action for abatement may pertain only to unfair clauses in pre-formulated contracts (adhesion contracts), which consumers cannot negotiate²¹⁸. Moreover, it does not target unfair

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

²¹⁷ See L.421-1 to 421-6 and following in Schedule 1.

²¹⁸ T.G.I., La Roche s/ Yon, September 5, 1991, INC No. 2342.

practices²¹⁹ and the judgement applies only to the contracts of the professional for which the abatement is requested.

The association instituting the action for abatement of unfair clauses may also obtain damages in reparation for the collective prejudice²²⁰.

C) The Netherlands

In the Netherlands, the fundamental premise of contract law is not contract freedom, but “reason and fairness”.

Tout en évoluant depuis un quart de siècle vers une culture d'affaires anglo-saxonne, la Hollande demeure en effet à bien des égards un pays de tradition juridique française. C'est néanmoins dans les années 1990 que le lien avec l'héritage du Code civil français (CC) a été rompu par l'introduction - progressive - d'un nouveau code civil [Nieuw Burgerlijk Wetboek] (NBW) en remplacement du Burgerlijk Wetboek (BW). [...]

[Le NBW a remplacé les notions de bonne foi et d'équité des articles 1134 et 1135 du Code civil] par une notion à la fois traditionnelle, de longue date utilisée par la jurisprudence, et nouvelle, par l'usage généralisé qui en est fait dans le nouveau code. Il s'agit de la notion de 'redelijkheid en billijkheid' - raison et équité – unanimement présentée et utilisée comme une entité indissociable ('hendiadys' – en grec : un par deux)²²¹.

This concept manifests itself explicitly in many parts of the Dutch Civil Code of 1992. For instance, “a contract term that conflicts with the requirements of reason and fairness is not applicable²²²,” “the creditor and debtor are bound to behave toward one another according to the requirements of reason and fairness²²³,” “the requirements of reason and fairness may add to the obligation or restrict it²²⁴.”

Given the concept's peculiarity, sections 3 :11 and 3 :12, in the third book of the NBW (which deals with property right in the work) provide definitions of good faith as well as reason and fairness – definitions that apply to property law and contract law:

3: 11 – La bonne foi d'une personne, exigée pour qu'existe une quelconque suite juridique, ne fait pas seulement défaut, si elle connaissait les faits ou le droit sur lesquels sa bonne foi devait porter, mais si, en l'occurrence, elle devait les connaître. L'impossibilité de procéder à une vérification n'empêche pas celui qui avait de bonnes raisons de douter d'être tenu comme quelqu'un qui aurait dû connaître les faits ou le droit en question.

²¹⁹ T.G.I., Paris, April 16, 1991, INC No. 2300.

²²⁰ C.A., Grenoble, ch. urg., June 13, 1991, JCP 1992, II, 21819.

²²¹ Arnaud INGEN-HOUSZ. *Du CC aux BW et NBW hollandais : À propos de la règle déterminante de 'la raison et l'équité'* Courbevoie (2004).

²²² Art. 6:2 al. 2 Nieuw Burgerlijk Wetboek (NBW).

²²³ Art. 6:2 al. 1 NBW.

²²⁴ Art. 6:248 NBW. According to Arnaud Ingen-Housz, *op. cit.*, the terminology of reason and fairness or of similar expressions recurs in about a hundred NBW articles.

3: 12 – *Pour la détermination des exigences de la raison et de l'équité, il convient de prendre en compte les principes de droit généralement reconnus, les convictions de droit existant aux Pays-Bas ainsi que les intérêts sociétaux et personnels du cas d'espèce.*

The scope of these sections was interpreted as follows:

La notion de bonne foi est utilisée à l'article 3: 11 comme pouvant conditionner la validité d'actes juridiques patrimoniaux lesquels font l'objet du Livre 3. Il s'agit, à cet égard, de la bonne foi dite subjective (car incluant ce qu'une personne aurait dû savoir ou vérifier), particulièrement importante en matière du droit des biens.

En revanche, la notion de la raison et d'équité telle qu'utilisée dans le NBW a, dans la ligne d'une jurisprudence établie depuis longtemps, une valeur dite objective. Les trois curseurs figurant à l'article 3: 12 obligent le juge à se prononcer sur la source de droit non écrit dans laquelle il aura puisé en cas de recours aux critères de la raison et de l'équité²²⁵.

Moreover, Dutch law also accepts concepts of unforeseeability²²⁶ and lesion²²⁷ as reasons for cancelling, revising or amending a contract.

In Dutch law, the concept of an adhesion contract does not exist. Rather, it uses the concept of general terms, defined as ancillary stipulations (which must be formulated clearly and understandably²²⁸).

In practice, all contract stipulations are considered as general terms, except for the precise designation of the good or service to be provided and for the price to be paid²²⁹.

The regulation of general terms obliges the merchant or professional to give or provide all the general terms before or during the closing of an agreement, failing which those clauses are voidable²³⁰. If the information offered by the merchant or professional is incomplete or inaccurate, the contract is voidable.

The provisions governing contracts are public policy²³¹.

i) Unfair clauses

EEC Directive 93/13 on unfair terms in consumer contracts has been integrated in the Dutch Civil Code²³². While regulations, despite the Directive, covers only the standardized terms of pre-formulated contracts, other legal rules regulate unfair clauses. The Netherlands (as well as the Czech Republic, Latvia and Romania) is reproached for starting from “on the proviso that unfair clauses are binding unless the consumer invokes unfairness. This legal consequence

²²⁵ Arnaud INGEN-HOUSZ. *Du CC aux BW et NBW hollandais : À propos de la règle déterminante de 'la raison et l'équité'*. Courbevoie (2004).

²²⁶ Art. 6:258 NBW.

²²⁷ Art. 6:230 NBW.

²²⁸ Art. 6:231 NBW.

²²⁹ Dr. Diana DANKERS-HAGENAARS, *Les contrats du consommateur, Rapport Néerlandais*, Journées colombiennes, SEPTEMBER 24 – 28, 2007.

²³⁰ Art. 6:231 and following, NBW.

²³¹ Art. 7:6, NBW.

²³² Articles 6:238, 6:231 and 6:240, NBW.

contradicts the requirements of the ECJ, which in *Océano*, *Cofidis* and *Mostaza Claro* explicitly emphasised, that unfairness is to be determined on the court's own motion²³³."

Dutch law treats unfair clauses as "abnormally onerous" clauses, i.e., disadvantageous to the co-contractor. That disadvantage may be monetary, but also immaterial.

A party may have "abnormally onerous" clauses voided²³⁴. This regulation is not limited to consumers: transactions between consumers and between individuals are also included.

In assessing the abnormally onerous nature of a term, the judge must determine: 1) whether the term is onerous; and 2) whether it is so onerous as to be abnormally so.

The use of the word "abnormal" indicates that there is a certain "level of normality" beyond which the clause that is at the consumer's disadvantage becomes voidable. This threshold is based on a certain number of criteria, such as:

- the nature of the contract;
- the other terms of the contract;
- the way in which the term was introduced in the contract;
- whether or not it has been negotiated;
- whether or not there is reciprocity of prestations;
- and all other circumstances²³⁵.

The judge also takes into account the quality of the parties, their level of expertise, their education or any other circumstance: a clause that is abnormally onerous for a consumer will not necessarily be so for a professional. The person who wants to have a contract clause declared unfair is responsible for demonstrating that the clause is abnormally onerous²³⁶.

Moreover, ambiguous general terms must be interpreted against the party that has formulated them (*contra proferentem*)²³⁷.

The Dutch Civil Code contains two lists of clauses deemed or presumed abnormally onerous: a black list (irrefragable presumption)²³⁸ and a grey list (simple presumption)²³⁹.

ii) The collective defence of rights

The Netherlands recognizes two types of class actions: general class action law²⁴⁰ and the special proceeding for settlement of mass prejudice.

²³³ Martin EBERS. *European Union*. Martin EBERS, *Comparative Analysis. C. Unfair Contract Terms Directive (93/13)*. *EC Consumer Law Compendium. Comparative Analysis. C. Unfair Contract Terms Directive (2008)*.

²³⁴ Art. 6:233 NBW.

²³⁵ *Ibid.*

²³⁶ Art. 150 of the Code de la Procédure Civile.

²³⁷ Art. 6:238 al 2 NBW.

²³⁸ Art. 6:236 NBW.

²³⁹ Art. 6:237 NBW.

²⁴⁰ Art. 3:305a and following of the Civil Code.

iii) Class action law

A foundation or association may introduce a request for defending the rights of others. Those interests must be included in the statutes of that foundation or association. If a group is constituted spontaneously for the common defence of interests, it must have its statutes registered by a notarial act.

Requests cannot have the object of obtaining damages. Indeed, Dutch class actions do not pertain to the indemnification of a group of wronged members. Rather, Dutch class actions have the object of forcing the execution or demanding the cancellation or modification of a contract. It is also possible to request restitution for payment of a thing not due²⁴¹.

However, it is possible to ask the judge, in a class action, for a declaration or illegitimacy or civil liability that can be used afterward either in individual actions or in a mass prejudice settlement.

Class action law is little used, particularly because of the costs of such procedures and the fact that obtaining compensation is not permitted by the law²⁴².

iv) Collective settlement of mass damages

Dutch law has recently introduced a legal proceeding for collective representation. The *Act instituting collective actions (Act respecting the collective settlement of mass damages (Wet collectieve afwikkeling massaschade))* institutes a proceeding that corresponds, on the whole, to class actions. The purpose of this law, integrated in the Civil Code, is to make possible a transaction between the person(s) who have caused or are causing damages and an organization defending the victims' interests.

The Civil Code draws a long list of requirements for such contracts²⁴³, and the judge is responsible for verifying their compliance and declaring them, as the case may be, of general application²⁴⁴. The remedy sought by this proceeding is to obtain damages.

As opposed to what is required for collective actions, the group's representativeness is required in proceedings for collective settlement of mass damages²⁴⁵.

v) Proceedings before Consumer Dispute Boards

In the Netherlands, extra-judicial proceedings before Consumer Dispute Boards (Geschillencommissies) are very often used (12,000 complaints in 2006 and 5,000 decisions rendered²⁴⁶).

Those boards derive their legitimacy from the Civil Code, which encourages dialogue between consumers and the merchant or professional²⁴⁷. A board of this type is a bipartite forum with a chair, a consumer representative and an economic sector representative²⁴⁸, generally a delegate from one of the sectoral boards, which involve many business sectors, such as:

²⁴¹ Art. 6:271 Cc.

²⁴² Dr. Mirjam FREUDENTHAL, *Le droit du consommateur, Thème 4 : Le consommateur et le procès*, Association Henri Capitant des amis de la culture juridique française, Journées colombiennes (September 24-28, 2007).

²⁴³ Art. 7:907, paragraph 2, Cc.

²⁴⁴ *Ibid.* paragraph 1, Cc.

²⁴⁵ Art. 3:305 Cc.

²⁴⁶ Thom van MIERLO, *Consumer Protection on the Single Market: Self-Regulation for Dating Services*.

²⁴⁷ Articles 6:231-247 Cc.

²⁴⁸ Thom van MIERLO, *Consumer Protection on the Single Market: Self-Regulation for Dating Services*.

banking; mail and telecommunications; energy utilities and public transportation (railroads); construction and building materials; etc. In 2008, there were 28 sectoral boards, all part of the Consumer Complaint Boards Foundation (*Stichting Geschillencommissies voorconsumentenzaken: SGC*)²⁴⁹.

Those boards essentially belong to private law and are funded by the business community and by registry fees, but the government also participates in their funding through subsidies.

The procedure is simple: the consumer must first attempt to settle the dispute with the merchant or professional concerned. If this undertaking fails, the complaint is made before a Dispute Board.

The boards first investigate and send the two parties a questionnaire to clearly understand the dispute. Afterward, an audition may take place. Representation by a lawyer is not necessary. The boards may hear witnesses, but since the latter are normally experts in their fields, the presence of external experts is quite rare. The boards' decisions are enforceable.

Moreover, for the formation of a sectoral board, there must be an association of businesspeople in the field concerned, and the association's members pledge to comply with the board's decision. Thus, in the event that a merchant refuses to comply with a decision, the association must provide the product or service or force the recalcitrant member to comply with the decision rendered.

The boards' decisions are protected by a privative clause, and the legal review, although possible, is limited to a verification of the decision's reasonable nature, according to a very high burden of proof: the court will intervene only if the decision is *manifestly* unreasonable.

The costs to the consumer are minimal, and if he wins his case, the merchant normally must reimburse the registry fees.

The boards often hear cases where the amounts involved would not have justified going to court²⁵⁰.

D) Brazil

After a long series of authoritarian governments, and after "the euphoria of a return to democracy following twenty years of a ferocious dictatorship encouraged by the United States during the Cold War²⁵¹," a new constitution was ratified on October 5, 1988 in view of "laying the foundations of a new society at once liberal and social, or, to use the vocabulary preferred by

²⁴⁹ E. KATSH: *The Data Highway Of Health Or Commerce Or Education Can Be The Source Of As Much Litigation As The Paved Highways Of The Physical World.* Law In A Digital World.

²⁵⁰ The Netherlands - Consumer policy institutions - Consumer policy institutions and Consumer policies. (2011) Available on the website of the European Commission – Consumer Affairs http://ec.europa.eu/consumers/overview/country_profile/NL_web_country_08profile.pdf (Page consulted on September 25, 2011); see also: Sociaal-Economische Raad. *The SER's responsibilities* http://www.ser.nl/sitecore/content/Internet/en/About_the_SER/Responsibilities.aspx (Page consulted on September 25, 2011).

²⁵¹ Michel FROMONT, *L'influence de la Constitution sur le Code civil au Brésil*, La Lettre du CFDC, No. 58, October 2008, p. 6.

Brazilians, liberal and solidary²⁵².” At the heart of this Constitution (hereinafter: the *Citizens’ Charter*), human dignity is recognized as a fundamental principle of the Republic. Social solidarity, equality and personal safety are promoted as fundamental rights and guarantees.

The *Citizens’ Charter* states, in section 5: “The State must promote consumer rights by legal means²⁵³.” Accordingly, in September 1990, Brazil adopted a *Consumer Defence Code*²⁵⁴ (hereinafter: the CDC).

In addition, Brazil has adopted a new *Civil Code*, published in January 2002, which is inspired in many ways by the CDC²⁵⁵ and “applies almost word for word the constitutional principles as written in the Constitution as interpreted by legal experts and politicians²⁵⁶,” even though, in its structure, it essentially follows the 1916 codification.

As for the content of its standards, the most valued innovation of the 2002 Civil Code is found in the change in the legislative technique used for handling private relationships. Inspired by the more recent statutes, the legislators use general clauses, abdicating the regulatory technique that, governed by codification, defines the judicial types and their effects. The interpreter is responsible for drawing from the general clauses the incidental functions reflected in innumerable future situations, some of which have not even been taken into account by legislators, but are still submitted to the intended legislative process because they insert themselves in certain standard situations: formal typification gives rise to general, universal and open clauses²⁵⁷.

Section 1 of the CDC informs us that “This code establishes consumer protection and defence standards, in the public and social interest²⁵⁸.” This concept of *social interest* is found at the heart of consumer contract regulations.

Section 4 lists the legislators’ objectives in developing the CDC. It features the contractors’ duty to act transparently, the duty to act fairly, the desire to meet consumer needs, respect for the

²⁵² *Ibid.*

²⁵³ Art. 5. Everyone is equal before the law; all Brazilians and foreigners residing in Brazil are guaranteed the inalienable right to life, liberty, safety and property, in the following terms:

[...] XXXII – The State shall promote consumer protection, under the terms of the law; see also: Art. 170. V): “The economic order, based on human labour and free enterprise, aims to ensure dignity for all, under the precepts of social justice, according to the following principles: [...] V – consumer protection;”.

²⁵⁴ Consumer Protection Code, Act No. 8.078/90.

²⁵⁵ Fernando HINESTROSA, *Les contrats du consommateur*, Rapport brésilien pour l’Association Henri Capitant, Journées colombiennes 2007, p. 23; in this regard, it is interesting to note the similarities in terms of rescission of contracts when there is an excessive disproportion between the parties’ mutual benefits.

²⁵⁶ Michel FROMONT, *L’influence de la Constitution sur le Code civil au Brésil*, La Lettre du CFDC, No. 58, October 2008, p. 6.

²⁵⁷ Gustavo TEPEDINO and Anderson SCHREIBER. *Culture et droit civil : rapport brésilien*. In Travaux de l’Association Henri Capitant, Tome LVIII – Droit et culture : journées louisianaises (May 19-23, 2008), Brussels: Bruylant 2010, pp. 87-98.

²⁵⁸ Art. 1 *Consumer Protection Code* (Act No. 8.078/90): “The present Code establishes standards for consumer protection and defence, public order and common good, in accordance with art. 5, point XXXII, 170, paragraph V of the Federal Constitution and art. 48 of the transitional provisions.

dignity, health and safety of consumers, protection of their economic interests, improvement of their quality of life, and harmony in consumer relations²⁵⁹.

In Brazil, the principle of contract freedom does not play a central role in consumer contracts, in contrast to classic contract theory. On the contrary, the *CDC* defines contractual standards that are in the public interest. The most important premise in consumer relations is not the will of the parties, but rather the social interest²⁶⁰.

In section 2, the *CDC* defines the consumer as follows: “the consumer is any natural or legal person who acquires or uses a product or service as a final user.” Thus, the *CDC* broadens the concept of consumer to include the entrepreneur or merchant if he is the final user of the good or service.

Brazilian consumer law defines the consumer contract as a contract with a social function. The principle of the contract’s social function of course imposes restrictions on contract freedom, since according to section 421 of the Civil Code, “freedom to contract is exercised according to and within the limits of the contract’s social function.” The moment when the will to contract is manifested is less important than the effects that the contract has on society, given the social and economic condition of the parties. The principle of the contract’s social function has even been established as a standard of public and social interest²⁶¹, which implies that the judge may apply it on his own initiative at any stage of the dispute, without it being necessary for either party to expressly invoke this means. Far from limiting himself to an examination of the contract formation process, the judge also examines the contract from the angle of lesion and unforeseeability.

The unforeseeability rule is accepted in Brazilian law. The Civil Code allows either party to the contract to request the resolution or modification of a contract when the latter’s execution becomes excessively onerous to that party, due to extraordinary or unforeseeable events²⁶². For its part, the *CDC* does not require a demonstration of unforeseeability; the consumer has only to demonstrate that a clause is excessively onerous and that there is a disproportion between the advantages obtained by the co-contractors from their respective prestations²⁶³.

The *Civil Code*²⁶⁴ and the *CDC*²⁶⁵ alike prescribe that contract interpretation is always against the party that has formulated the contract. In addition, the *CDC* establishes imperative rules for the formulation of adhesion contracts.

²⁵⁹ Art. 4, *Consumer Protection Code*: (Act No. 8.078/90): “National consumer relations aim to meet consumer needs, respect for their dignity, health and safety, protection of their economic interests, improvement of their quality of life, as well as the transparency and harmony of consumer relations, so that the following principles have been examined:” (as written in Act No. 9008 of 21.3.1995).

²⁶⁰ Fernando HINESTROSA, *Les contrats du consommateur*, Rapport brésilien pour l’Association Henri Capitant, Journées colombiennes 2007.

²⁶¹ Art. 2035 of the Civil Code.

²⁶² Art. 478. In executory contracts, if a benefit provided by one of the parties become excessively onerous, to the extreme advantage of the other party, due to extraordinary and unforeseeable events, the debtor may demand the contract’s cancellation. The judgement’s effects are retroactive to the date of the benefit.

²⁶³ Art. 6 of the *CDC*: “are fundamental consumer rights: V – amendment of contract terms that establish or grant disproportionate advantages due to subsequent events making them too onerous.

²⁶⁴ Art. 423, *Civil Code*.

²⁶⁵ Art. 47, *CDC*: “Contract clauses shall be interpreted in a manner more favourable to consumers.”

Sections 51 to 53 of the *CDC* regarding unfair clauses provide for considering null by right clause that impose on consumers obligations incompatible with good faith or fairness.

Unfair clauses are those that create an imbalance between the parties; thus the legislators' severity in providing for the sanctions (even prison sentences of up to two years can be imposed in cases of deceptive advertising). The *CDC* protects consumers against unfair clauses in all his contractual relations, and not only in adhesion contracts.

Moreover, the *CDC* contains in paragraphs 1 to 16 of sec. 51 a non-exhaustive list of clauses considered unfair ("black list"). The effect of including an unfair clause in any consumer contract is the nullity of that clause, if the very object of the contract is not thus affected, otherwise the judge has broad latitude to find an "adequate and effective" remedy²⁶⁶.

There is also a pre-contract protection system in consumer affairs. Section 39 of the *CDC* provides that certain clauses may be declared unfair even if they are external to the contract and pre-contractual, i.e., if they are present during the negotiation phase. This section is accompanied by a list of examples of practices to be considered unfair if used during the pre-contractual phase. It should be noted that advertising is considered part of pre-contractual negotiations. The system thus protects against defects of consent, which impair the transparency of the target formation process.

In addition, the *CDC* illustrates by various other provisions the necessity of contractual balance. For instance, section 157 stipulates that in the case of lesion, i.e., if "either party, by necessity or inexperience, binds itself to provide a manifestly disproportionate prestation," the judge may "invite the parties to renegotiate and may also pronounce the rescission of the contract"²⁶⁷.

Sections 478 and 479 state that a modification or rescission of the contract may be requested when, due to extraordinary or unforeseeable events, its execution becomes too onerous.

Section 30 of the *CDC* provides that "any sufficiently accurate information or advertising, disseminated by any means of communication with regard to the products and services offered or presented, obliges the supplier who has had it disseminated or uses it, to integrate it in the contract to be entered into." Thus, the supplier's offer, made directly or through an advertisement, binds that supplier to the terms established in that offer. The *CDC*, in sections 30 to 35, establishes the principle of the contractual commitment of the offer made directly or through an advertisement. If the supplier of products or services refuses to comply with the offer as advertised, the consumer has three options:

- a) requiring the offer's forced execution, according to the offer's terms;
- b) accepting another product or the prestation of an equivalent service;
- c) cancelling the contract, with a right to a refund and a right to damages²⁶⁸.

The legal defences available to consumers and the powers granted to judges are very broad; thus, section 83 of the *CDC* states that: "For the defence of the rights and interests protected by this Code, all actions promoting an adequate and effective trusteeship are admitted."

²⁶⁶ Art. 83, *CDC*.

²⁶⁷ Michel FROMONT, *L'influence de la Constitution sur le Code civil au Brésil*, La Lettre du CFDC, No. 58, October 2008.

²⁶⁸ Art. 35, paragraphs I, II and III.

Section 81 indicates that “the interests and rights of consumers and victims shall be defended in court individually or collectively.”

Given the imbalance and vulnerability inherent in consumer relations, the legislators expressly gave the State a mandate to protect consumers, in light of the importance of protecting persons.

According to the constitutional obligation stipulated in sec. 5 of the *Citizens' Charter*, which guarantees legal assistance²⁶⁹ to all who need it, section 5 of the *CDC* provides for a legal aid system that is free of charge and complete for consumers who need it²⁷⁰.

To be entitled to the services of a lawyer, it is sufficient to declare oneself poor. The other party or the State is then responsible for proving that the person is not entitled to receive legal aid. However, the available information on this system is perplexing, and the latter appears more theoretical than real²⁷¹.

Consumer protection rules apply to users of public services, with a few limitations. Users of public services are generally bound to service providers by adhesion contracts that comply with rules established by Independent Regulatory Bodies in the various sectors (telephone, gas, electricity, etc.). Unfair clauses in the adhesion contracts of public utilities may be sanctioned either by the administration or the Judiciary.

Although the collective protection of rights system is provided for in the *Citizens' Charter*²⁷², it was implemented through two important ordinary acts, the *Public Civil Action Act (Act 7.347 of 24 July 1985)* and the *CDC*.

A consumer association may institute an action for the collective defence of its members if the association has been constituted for over one year, if its statutes authorize it to go to court (or if it obtains a special authorization from its members) and if there is a link between the action that the organization wants to initiate and the interests it defends under its articles of association²⁷³. The Brazilian legal system allows collective actions for the defence of homogeneous individual rights through the undertaking of a group of consumers involved in a common dispute. This type of action may be initiated even by a group that has existed for less than one year.

The collective actions allowed are listed in sec. 82 of the *CDC*. They are divided into 3 categories: (i) protection of diffuse rights²⁷⁴; (ii) of collective rights; (iii) of homogeneous

²⁶⁹ Art. 5) paragraph LXXIV) of the Citizen's Charter of 1988 provides that: “The State shall provide complete and free legal aid to all who prove to have insufficient means.”

²⁷⁰ Art. 5: “To implement the National Consumer Relations Policy, the public shall have the following instruments, among others:

I – Maintenance of complete and free legal aid to consumers who need it.”

²⁷¹ Donaldo ARMELIN, *Le consommateur et le procès*, thèmes No. 4, Rapport brésilien pour l'Association Henri Capitant, Journées colombiennes 2007.

²⁷² Art. 5, LXX of the Citizen's Charter: “A class action to guarantee a right may be commenced by: b) a trade union, an entity representing an economic group, or a legally constituted association in operation for over one year, in order to defend the interests of its members or associates.”

²⁷³ *Ibid.*

²⁷⁴ Luís Roberto BARROSO, *La protection collective des droits au Brésil et quelques aspects de la class action américaine*: “Les droits diffus se confondent, souvent, avec l'intérêt de la société comme un tout. Ses titulaires sont un nombre indéterminé de personnes, liées entre elles par des circonstances factuelles.”

individual rights. The collective defence is facilitated by the possibility for a judge to reverse the burden of proof to the benefit of consumers²⁷⁵.

²⁷⁵ Art. 6, paragraph VII, of the *CDC*.

6 Summary and Analysis of Measures Adopted on the American Continent and Europe against Abusive or Unfair Clauses

In this part we present a summary of the best practices observed in the course of our examination of various national and foreign frameworks for abusive clauses, and we indicate original approaches as well as pitfalls to be avoided. To enrich our summary and explore in greater depth possible approaches for regulating abusive clauses, we have chosen to benefit from the colossal work done by Martin Ebers²⁷⁶, who conducted an exhaustive comparative analysis of measures adopted by European Union member countries in view of the mandatory implementation of the *Directive on unfair terms in consumer contracts (93/13)*. From that detailed study, we have retained certain comments or analyses regarding European Union Member States whose legislation we did not analyse in greater detail in the course of our research.

6.1 REASONS TO INTERVENE AND DEFINITION

Classic contract theory was based on the principle that there was no contract without consent, without an agreement between the co-contractors on each of the elements constituting the contract; this conception of contracts may have been perfectly valid in an era where the contracting parties were of equal strength in terms of knowledge, resources, etc. The co-contractors agreed amicably, through a consensus, in the context of a relationship that was often personalized, and negotiated the advantageous and onerous aspects on either side in order to establish a balance based on trust and good faith.

This situation of balance between the contracting parties is certainly not what is found nowadays: the industrial growth leading to mass production and concentrated economic power has depersonalized business relations, which in addition have multiplied, and it has dramatically changed the balance of power. These paradigm changes have distorted the liberal (*laissez-faire*) model of contract freedom, so that a new contractual morality considers fairness and good faith paramount in contractual relationships.

Recognizing a latent danger, the industrial nations find themselves obliged to legislate in order to avoid consumers' loss of trust and the exploitation of the weaker party, and to ensure that competition truly acts as a safeguard. Everyone agrees that contracts should not become an instrument of exploitation of the weaker party by the stronger one. Legislators therefore amend their laws in the interest of "contract fairness", or "the social role of contracts", or "reason and fairness" established as mandatory principles.

On the basis of those principles, legislators across the world have added, to traditional rules or principles developed by courts of equity and integrated in common law, more-explicit provisions to prevent exploitation or provide a wronged contractor with adequate remedies. To a certain

²⁷⁶ Martin EBERS, *Comparative Analysis. C. Unfair Contract Terms Directive (93/13)*. In *EC Consumer Law Compendium*. Universitat Bielefeld (2011), p. 385.
http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf (Page consulted on September 25, 2011).

extent, we observe a proximity, whatever the legal system (of civil law or common law) in effect, between the various definitions adopted by legislators or developed by courts.

Given that they are built on the foundation of common concerns, it is not so surprising that the definitions of abusive clauses adopted across the world resemble each other on the main points: the definitions refer to the dominant position of one of the parties, and to a significant imbalance, practices contrary to good faith, exorbitant obligations, etc.

We note that, while this approach consists of detecting the patent imbalance and acting to prevent abuse, an evaluation of the consent that may have been given by the co-contractor in a position of weakness is not an explicit part of the equation. Common law, by contrast, has traditionally based remedies on what corresponds quite precisely to the concept of lesion in civil law, i.e., on “unconscionability” – on the premise that the co-contractor could not reasonably consent to such an imbalance, and that the contract can therefore not be valid.

Apart from this difference in approach (and in the consequences of determining a lesion, which are nothing else than the nullity of contract), it should not be surprising that the basis for court intervention remains the same: indeed, the lesion is characterized by a “disproportion between the respective prestations of the parties [...] that is so considerable as to be equivalent to exploitation,” an “excessive, unfair or exorbitant obligation” of the weaker party, bound to an imbalance of power between the parties.

As in remedies against unfair clauses, remedies based on what we will call, for the purpose of simplification, the lesion²⁷⁷, aim to prevent or correct unfairness.

The contract must not become an instrument of exploitation by the stronger party to the detriment of the weaker one. To avoid that, nations have adopted various measures that can be broken down into multiple elements for the purpose of comparative analysis.

Accordingly, we will examine the provisions’ form and content; the scope of provisions; the effects of a determination of unfairness; and the remedies provided for.

Directive 93/13 on unfair terms in consumer contracts, will serve here as a reference, given its importance, given the obligation it imposes on member countries to integrate it in their national legislation, and given that the transposition efforts of several member countries will be mentioned here for comparative purposes.

Our summary pertains only to clauses of general application, not on specific provisions that apply only to certain types of contracts or transactions (those that apply in Canada or Australia, for example, to financial services only).

²⁷⁷ We find indeed a certain identity between the definitions of “lesion” and “unconscionability”: in Quebec, sec. 2332 CCQ, which reprises the common law doctrine of unconscionability, allows the court to cancel or reduce the obligations of a loan agreement if it considers that there has been lesion; sec. 1040 c) CCLC, which refers in French to “opération abusive et exorbitante”, uses the terms “harsh and unconscionable” in its English version.

6.2 QUESTIONS OF FORM

A) Public Order

We note at the outset that provisions to counter unfair clauses are almost always part of the public order. This implies that a contract clause intended to avoid the application of those provisions would be abusive in itself, by being contrary to the public order.

It also means that the unfairness of a clause of which a part would be intended to compel application could be detected by the courts on their own motion. And yet, the Netherlands provide an example contradicting this principle: provisions prohibiting unfair clauses are part of the public order, but the court may focus on the unfairness of a clause only if the argument is made by the party considering itself wronged. This approach is all the stranger because the Netherlands have adopted as a principle that the fundamental premise of contract law is not contract freedom, but “reason and fairness”.

By contrast, Brazil has erected as a standard of public order and social interest not only provisions on unfair clauses, but the principle of the social function of the contract itself; the judge can thus apply that principle on his own motion at any stage of the dispute, without the need for either party to expressly invoke this means.

The particular danger in these cases [in those Member States which do not provide for courts/authorities to monitor terms on their own motion] is that the consumer cannot defend himself against unfair terms because he is either not aware of his rights (and that he has to exercise these rights) or is deterred from asserting them by limitation periods or the costs entailed with bringing a court action.²⁷⁸

If remedies against unfair clauses exist because a party is likely to be more vulnerable, it appears logical for the court to find a clause of transaction unfair without that party having even to present this motive²⁷⁹.

In Cofidis the ECJ extended the competence to review further and stated that the protection of the consumer precludes any national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair²⁸⁰. (Our emphasis)

B) Good Faith

As mentioned above, the abuse or exploitation of the weaker party by a co-contractor in a position of strength appears contrary to the good faith that must prevail in contractual relationships. In Quebec, for example, the then Justice Minister explained, during the

²⁷⁸ Martin EBERS. EC Compendium, *op. cit.*

²⁷⁹ The judge’s power to determine on his own motion a clause’s unfairness was confirmed in Europe in the decisions *Océano* (21 CJCE, 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero*), *Cofidis* (22 CJCE, 21 November 2002, C-473/00 - *Cofidis v. Fredout* [2002] RCE I-10875.) and *Mostaza Claro* 23 CJCE, 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* (not published).

²⁸⁰ Martin EBERS. EC Compendium, *op. cit.*

presentation of the new section 6 of the Civil Code of Québec, which raised good faith from a simple general principle of interpretation to an explicit legal rule: “This section has the effect of preventing the exercise of a right from being diverted from its intrinsic social purpose and the moral standards generally recognized in our society²⁸¹.”

Some countries have included a mention of good faith in the text prohibiting unfair clauses. In their civil code, the Netherlands defined good faith, which, as can be observed, has an objective as well as a subjective aspect. Here is that definition:

*3: 11 – La bonne foi d'une personne, exigée pour qu'existe une quelconque suite juridique, ne fait pas seulement défaut, si elle connaissait les faits ou le droit sur lesquels sa bonne foi devait porter, mais si, en l'occurrence, elle devait les connaître. L'impossibilité de procéder à une vérification n'empêche pas celui qui avait de bonnes raisons de douter d'être tenu comme quelqu'un qui aurait dû connaître les faits ou le droit en question.*²⁸²

The mention of good faith in the very text of the provisions on unfair clauses appears to pose a problem. This is the case in Quebec, where the Civil Code provision considers a clause abusive (unfair) if it “is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith” (sec. 1437 of the CCQ). This is also the case for the European directive (the Directive) that describes an unfair clause as follows: “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 consumer²⁸³.”

Quebec doctrine questions the usefulness of such a mention, which appears to be present only as an indication, but which some are likely to interpret as an additional criterion that will make the burden of proof heavier; some decision-makers have already made this interpretation. The same arguments have been made against the Directive.

Whereas according to the Directive, unfairness only exists if a term causes an imbalance and this imbalance is furthermore contrary to the principle of good faith, seven countries make direct reference to “significant imbalance” without mentioning the additional criterion “good faith”. This tends to lead to a lowering of the burden of proof for consumers.

[...]

The relationship of the principle of good faith to the criterion of “imbalance” remains unclear. Are these criteria to be understood cumulatively, as alternatives, or in the sense that any clause which generates a significant imbalance is always contrary to the principle of good faith²⁸⁴?

We think the latter interpretation should be chosen, since it is more likely to allow, by not uselessly adding to the burden of proof, an efficient institution of actions against unfair clauses. The Groupe de Recherche et d'étude en droit comparé international de la consommation

²⁸¹ Comments of the Justice Minister on sec. 6 CCQ (39).

²⁸² New Civil Code of the Netherlands (Nieuw Burgerlijk Wetboek)

²⁸³ Directive 93/13/EEC of 5 April 1993 (Official Journal L.95 of April 21, 1993).

²⁸⁴ Martin EBERS. EC Compendium, *op. cit.*

(GREDICC), in its report *Jalons pour un Code de la consommation*, proposes to simply remove the reference to good faith from the provision against abusive clauses²⁸⁵. Barring a clarification that any clause creating a significant imbalance systematically contradicts the requirement of good faith, we agree with this position.

C) Lists of Abusive Clauses

Is it preferable to establish lists of abusive clauses that add to a general prohibition? Could one list suffice in a general clause? Or a general prohibition clause without lists (or catalogues) of examples? In that case, should the clauses included in such lists lead to a presumption? If so, should it be a simple or an irrefragable presumption?

Most of the foreign jurisdictions we studied have established such lists (not all the American States have done so). The effect of those lists differs from one jurisdiction to another, though. While several have established two lists, one of clauses presumed abusive (simple presumption, called a grey list) and the other of clauses considered abusive (irrefragable presumption, called a black list) – Germany, France and the Netherlands – Great Britain has only adopted a grey list and Brazil only a black list. Australia has adopted a list of clauses that does not lead to any presumption.

Quebec has taken a peculiar position, which may seem uneasy. We recall that the general application provision that pertains to abusive clauses is found in the Civil Code; this general provision is not accompanied by any list, grey or black. The *Consumer Protection Act* (CPA), for its part, which provides no definition or general prohibition of abusive clauses (section 8 of this Act, as mentioned above, concerns lesion) prohibits including in contracts certain clauses, thereby deprived of any effect because inapplicable in the consumer contracts covered by the Act. (It should be noted that clauses prohibited by the CPA are often the same as those found abroad in lists of abusive clauses.)

To the extent that lists of abusive clauses are likely to facilitate, as examples, the interpretation of the general rule, and also facilitate the proof for the co-contractor in a position of weakness – or even reverse the burden of proof to the co-contractor in a position of strength – the usefulness of such lists appears certain.

Of course, the existence of such lists is insufficient, and a clause of general application remains indispensable for declaring abusive a contract clause that would not appear on such a list.

As for the content of those lists, obviously it should be easily adaptable, to follow the evolution of markets and business practices and be able to respond time after time to the overflowing imagination and inventiveness of merchants.

6.3 SCOPE OF PROVISIONS

What clauses may be declared abusive? What types of contracts may be examined? Should the abusive nature include process as well as substance?

²⁸⁵ Thierry BOURGOIGNIE, Pierre-Claude LAFOND and Lindy ROUILLARD. *La réforme de la Loi sur la protection du consommateur du Québec. Jalons pour un Code de la consommation du Québec*. Montreal, 2011.

Here again, the solutions adopted by legislators often differ, according to a set of variables: civil law or common law; justification of an intervention; concern for maintaining contract stability; etc.

We will examine those questions here point by point.

A) The Type of Contract That May Be Examined

Depending on the jurisdictions, only clauses contained in certain types of contracts or in all types of contracts may be declared abusive.

In Quebec, the relevant provisions find application only to consumer contracts and adhesion contracts. In Brazil, France and Louisiana, all consumer contracts are concerned.

In the Netherlands, all contracts are likely to be examined, whereas in the United States only contracts pertaining to goods may be.

Germany limits remedies to pre-formulated contracts and Australia to adhesion contracts and pre-formulated clauses. England has two systems, one of which applies only to consumer contracts.

The European Directive applies to all types of contracts, but uses the words “goods and services” and “seller and supplier”.

The system of monitoring the fairness of terms in all 25 Member States can be classified into four different models:

[Note: “B” designates companies, “C” consumers, and “P” individuals.]

- *In the Nordic States (DENMARK, FINLAND, SWEDEN) review of content relates to all contracts (B2B, B2C, P2P), also individually negotiated terms are subject to review.*
- *In other States, which traditionally follow the “transaction costs theory”, control of content likewise extends to all contracts (B2B, B2C, P2P), however, according to the standard model only standard terms are subject to review. A review of “terms not individually negotiated” in contrast – in accord with the Directive – is only possible for B2C contracts. This model is followed by GERMANY, PORTUGAL, AUSTRIA and the NETHERLANDS. Also the new Member States HUNGARY, LITHUANIA and SLOVENIA have adopted this model. To a certain extent ESTONIA also counts amongst this group, as according to the Estonian Law of Obligations Act review of all contracts is possible, however with the difference that this primarily (and not only, as in the aforementioned Member States, for B2C contracts) relates to “terms not individually negotiated”.*
- *All Member States, who restrict the monitoring of content to B2C contracts, but thereby also subject individually negotiated terms to review fall into the third group. These are FRANCE, BELGIUM and LUXEMBOURG as well as the CZECH REPUBLIC, LATVIA and MALTA.*
- *Finally a number of Member States follow the concept of Directive 93/13, in which the content review is restricted to B2C contracts and only terms not individually*

*negotiated can be controlled. These are UNITED KINGDOM, IRELAND, SPAIN, GREECE and ITALY (although some of these Member States provide a black list for certain individually negotiated clauses). Amongst the new Member States BULGARIA, CYPRUS, POLAND, ROMANIA and SLOVAKIA have opted for this model.*²⁸⁶

It should be noted that Germany, while opening to everyone a recourse to provisions on abusive clauses, provides that presumptions related to lists of abusive clauses can be invoked only in the case of contracts entered into with consumers.

As we can see, this classification mixes considerations on the type of contract with those on the types of clauses. We will summarize in the following section.

B) The Type of Clause That May Be Declared Abusive

As mentioned above, the “theory of transaction costs” justifies an intervention on pre-formulated terms (or a “*contractual term which has not been individually negotiated*,” to quote the Directive), whereas the “theory of unfairness” justifies an intervention on all the possible terms of a contract, to the extent that a co-contractor’s position of relative weakness makes unfairness possible in every case, including negotiated terms.

As for the object of terms that may be declared unfair, the Directive specifies that “*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 supplies in exchange, on the other*” (art.4). The Directive’s approach is that of several jurisdictions, which only allow the examination of a possible imbalance in the ancillary terms and not in the essential clauses of a contract.

German legislation allows an examination of all contract clauses, so long as they have not been introduced by the consumer. This is also the case for several Member States that have extended the possibility of examining clauses to the contract’s main object and to the price’s appropriateness.

Quebec, with its double system (lesion in the *CPA* and abusive clauses in the Civil Code), is also an exception. All the more so because the provision for cancelling or revising a contract in case of abusive clauses explicitly applies to all clauses (1437 CCQ) and that caselaw has intervened by means of this provision in contracts it has considered “lesionary”.

As we have seen in our study, clear distinctions have already been established between a lesionary contract and abusive clauses. Apart from theoretical bases (and their consequences, in theory, on the effect that the determination will have on the contract: the abusive clause may be judged non-applicable or be modified, and the lesionary contract must be rescinded since it affects consent) and their justifications (the fairness and morality of transactions, free consent), we observe more and more that interventions based on these two concepts tend to merge (legislative as well as caselaw and doctrinal interventions). This merger is justified by the fact that the desire, the necessity of interventions to prevent, for all the reasons we cited, the contract from becoming an instrument of exploitation by the stronger party to the detriment of the weaker one results in all the means available to the courts being used in the end for

²⁸⁶ Martin EBERS. EC Compendium, *op. cit.*

purposes of fairness, to hinder the abusive pursuit of unilateral interests. In addition to common law countries, which can apply the rules of “unconscionability”, the Dutch, German, Brazilian, Swiss and Italian civil codes, among others, have incorporated the concept of lesion among persons of full age, which is largely equivalent to the doctrine of unconscionability.

In that spirit, it appears justified that provisions for remedies against abusive clauses may, in a modern approach to contract law and more specifically to consumer law, set theoretical classifications aside and apply to all contract clauses and not only to ancillary clauses. It also appears justified that the distinction between clauses negotiated or not be avoided. Indeed, the imbalance between the parties will affect the negotiation as well as the “acceptance” of ancillary clauses, since these two types of remedies aim to “sanction the exploitation of one party’s weakness by the other’s abuse of power” and to counter a flagrant imbalance, an excessive and unreasonable disadvantage victimizing one of the contractors.

As we will see below, the distinctions, under the theories of lesion and of unconscionability alike, that pertain both to process and substance, and those that pertain to the effects of the determination, have already been largely set aside to merge the two approaches. We find it completely logical and relevant that this merger occur openly and allow an examination of the entire contract.

We also note the gap opened by the European Directive, which specifies that the exclusion of essential terms will be effective only “in so far as these terms are in plain intelligible language²⁸⁷.”

C) Process and Substance

To what extent should consideration of the process that took place before and during contracting influence an assessment of the unfairness of a clause or contract?

Canadian common law, for example, sanctions injustice in principle only if it involves process and substance²⁸⁸. The contract formation process, which leads to consent, is thus considered to the same extent as the content of the clauses or the contract. The practical impossibility of proving a defect of consent has over time led the courts to be satisfied with proof of a simple risk of process defect – for example, unequal bargaining power between the parties – and to consider substantive injustice as a demonstration of that risk in the case under study.

We note that in Quebec, the application of section 1437 of the Civil Code is limited to adhesion contracts and consumer contracts, whereby the imbalance between contractors is taken for granted. A process defect (or of the risk of such a defect) therefore no longer has to be proven by the party invoking this provision.

The distinction between process and substantive aspects is all the more important because the question will be raised about the moment when the unfairness or imbalance occurred.

In the *Kabakian* decision, the Court of Appeal opined that:

²⁸⁷ We recall that in case of doubt on the meaning of a term, the interpretation most favourable to the consumer prevails.

²⁸⁸ Sébastien Grammond, *La règle sur les clauses abusives sous l’éclairage du droit comparé*, (2010) 51 *Cahiers de droit* 83-116.

[...] en matière de clauses abusives, on doit évaluer principalement celles-ci au moment de la conclusion de l'engagement. Revoir le contrat au moment de son exécution et réduire l'obligation du parrain en tenant compte de sa capacité de payer me paraît alors n'être rien d'autre qu'une révision de la convention par le juge pour imprévision, notion qui n'est pas acceptée dans notre droit comme principe général (art. 1439 CCQ), mais simplement dans certains cas particuliers (art. 771, 1294, 1834 CCQ²⁸⁹).

As mentioned above, the Court openly favours an analysis of the moment of contracting, without however closing the door completely to an examination taking into account elements that occur at the moment of the clause's application. As explained by Judge Beaudoin in that same decision: "Basically, we thus find at the heart of section 1437 CCQ the fundamental idea that, because an adhesion contract is being considered, the latter should not become an instrument of exploitation by the stronger party to the detriment of the weaker one." This consideration should result in all the means at the court's disposal be used to determine whether there is abuse.

In Brazil, section 4 of the Consumer Code lists the legislature's objectives in developing the *Consumer Defence Code*. The section includes the duty to act with transparency between the contractors, the duty to act fairly, and harmony in consumer relationships. Accordingly, the courts examine the contract formation process as well as the contract's content, in terms of lesion as well as unforeseeability.

In some Member States, while assessing the fairness of contractual terms regard is to be paid not only to the circumstances prevailing at the time of conclusion of the contract (as the Directive provides), but also to conditions following conclusion of the contract²⁹⁰.

Indeed, article 4 of the Directive states:

[...] the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

On the other hand, several jurisdictions have stipulated that the circumstances during and even after contracting must be taken into account.

The DANISH system of consumer protection law is comparable to that of the other Nordic countries (FINLAND and SWEDEN, see 7. and 24.). A key feature of those countries is the vast usage of the general clause, laid down in sec. 36 of the Contracts Acts. This clause makes it possible to wholly or partly disregard an (even individually negotiated) agreement, if the term is unfair/unreasonable with respect to the contract's content, the position of the parties and the circumstances prevailing during and after the conclusion of the contract.

[...]

Through the transposition an even higher degree of flexibility was achieved, making it possible not only to disregard an agreement in whole or in part, but also to amend it.

²⁸⁹ P.G. Quebec v. Kabakian-Kechichian, [2000] R.J.Q. 1730, 1739 (C.A.).

²⁹⁰ Martin EBERS. EC Compendium, *op. cit.*

The Australian framework also provides that the process leading to the conclusion of the contract, the terms of the contract and the parties' subsequent behaviours will be taken into account for evaluating the unfairness of a disputed clause or contract. The court can thus assess all the circumstances of a contract, including its intelligibility and readability. England and Germany also allow the possibility of such a broad examination.

The Netherlands also allow that examination, since Dutch law also accepts the concepts of unforeseeability and lesion as reasons for cancelling, revising or modifying a contract. This is also the case in Brazil: far from being limited to an examination of the contract formation process, the judge will also examine the contract in terms of lesion and unforeseeability.

We think that this broader approach to the contract, considered as a whole and in its social dimension, represents the ideal practice in view of allowing the efficient use of a remedy for restoring contractual balance for the sake of fairness.

We recall that:

Le contrat doit être utile. L'utilité s'entend dans le sens d'intérêt général. Le contrat a une utilité sociale. Il s'avère l'instrument par excellence pour effectuer les échanges de biens et de services entre les personnes. Cet instrument est indispensable à la vie en société. Le citoyen ne vit ni en ermite, ni en solitaire. Il a nécessairement besoin de l'activité de ses pairs et de mécanismes juridiques pour assurer sa croissance. Le contrat a donc une utilité sociale certaine, et c'est à ce titre que le législateur le sanctionne et qu'il intervient pour contrôler les abus qu'il peut engendrer²⁹¹.

6.4 EFFECT OF AN ABUSIVE NATURE DETERMINATION

A) Effect on the Clause and Contract

As mentioned above, the lesion-based approach provides that the wronged party could not have consented to the lesionary contract, so that the latter can have no effect, in the absence of an essential condition of its formation.

We have also seen that the monitoring of abusive clauses targets only the imbalance that a contract clause may provoke between the co-contractors – an imbalance that the suppression or modification of such a clause is intended to remove.

However, our examination of the provisions adopted in the various jurisdictions studied has indicated that the determination of a lesion or unfairness, as the case may be, is not always applied in so clear-cut a manner: we have observed lesionary contracts modified and unfair clauses leading to cancellation of a contract.

Whereas the Civil Code Civil of Québec provides that the clause in contention is null (or that the resulting obligation may be reduced), it goes without saying that when the determination of unfairness pertains to the essential clause of a contract, the latter should be cancelled if the

²⁹¹ Brigitte LEFEBVRE, La justice contractuelle : mythe ou réalité ?, Les Cahiers de droit, vol. 37, N° 1, 1996, p. 17-30. Page 21 <http://id.erudit.org/iderudit/043375ar> (Page consulted on September 25, 2011).

obligation cannot be reduced. For its part, the CPA stipulates that a consumer invoking lesion may request the contract's nullity or a reduction of resulting obligations.

Several foreign jurisdictions – Australia and England, for example – explicitly provide that a court deeming a clause abusive may declare it without effect so long as the contract can subsist without that clause, or the court may cancel the contract if the contract's nature is vitiated without that clause.

The European Directive reads similarly.

The Member States of the European Union have adopted varied approaches to possible modifications following a determination of unfairness:

Si la clause est abusive, la directive 93/13 pose uniquement le principe de l'exclusion ou de la modification de la clause, le contrat restant contraignant.

Furthermore, in some member states public bodies can request the incorporation of new terms in order to prevent a significant imbalance between the rights and obligations²⁹².

It seems to us that the deterrent effect against using this type of clause, given the possibility of an unfair clause being cancelled or modified, is greatly diminished by the possibility for the merchant to succeed in having contractual rights and obligations rebalanced once a clause's unfairness has been recognized. It seems very curious that the benefit he hoped to obtain from the excessively onerous clause he attempted to impose on the consumer could, once his attempt was denounced, be maintained and distributed over all the rights and obligations that would remain in effect. We therefore think that the best practice consists here for the court to act only on the clause in contention, by cancelling or modifying it without touching the rest of the contract, so long as the latter can survive a withdrawal of said clause.

[...] la dissuasion s'accroît donc : non seulement les professionnels verront les clauses ambiguës interprétées en faveur du consommateur, mais quand ces clauses seront jugées abusives, elles ne feront pas tomber le contrat. Cette disposition représente donc un risque évident pour le professionnel de devoir assumer des charges dont il avait pensé s'exonérer, ce qui peut lui être particulièrement préjudiciable » L'article 6 constitue donc à la fois une dissuasion et une sanction²⁹³.

As for nullity, the Member States also establish different rules:

Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

The open wording of the Directive does not clarify how the Member States shall establish the form of the non-binding nature. There are several possibilities, e.g.:

²⁹² Martin EBERS. EC Compendium, *op. cit.*

²⁹³ Kurt G. Weil; Fabienne Puis. Le droit allemand des conditions générales d'affaires revu et corrigé par la directive communautaire relative aux clauses abusives. Revue internationale de droit comparé. Vol. 46 N°1. January-March. pp. 125-140. http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1994_num_46_1_4814 (Page consulted on September 25, 2011).

- *The national legislators can declare the ineffectuality or absolute nullity of an unfair term ex officio or provide that the contractual term is regarded as not being written in civil law (fiction of non-existence) and does not give rise to any legal consequences.*
- *In some Member States, however, there also exists the more flexible concept of relative nullity, according to which the unfair term initially remains in force, so long as this suits the contractual partner of the user (i.e. generally the consumer), who alone can unilaterally assert its nullity.*
- *Other Member States follow different concepts of nullity providing that the nullity of a clause can only occur to the advantage of the consumer, whereby the court has jurisdiction to declare the term void on its own motion (so called “protective nullity” – “nullità di protezione”).*

[...]

The concept of absolute nullity is in line with the requirements of the ECJ, whereas the concept of relative nullity as described above does not comply with Océano, Cofidis and Mostaza Claro. Other legal consequences – such as the concept of protective nullity – seem to be in accordance with ECJ case-law, provided that a consumer is protected even if he fails to raise the unfair nature of the term, either because he is unaware of his rights or because he is deterred from enforcing them²⁹⁴.

With regard to the possibility of partially retaining the clause declared unfair, the doctrine states that the Directive does not allow it:

The possibility of a so-called partial retention, i.e. a preservation of the unfair clause with content which is still permissible, is not mentioned in the Directive. One argument against a partial retention is that the clause would thereby, contrary to the prescription in recital 21 and in Art. 6(1) of Directive 93/13, not be rendered “non-binding” but merely “partly binding”. Additionally, such a possibility would reduce the risk of use of unfair terms from the point of view of the business and thereby run contrary to consumer protection²⁹⁵.

The approach that consists of considering that nullity is absolute presents a double advantage: while the curative aspect is beyond doubt, it seems appropriate to insist on the likely preventive aspect – a merchant who knows he will probably have to “live with” the rest of the contract should a clause be considered unfair will likely tend to limit to the extent possible the risk of that outcome.

B) Effect on the Market

Court decisions in the context of collective proceedings are in the vast majority of Member States only binding on the business who is party to the case. Furthermore decisions in collective proceedings are generally restricted to the clause in question in its particular wording. These legal consequences are particularly disadvantageous in those Member States which do not have an administrative procedure to monitor unfair terms.

²⁹⁴ Martin EBERS. EC Compendium, *op. cit.*

²⁹⁵ *Ibid.*

Therefore how these can avoid the negative consequences of res judicata should be considered.

[...]

Court or administrative decisions in the context of collective proceedings are in the vast majority of Member States only binding on the businesses who are party to the case. The decision has no effect on other businesses who use identical terms.

In derogation from these principles though, the relativity of court decisions has been eroded in some Member States: In POLAND, a legally binding decision, which prohibits the use of unfair terms, is published in the economic and court journal and entered into a register. With the registration the judgment acquires, according to Art. 47943 of the civil procedure rules, erga omnes effect – a legal consequence, although this is questionable on principles of constitutional law in Poland. Court decisions, which, in HUNGARY, according to CC Art. 209/B are handed down in relation to the actio popularis, likewise have erga omnes effect; only contracts, which have already been fulfilled before the action was lodged, are excluded. In SLOVENIA, only a sustaining judgment has a general erga omnes effect, such that any person may refer to a final judgment by which certain contracts, individual provisions of those contracts or the general terms and conditions of business incorporated in those contracts were declared null and void. However, a judgment of refusal only affects the parties concerned and does not prevent a new action in respect to the same claim. In SPAIN, the Law on Standard Terms⁹⁶⁷ in contracts did originally prescribe in Art. 20 a rule according to which decisions of the Supreme Court have precedent value; this rule however was repealed and not replaced with the new civil procedure rules (Law 1/2000)²⁹⁶.

The idea of attenuating the principle of the relative effect of legal decisions generalized to all decisions on unfair clauses – although it seems attractive in view of maximum consumer protection against unfair clauses – also appears to contradict well-established principles in Canada sufficiently to make it seem foolhardy rather than bold.

Although an application may seem possible as part of actions instituted in consumers' collective interest (we will examine this idea below), measures may still be considered to meet the same objective without shaking our legal foundations. For instance, clauses declared unfair by the courts could be integrated in a black list imposed on all merchants; ideally, this should also enable organizations in charge of applying the law to institute actions against delinquent companies that would persist in using such prohibited clauses, or to levy administrative sanctions against them.

The original approach taken by the Alberta legislature is noteworthy: a court's determination that a given clause is unfair authorizes consumers thus victimized to cancel by right, with no fees or penalty, upon a simple notice sent to the merchant, the contract that contained the unfair clause.

²⁹⁶ *Ibid.*

6.5 REMEDIES AGAINST ABUSIVE CLAUSES

Our study does not focus on common law remedies whereby consumers may try to obtain compensation in contractual matters. Rather, we have focused on specific remedies established to counter unfair clauses specifically. Those remedies are threefold: the powers conferred to associations, those exercised by bodies in charge of applying consumer protection laws, and boards set up to intervene in cases of unfair clauses. Afterward, we will summarize an initiative pertaining to the publication of unfair clauses.

A) Powers Conferred on Associations

Conferring on associations (mainly consumer associations, the subject of interest here, but at times also on business associations) powers or a special interest that enables them to go to court against unfair clauses tends to become the norm rather than the exception.

France and Germany have long provided for such powers (long before the European Directive. In its Consumer Protection Act, Quebec has included a power of injunction that, according to the bill, should have allowed consumer associations to initiate actions resembling injunctions against unfair clauses; but the legislative amendment as adopted only allows them to initiate actions against clauses that the CPA already prohibits explicitly and that merchants may nevertheless insert in their contracts so long as they denounce the inapplicability of said clauses. We see this as a missed opportunity. For its part, Alberta provides for a true power of injunction granted to consumer protection organizations against unfair clauses, which enables those organizations to have a contractual term declared unfair and have its usage cease.

France provides for several actions that can be initiated by consumer associations in their members' interest or in the collective interest of consumers. Consumer associations can go to court by exercising the rights recognized in the civil part "with regard to facts involving direct or indirect prejudice to the collective interest of consumers," i.e., this is a repressive action enabling consumer associations to demand damages in compensation for the collective prejudice. They can also initiate preventive actions, i.e., injunctions, to require the physical withdrawal from contracts of the clause deemed unfair, along with a prohibition against using such a clause. However, this action is limited to pre-formulated clauses in consumer contracts. Damages may also be granted through such actions.

The Netherlands provide for a general right to launch class actions that allows associations to compel the execution or request the cancellation or modification of a contract. The association may also request restitution for payment of a thing not due, but may not request damages. That country also has a special proceeding for settlement of mass prejudice: associations may initiate a class action giving them the right to conclude a transaction on behalf of the consumers concerned. A judge presiding over such an action may grant damages and also declare his judgement to be of general application.

The Brazilian legal system allows collective actions (in effect, class actions) in defence of homogeneous individual rights through the initiative of a group of consumers united by a common issue: (i) protection of diffuse rights; (ii) of collective rights; (iii) of homogeneous individual rights. Collective defence is facilitated by the possibility for a judge to reverse the burden of proof in favour of consumers.

Since 1965, Germany has provided for actions for discontinuance (injunctions) or retraction that may be instituted by associations. If initiated by consumer associations, actions against unfair clauses may have the effect of a broadened application.

[...] toutes les conditions générales antérieures ou postérieures contenant les clauses sanctionnées peuvent être interdites sur le fondement du jugement de sanction : il n'y a pas interdiction judiciaire d'utiliser les conditions générales sanctionnées, mais le cocontractant reçoit une exception dont il peut invoquer le bénéfice en se prévalant du jugement²⁹⁷.

Actions instituted by German associations must be preceded by a notice to the defendant, who may settle through a transaction by signing a commitment binding him to the same extent as a judgement and accompanied by a penal clause.

In the United States, some States grant consumers a right to act against unfair practices apart from any direct damage, without the requirement to demonstrate a "public interest". However, the fact that the remedies are not harmonized between the various States causes a few problems.

The European Directive has compelled Member States to provide for mechanisms for consumer associations to intervene against unfair clauses.

According to Art. 7(1) of Directive 93/13, Member States shall ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. The Directive largely leaves the choice of means to the Member States which must be put in place. Community law aims to accommodate appropriately the existing systems which had already developed in the Member States even before Directive 93/13 came into force. Art. 7(2) of Directive 93/13 thus only provides in general terms, that "the means (...) shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms." This rule is supplemented by Directive 98/27 on injunctions for the protection of consumer interests (see esp. Annex 7 to the Directive).

All Member States provide for collective court procedures, by which the use or recommendation of unfair terms in legal agreements shall be prohibited. In a number of Member States, the emphasis is on administrative proceedings (see 2.), in almost all Member States it is furthermore possible to pursue collective court actions against unfair clauses (3.). Some Member States, e.g. FRANCE and SLOVAKIA, make additional provisions for criminal proceedings to prohibit unfair terms.

²⁹⁷ Kurt G. Weil; Fabienne Puis. Le droit allemand des conditions générales d'affaires revu et corrigé par la directive communautaire relative aux clauses abusives. *Revue internationale de droit comparé*. Vol. 46 N°1. January-March. pp. 125-140. http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1994_num_46_1_4814 (Page consulted on September 25, 2011).

It appears however, that such kinds of proceedings play a subordinate role in practice, so a more detailed examination is not required here²⁹⁸.

This type of action, though it appears promising, only plays a subsidiary role, probably because consumer associations thus incur fees they cannot pay, since this power is not accompanied, in any of the jurisdictions for which we have this information, by any type of funding. Comments have been made about this direct cause of inaction, in Quebec as well as Germany, England, France and the Netherlands.

Decisions in collective proceedings are generally confined to the cases that have arisen before them. But if the legal effect of a court judgment is restricted to the clause in question in its particular wording, then the judgment does not prohibit the user of the clause from replacing the term in question with other terms that are just as unfair but that are not covered by the judgment.

Some Member States have introduced safeguards for this very eventuality in the interests of consumer protection: In the UNITED KINGDOM, according to UTCCR Art. 12(4) an “injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term which has a similar effect, used or recommended for use by any person.” Similarly, in CYPRUS, injunctions can be filed against more than one seller or supplier of the same or different business domain who uses or recommends for general use, the same or similar contract terms. Accordingly, in these countries, provision is made to prevent businesses from circumventing the judgment by replacing the offending term by terms that have a similar effect.

It must finally be borne in mind that the associated disadvantages to the consumer of the principle of relativity of res judicata can be de facto avoided if public bodies, on the basis of a relevant judgment, proceed against other businesses and thus extend the effect of the judgment far beyond the particular proceedings²⁹⁹.

B) The Powers of Organizations Assigned to Apply Laws and Sanctions

In Quebec, the Office de la protection du consommateur has the same proceeding for injunctive relief, with regard to prohibited clauses, as the one we discussed above. It also has the power to file claims for injunction and undertake penal actions against merchants using prohibited practices; given that the use of unfair clauses does not constitute a prohibited practice, these powers are of no assistance to consumers with regard to unfair clauses.

In Australia, a merchant may be subject to administrative or penal sanctions.

In Brazil, unfair clauses are those that create an imbalance between the parties – thus the legislature’s rigour in the severity of sanctions provided for (prison sentences of up to two years are even provided for in cases of deceptive advertising).

The laws of Alberta and Saskatchewan grant broad powers to bodies in charge of applying the law: those bodies may, in the public interest, institute against merchants the actions available to consumers, or pursue an action instituted by a consumer in order to complete it.

²⁹⁸ Martin EBERS. EC Compendium, *op.cit.*

²⁹⁹ *Ibid.*

In MALTA, where a person does not abide with a compliance order issued by the Director of Consumer Affairs, then such non-compliance is considered a criminal offence and punishable as such. However, it has been suggested that these consequences should be re-evaluated and substituted by a more effective regime of administrative fines since the initiation of criminal proceedings is invariably time-consuming and the burden of proof in such instances is that required in criminal cases – namely of proving beyond reasonable doubt³⁰⁰.

This proposal should be seriously considered; its application would certainly be facilitated by the adoption of a list clearly establishing which clauses are prohibited and fined.

C) Commissions

Consumer boards or councils are common in the European Union. Those bodies, usually equivalent, are generally comprised of consumer representatives, industry representatives and representatives of the Department or monitoring body concerned, and experts may be added.

The boards generally have monitoring and recommendation roles.

In France, for example, the *Commission des clauses abusives* verifies, among other things, the normative content of contracts, proposes legislative adaptations, suggests model contracts to merchants, and studies, denounces and disputes contracts used in certain consumer sectors.

All Member States have a Consumer Council, except for:

- *Germany, whose consumer committees do not correspond exactly to the concept of a consumer council,*
- *Ireland, where it is being set up,*
- *Italy,*
- *Sweden, where there are plans to set up a council on consumer issues within the government³⁰¹.*

In Germany, five bodies share this mission:

- I. Consumer Consultative Committee at the Federal Ministry of the Economy,
- II. Consumer Council at the German Standards Institute,
- III. Consumer Committee at the Federal Ministry for Food, Agriculture and Forestry,
- IV. Technical Equipment Committee,
- V. German Food Code Commission.

its mission [of the Consumer Consultative Committee] is to represent consumer opinion, to deliver opinions and to table suggestions to the Federal Government on basic consumer policy issues. It was created by decree of the Federal Minister for the Economy but is not to any administrative structure. Its members are personally appointed by the Minister and selected for their knowledge of the present situation in consumer protection (representatives of consumers associations, trade unions journalists etc.)³⁰².

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

In the Netherlands, a Disputed Claims Board has been established, with the mission of settling consumer disputes.

According to Benoît Moore, Quebec should:

[...] penser à mettre sur pied, à l'instar de la France, une commission qui verrait à étudier la présentation du contrat et son contenu normatif ; proposer ponctuellement des réformes afin d'adapter la législation aux pratiques nouvelles ; soumettre aux commerçants des types de contrats ; étudier, dénoncer et contester les contrats utilisés., une commission qui aurait comme mandat de « proposer la réglementation ou l'interdiction de certaines clauses, à mesure qu'elles apparaissent, de proposer l'utilisation de contrats ou de clauses types, ou encore de voir au respect de la législation en dénonçant les contrats qui ne s'y conforment pas », devrait être mise sur pied au Québec³⁰³.

D) Publication

Certain Member States (particularly Poland, Portugal and Spain) have a Registry of Standard Terms, whose purpose is to improve consumer protection by publishing contractual clauses and court decisions in the field of unfair clauses. This registry has certain effects on notaries, public officials and judges.

In the case of financial services, monitoring bodies, such as the *Australian Competition and Consumer Commission (ACCC)* and the *Australian Securities and Investments Commission (ASIC)*, have the power to publish notices informing the public of the presence, in a business, of potentially unfair practices or clauses, without obtaining prior court authorization.

³⁰³ Benoît MOORE, *La réforme du droit de la consommation et l'équité contractuelle*, in François MANIET (dir.), *Pour une réforme du droit de la consommation au Québec*, Cowansville, Yvon Blais, 2005, pp. 113-130.

Conclusion

Le contrat doit être utile. L'utilité s'entend dans le sens d'intérêt général. Le contrat a une utilité sociale. Il s'avère l'instrument par excellence pour effectuer les échanges de biens et de services entre les personnes. Cet instrument est indispensable à la vie en société. Le citoyen ne vit ni en ermite, ni en solitaire. Il a nécessairement besoin de l'activité de ses pairs et de mécanismes juridiques pour assurer sa croissance. Le contrat a donc une utilité sociale certaine, et c'est à ce titre que le législateur le sanctionne et qu'il intervient pour contrôler les abus qu'il peut engendrer³⁰⁴.

This concern regarding the possible unfairness of contracts, particularly consumer contracts, has become almost universal in recent years.

The Member States of the European Union are working to set up and implement protections against unfair clauses and consumer exploitation to satisfy economic interests.

The Canadian provinces' legislators, which have exclusive jurisdiction within the federation to intervene in these matters, are working to modernize their consumer protection laws. The issue of unfair clauses has hitherto been addressed piecemeal, though; for example, the Quebec legislature regulates, depending certain areas (remote services, including telephony, gift cards, etc.) depending on which has the most urgent problems, or prohibits certain types of clauses, without clearly addressing an issue – unfair clauses – that is expressly addressed by the Civil Code, but that the Consumer Protection Act appears to avoid.

It seems to us that the European example is showing us the way forward in two ways.

Our research has led us to point out the best practices in terms of interventions against unfair clauses. The different avenues summarized above, taken notably by the legislators of the European Union's Member States, indicate means of intervention which might well serve as models for Canada. The existence of the European Directive itself indicates an alternative path we think essential for us to follow as well: that of harmonization.

Apart from the fact that all Canadians deserve maximum – and equal – protection against unfair clauses, it is now recognized that there are evident trade barriers as a result of unfair clauses: the Consumer Law Compendium, in discussing obstacles to cross-border trade, demonstrates that differences in handling unfair clauses constitute an evident trade barrier:

Accordingly, traders cannot use a contractual clause which is valid across the EU, but must instead formulate different clauses for each member state. Hence, considerable obstacles to the functioning of the internal market exist. Providers can only perform pre-formulated contracts across borders with considerable transaction costs³⁰⁵.

Quebec, aware of the burden that would be imposed on merchants by the obligation to prepare distinct contracts for the province's consumers, provides in the *Consumer Protection Act* a simple obligation to indicate clearly which clauses are not applicable in Quebec according to the

³⁰⁴ Brigitte LEFEBVRE, La justice contractuelle : mythe ou réalité ?, Les Cahiers de droit, vol. 37, N° 1, 1996, pp. 17-30, p. 21.

³⁰⁵ Martin EBERS. EC Compendium, *op. cit.*

Act. This compromise results in a strange situation: the legislators who take the time to prohibit a clause (since this is the chosen approach) indicate simultaneously to the users of that clause the means to include it in the contract legally.

The advantage of all Canadian provinces adopting uniform rules of prohibition and, ideally, similar if not identical lists of prohibited clauses, appears evident, both for the Canadian consumer wherever he may be, and for industry, which would then simply be obliged to adapt to a set of much clearer rules.

The fact that the Canadian provinces share, in matters of civil law, two distinct systems – civil law and common law – poses no problem in practice: the application of the European Directive within Member States, which feature this same duality, has posed no major problem. The American example can also be invoked, since the American States also present this duality, though to a much lesser extent.

A generalized application of common rules appears today all the easier because the border between different approaches to contract unfairness or exploitation appears more and more theoretical, given that the theories of unfair clauses, lesion, unconscionability, and other principles of common law and civil law are more and more invoked across the board in applying the rules adopted according to these two approaches.

The American States and the Member States of the European Union have benefited from the intervention of a transnational entity establishing common rules enabling them to harmonize their respective laws. Those responsible for applying consumer protection laws work in concert to harmonize those laws in Canada through the Consumer Measures Committee.

Our work has been an opportunity to question the protection provided in Canada against unfair clauses. Our questioning has been guided by the objective of developing recommendations whose application we think would be likely to substantially improve our consumer law. We respectfully address these recommendations to provincial legislators and to the Consumer Measures Committee.

An issue that is not specific to the control of unfair clauses but that pertains to one of the issues raised as part of our study will also be the object of a recommendation. It is the issue of class actions known as sectoral; before the Court of Appeal, in the Agropur case, ended this practice, certain class actions were initiated by consumer associations that named as defendants several companies guilty of the same practices. A wise choice would be to adopt necessary legislation to allow such actions. It is partly a matter of economics in the legal system: one purpose of class actions is to avoid a useless multiplication of actions, so such legislation would seem perfectly coherent to us.

This recognition of the validity of sectoral actions would also make it possible to bypass the problem of the relative effect of judgements, with regard to unfair clauses and other prohibited practices. While the Alberta initiative, which allows consumers to cancel their contracts individually following a judgement obtained by a third party, seems very appropriate to us, it remains that such a remedy is individualized. The issue under study involves the collective interest of consumers, and even of society (many legislative interventions in this regard are largely based on this justification), so we think it would be wise to adapt an existing procedure to optimize its efficiency and thus further improve consumer protection and fairness, by allowing many more victims of unlawful practices to be indemnified simultaneously.

Recommendations

1. **Union des consommateurs recommends that provincial legislators** see to it that their consumer protection legislation contain explicit measures to regulate unfair clauses in consumer contracts.

- a) Provisions against unfair clauses should be of the public order and no one should be allowed to contravene them
- b) The unfairness of a clause or contract should be subject to being raised by the court on its own motion, even if the action is prescribed
- c) Provisions against unfair clauses should be of general application and exclude no type of consumer contract unless equivalent provisions grant consumers the same protection against such contracts
- d) The definition of what is unfair should, if it contains a reference to good faith, clearly indicate that any clause creating a significant imbalance systematically contradicts the requirement of good faith
- e) Regulations provided for by law should merge the concepts of lesion and the measures related to the unfair clauses themselves: the law should allow sanctioning the overall imbalance, the lack of equivalency in prestations, as well as the imbalance revealed by a particular clause of the contract
- f) All consumer contracts and all types of clauses therein, including essential clauses and those that were negotiated by the consumer, should be subject to an examination of their possible unfairness

Determination criteria

- g) To determine the unfairness of a clause or contract, the court should be allowed to examine both the process that led to the conclusion of the contract and the content of the clauses themselves; the findings on either aspect should be able to lead the court to recognize the unfairness of a clause or contract
- h) The court should take into account, in determining the unfairness of a clause or contract, all the clauses of the contract as well as those of an accessory contract on which this contract would depend
- i) The subjective aspect of the imbalance created by the contract or clause in contention should be taken into account by the court to the same extent as the objective imbalance
- j) The imbalance which the court should take into account in its determination should be allowed to be that created by the contract or clause at the moment of the conclusion of the contract, to the same extent as any imbalance that occurs as the contract is being executed

- k) As part of its determination, the court should be allowed to take into account the parties' behaviour at the moment of the conclusion of the contract as well as their subsequent behaviour
- l) The unfairness of a clause or contract should be allowed to be recognized even if the imbalance recognized by the court at the moment of the determination was not predictable for the parties at the moment of the conclusion of the contract

Effects of a recognized unfair clause:

- m) A clause recognized as unfair should be subject to being cancelled or modified by the court; to the extent that the contract can be maintained, it should continue to exist without the clause declared unfair and cancelled by the court
- n) The court's qualification of a contractual clause's unfairness should have the effect of making that clause null and inapplicable to the consumer
- o) The court's declaration that a clause is unfair should allow consumers bound by an identical contract concluded with the merchant(s) concerned by the judgement to cancel by right, without fees or penalty, said contract by a simple notice to the merchant

Lists of unfair clauses

- p) Other than a general provision prohibiting the use of an unfair clause, the law should provide a list of clauses considered unfair
- q) The unfairness of clauses appearing on the list should be the object of an irrefragable presumption
- r) A clause recognized as unfair by the court should be withdrawn from the contracts of the merchant concerned by the determination
- s) The legislator should see to it that clauses recognized as unfair by a court be included as soon as possible in the list of prohibited clauses
- t) The law should provide a mechanism for updating the list of unfair clauses in a continuous and timely manner
- u) The law should provide administrative sanctions that could be levied on merchants who use a clause included in the list of prohibited clauses that is established by law or who use any similar clause

Consumer associations' right to act

- v) The law should grant consumer associations a right to act that would allow them, in the collective interest of consumers, to address the courts in order to have contractual clauses determined as unfair

Effects on contracts, damage to the collective interest of consumers, and irrefragable presumption

- w) The court addressed by a consumer association should be allowed to order, in addition to the non-applicability of clauses declared abusive, the withdrawal of the clause in contention of the contracts of merchants concerned by the remedy, as well as the prohibition against replacing the clause declared unfair by any similar clause, under threat of contempt
- x) A court that, at the request of a consumer association, concludes that a contractual clause is unfair should be allowed to order payment of damages caused to the collective interest of consumers
- y) As part of an action instituted to compensate for damages suffered by consumers to whom a clause had been imposed that has been declared unfair in the context of an action instituted by a consumer association, such a judgement should be able to establish an irrefragable presumption of the commission of a prohibited practice

2. **Union des consommateurs recommends that** provincial legislators examine the possibility and appropriateness of setting up Unfair Clause Commissions whose mission would involve verifying the normative content of contracts as well as studying and denouncing contracts used in certain consumer sectors, and that could propose legislative adaptations, propose model contracts to merchants, etc.

- a) Such a Commission should be under the authority of the Department of the body charged with monitoring the application of the Consumer Protection Act; consumer association representatives should be invited to participate in the Commission, and a sufficient resources for adequate participation should be allocated to those associations.

3. **Union des consommateurs recommends to provincial governments** to acquire a Registry of Prohibited Clauses, with the purpose of improving consumer protection by publishing judicial decisions against unfair clauses, as well as, if applicable, lists of clauses development according to law; in addition, the presence, in a business, of potentially unfair practices of clauses, should be made public, without obtaining prior authorization from a court.

4. **Union des consommateurs recommends to the Consumer Measures Committee** to see to the implementation of the recommendations herein in order to ensure the harmonization of future legislation in provincial jurisdictions

5. **Union des consommateurs recommends** that provincial governments see to it that mechanisms be put in place to assure consumer associations of sufficient resources for them to institute and adequately pursue actions entrusted to them with regard to unfair clauses and to conduct necessary research as part or in view of such actions

6. **Union des consommateurs recommends that** provincial legislators recognize by legislation that consumer associations have the right to institute actions in consumers' collective interest; this recognition should be designed so as to justify also the institution of sectoral class actions

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