Draft Paper

Application of Abuse of Dominance in New Competition Regimes: Unconscionability as a Stabilising Tool at Time of Indecision

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Summary

This paper seeks to propose that new competition regimes particularly those of developing and under-developed economies should take advantage of more amenable and more familiar legal tools such as the doctrine of unconscionability in their abuse of dominance assessments. This is because the pure economic model might be unsuitable for them at least in the early years. This paper will therefore explore how the doctrine can be infused into their competition laws serving either as a major basis for assessment or as a stop-gap while they gain concrete knowledge of the true economic and developmental implication of applying complex economic models in their assessment of abuse of dominance.

Introduction

Determining when a firm's behaviour is an abuse of market power is one of the most complex and controversial areas in competition policy. Nevertheless, it appears that some of the foundational concepts have now been settled in principle. For instance, it is somewhat universally understood that concepts such as "market power" can be said to exist when competitive constraints imposed by other firms are relatively ineffective on the dominant firm. However, despite the relative convergence on matters of principle, the concepts and methods applicable in real cases remain unsettled. In essence therefore, the real content, meaning and mode of application of these arcane concepts continue to elude everyone, even the most advanced competition regimes. For example, what amounts to substantial market power in real cases remains debatable. Also, ascertaining what amounts to abusive conduct remains a problematic task. This is a problem faced by the most sophisticated regimes, let alone new and less financially buoyant regimes.

The urge to develop the best possible competition framework has led competition authorities and courts to develop different methods and approaches. In recent time, it is the economic

approach that is considered to be best suited for providing the much needed principled approach to abuse of dominance/monopolisation.

The present fascination for economic reasoning in competition cases in general is not unconnected to the way competition law and policy has developed in the major competition jurisdictions, particularly the US and EU. As a result of the level of influence these regimes exert, many other competition authorities expectedly are positively disposed to the economic reasoning. The problem however is that even the superior competition authorities which they look up to have been far from convincing regarding the veracity of their proposed methods. One of the major problems of the so-called "economic model" is that it at times suffers from extreme velocity. Two aspects of competition inquiry is worthy of emphasis here – standards governing the conducts that give rise to competition infringement and the causation needed to establish liability for breach of competition rules. Despite concerted efforts in these two areas, the velocity, instead of subsiding is getting even more vertiginous.[1]

Giving that even the proponents of the sophisticated economic reasoning in competition cases continue to struggle, it becomes even more pertinent to focus on the emerging and new competition regimes who might be drawn by the appeal of the grandiose economic approach. It is thus imminent to show why a more suitable standard should be considered by the emerging markets. In this paper, the alternative standard proposed is the doctrine of unconscionability.[2]

Unconscionable conduct generally refers to situations where one party to a transaction has a special disadvantage, and the other party is likely to know of this disadvantage. Where the stronger party takes unfair advantage of this inequality, they have engaged in unconscionable conduct. This paper therefore attempts to establish the unconscionability principle as a viable alternative in the assessment of competition standards and for establishing causality and liability. The paper will also explore how to apply the unconscionability doctrine without compromising the general understanding of abuse of dominance/monopolisation.

In order to properly establish this alternative standard, this paper will be divided into five parts. Part I will provide practical justification for the alternative unconscionability doctrine instead of the mainstream approach. Part II will provide more detailed substantive

[1] See generally Simon Bishop, "Snake-oil with Mathematics is still Snake-oil: Why Recent Trend in the Application of So-called "Sophisticated" Economics is Hindering Good Competition Policy Enforcement" (2013) 9(1) European Competition Journal 67.
[2] Hereinafter also referred to as "the doctrine".

justification for the application of the doctrine in abuse of dominance cases. Part III will provide analysis of how unconscionability or similar doctrines have been applied in different jurisdictions. Part IV focuses on how the doctrine can be applied in emerging markets. Part V will contain the conclusion.

1. WHY UNCONSCIONABILITY?

Though prohibiting abuse of dominance[3] has been recognised as being of fundamental importance in competition law, it continues to pose the stiffest challenge in all countries particularly because of problems associated with measurement, market dynamics, issues concerning multi-sided markets and remedy issues. The problems affect developed countries and emerging markets alike.

An indication of the challenges faced (regarding abuse assessments) by the developed and more mature competition regimes is that, as opposed to other areas of competition law such as restrictive agreements and merger control where there has been considerable body of guidelines and jurisprudence to help shape the law and policy, the volume of documents available which sheds light on important issues such as enforcement priorities is conspicuously lean. For example, despite the high expectations that preceded the EU Commission's Article 82 Guidance, the document barely addressed the most critical issues in any detail much unlike the guidelines that had been produced for anti-competitive agreements. Even when attempt had been made to produce detailed guidelines, it has proven to be particularly problematic. In this regard, the United States' Department of Justice's (DOJ) withdrawal of its detailed monopolization guidelines which it had expended much time and effort in producing is quite instructive.

The extreme caution taken by the most mature competition regimes really brings home the sensitive nature of abuse of dominance as a competition law concept. This further brings to question the prospect for emerging markets to adequately apply this truly noble competition law objective.

It is on the basis of this backdrop that it is suggested in this section that perhaps it is time to start thinking of a different way to operationalise abuse cases. In other words, the field might have become too complex for its own good. While this might prove to be true universally, it

[3] Hereinafter also referred to as "abuse".

is even more likely for emerging markets. Hence, it is imperative to consider an alternative (in this case, unconconscionability) because of four interrelated reasons. First, there remains serious doubt about the veracity of the so-called superior methods especially for abuse of dominance. Second, some emerging markets are not equipped with adequate knowledge and tools to carry out the economic assessment. Third, emerging markets are particularly vulnerable to the heightened tendencies of false positives and false negative that can result from the application of the economic approach. Finally, the doctrine of unconscionability can add legitimacy to competition enforcement because of its simplicity, moral suasion, and familiarity as so on. Each of these reasons are addressed briefly below.

i. Doubt about So-called Superior Methods

Methods of assessment are of vital importance as they give life to textual provisions. In this regard, two aspects of competition inquiry is worthy of emphasis – standards governing the conducts that give rise to competition infringement and the causation needed to establish liability for breach of competition rules. The content of competition rules may or not have a direct bearing on how these competition inquiries are undertaken. As such, to hold out certain textual provisions as reflecting superior method without alluding to concrete methods of competition inquiry would not mean much – the value of such provisions might not worth more than the paper they are written on. When emerging markets transplant the textual competition provisions of the more mature regimes, they are thus expected to understand these forms of inquiry and to adopt/adapt the one most suitable to their markets.[4] The problem is that while the textual provisions might be desirable for example in terms of their goal i.e., the enhancement of consumer welfare, the forms of inquiry may be inimical to their progress.

This is not the best of times for making any posturing regarding the veracity of any particular method for abuse assessment. This damning assertion applies also to the so-called superior methods. The situation in the United States is a good illustrative basis for showcasing the inherent tensions even in mature regimes. As already mentioned, the fact that the US authorities withdrew the guideline for monopolisation primarily because a fundamental shift

[4] See Heba Shahein, Designing Competition Laws in New Jurisdictions: three models to follow in Richard Whish and Christopher Townley (eds), New Jurisdictions and Competition Law: Shaping Policies and Building Institutions (Cheltenham, Edward Elgar, 2012).

in opinion regarding the standards that should be applied should serve as food for thought for emerging markets that have become enthralled by the "superior method" mantra.

Further, the method for establishing causal link between an alleged anti-competitive act and the injury caused draws on two aspects of causation – legal and factual. These aspects are as well not spared of this lack of coherence of thought and practice. For example, with regards to factual causation, Kalos et al noted the confusion in the US. They stated thus:

"… with regards to establishing factual caution in order to prove antitrust injury in US antitrust law, courts have sought to develop different standards such as material cause, 'substantial factor' etc. It is confusing enough that courts have failed to establish a core test for factual causation. Even when two cases invoke the same standard such as 'material cause' the application of such standard often diverge greatly. Searching through judicial precedents is therefore almost unhelpful … searching for judicial precedents that might identify injury by analogy is cumbersome, imprecise and often requires an action of jurisprudential contortion of conventional economic theory".[5]

The foregoing shows that an attempt to identify an alternation mode of analysing abuse cases is not out of place given that the so-called superior methods still show signs of vulnerability.

ii. Inadequate knowledge

Even if we are to accept the value of the so-called superior methods, they would only work when applied properly. However, one can only apply properly what they understand clearly. The more established regimes have gone through gestation periods characterised by highs and lows and plenty of errors and corrections. Ultimately, they have learnt what the most appropriate interpretation of competition rules are and how to apply them through their experimentations. Newer regimes have not had the same advantage of figuring out the essence and appropriate methods of competition law and policy suitable to their circumstance. Rather, they were introduced to the world of competition law and policy deep into its stage of relative sophistication where they cannot make much meaningful contribution in ascertaining what is good for them. As a result, rules and assessment methods have been suggested to them with minimal attention paid to whether they realise and feel the true value of such

[5] Stephen H. Kalos, Lawrence Kolbe, Kevin Scott Marshal The Economics of Antitrust Injury and Firm-Specific Damages

recommendations within their system. This has resulted in lack of confidence in tackling competition concerns.

The implication of this lack of confidence has informed the need to consider an alternative approach as many emerging markets are still struggling with what the law really pertains to. A major factor behind the lack of understanding in emerging markets is because stakeholders in these markets "learn" the value of such rules and methods outside the context of their society. A good example is Nigeria where there has been about nine competition law bills presented before the parliament since 2001 and yet the law has not been passed. At one point, the parliamentarians' hostility towards the idea of a competition commission was justified on the grounds that there were already too many commissions in the country and moreover that similar law had been passed; what they were referring to was the law that established the Consumer Protection Council in Nigeria.[6]

The lack of understanding and resulting stalemate continues to bedevil even the jurisdictions that have passed the law. The rules remain redundant in many of the developing countries or at best they are haphazardly applied. Many countries have adopted competition laws but have never quite managed to successfully enforce them. For example, it took Egypt almost ten years to enact its competition law and even now the enforcement priorities of the authority remains uncertain.[7] Further, it took two decades for the competition law enacted in Thailand to be implemented, and even after implementation, enforcement records are still considered poor.[8]

One way to solve this problem is by developing local capacity through training and advocacy. For a considerable period, there has been efforts made in this regard but with little to show for it. Save for very limited success stories,[9] this approach has failed to achieve the expected outcomes. This could be because the competition authority agents in affected emerging countries have failed to internalise the training or that they simply are unable to apply them for various reasons. Even where the authorities are motivated and capable of directing their competition regimes accordingly, they are often easily undermined by the political class. The ease at which the political class often undermine the effectiveness of the activities of these

[6] Laura Ani "Rethinking Competition Law and Policy: Building a Framework for Implementation in Nigeria" pg 19

[7] A view expressed at the Sixth ASCOLA Conference titled "New Competition Jurisdictions: Shaping Policies and Building Institutions" held at King's College Sixth on the 1/2 July 2011

[8] Law was enacted in 1979 but implemented in 1999. Xx see xx. Other examples which similar stories include Indonesia, Pakistan, Sri Lanka, Malawi and Namibia

[9] For example south Africa xx

authorities is not unconnected to the fact that the populace do not truly connect with the operations of competition law even though they often seem to appreciate its value when explained in simplistic terms. The failure of advocacy is even the more accentuated by the failure to truly capture the interest of lawyers. In some of these emerging markets, it is not uncommon to hear a lawyer talk about the value of competition law. However, deep down, many of them are disconnected from the operation of competition law. How really would competition law grow when lawyers do not even recognise competition concerns outside the very glaring cases which do not occur that regularly?

This disconnect within emerging markets in understanding the value of competition rules stems from the fact that many developing countries are yet to see any visible effect of the law on their economy partly because of the inadequate enforcement resources, absence of reliable data and information deficit about markets and production costs.[10] Hence, with no clear solution in sight, it is time to consider an alternative.

iii. Peculiar Vulnurability of Emerging Markets

As experience has shown, the challenge of introducing competition law and policy especially in emerging markets should not be underestimated. As such, even where a country is determined to set up a firm systems of competition law, they would have to be prepared for the immense task of formulating a competition law that can be effectively enforced. On surface value, this task might appear unproblematic as such regime could simply build on instruments such as UNCTAD's Model Law. However, the peculiarity of every regime[11] makes such task a tricky affair. This stems from a number of factors such as the incongruence between economic models on the one hand and economic realities and resource scarcity on the other. These factors will be briefly explained in turn:

a. Incompatibility with Economic Models

There is no gainsaying that mainstream economic models do not necessarily match the reality in developing countries. Mason, for example, developed the market performance approach which identified how abuse/monopolisation can be ascertained through the effect of an

[10] Laura Ani "Rethinking Competition Law and Policy: Building a Framework for Implementation in Nigeria" pg 20

[11] In light of their legal and administrative traditions, stage of economic development and political realities. Note also OECD (2003) opinion that there is no single (or one-size-fit-all) optimal design of competition institution

alleged abusive conduct. Factors that help in determining such effect include; the effectiveness of product and process innovation, the cost-price relationships, capacity-output relationships, the level of profits, and the selling expenditures. These indicators can only be ascertained where there exists adequate information and empirical evidence. Reality in many emerging markets however is that standard verifiable data are hard to come by or are at best not shared with the public and authorities. Moreover, research has shown that there is no indication that people in developing countries are motivated by ideals such as utility maximisation.[12]

Another factors that undermines the economic model is the relative large nature of the informal markets in many emerging markets.[13] For example, Nigeria has an informal sector of 57.9% to the formal sector with 42.1%.[14] This creates a dual market scenario which makes it difficult for any economic model to accurately mirror the price elasticity of demand.[15] Further, the existence of a large informal sector also creates additional noise in price information which makes it difficult to conduct proper competition analysis.

It must be noted that the difficulty of transposing economic models from developed regimes has been recognised by scholars and some efforts have been made to develop a suitable economic basis for emerging/developing economies.[16] There indeed has been claims that the present economic approach is either not suitable in general or particularly unsuitable for developing/emerging markets. However, given the there is an ingrained (mis)understanding that the essence of competition law is inexorably linked with the concept of competition propounded by neo-classical scholars, the best efforts so far made in addressing the interest of developing countries is to "adapt" the standard economic model to the situation in these economies. For example, efforts have been made to redirect enforcement priorities,[17] and reshape assessment criteria and priorities[18] for emerging markets while acting within the economic framework. However, research has shown that some of these "adaptation"

[12] See Abijhit Banerjee and Esther Dufflo, "Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty (BBS Publications, 2011).
[13] OECD, "Competition Policy and the Informal Economy" (2009)
[14] see the World Bank's country to country assessment xx
[15] Laura Ani "Rethinking Competition Law and Policy: Building a Framework for Implementation in Nigeria"
[16] See e.g., David J. Gerber, "Adapting the Role of Economics in Competition Law: A Developing Country Dilemma"
[17] See e.g., Eleanor M. Fox "Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries"
[18] Michal S. Gal and Eleanor M. Fox Drafting competition law for developing jurisdictions: learning from experience (2014) 79 Antitrust Law Journal 27.

experiments (i.e. developmental economics) are unsuitable for tackling the challenges in these economies.[19]

b. Resource Scarcity

It is contended that even if these questions can be effectively addressed in more mature competition regimes, the prospect of the emerging markets getting them wrong is quite high partly as a result of resource scarcity.[20] One wonders for example how the Zambian Competition Authority, with 29 members 17 of whom are directly involved in competition and consumer issues and only half on antitrust enforcement would be able to cope with complex abuse of dominance issues.[21] Further confounding the problem is that most of the members of the judiciary do not have an adequate understanding of competition issues,[22] and no academic institution running competition law, economics or policy courses.[23]

iv. Suitability of Unconscionability Doctrine

The difficulty of mirroring the economic realities in emerging markets calls for some sort of reaction. On the one hand we can stick to the present (economic) approach(es) as noted by one scholar who stated that "there is nothing one can do about this problem, other than to bear [their shortcomings] in mind, and be accordingly guided when making analysis and assessments of the strength of dominant firms in the economy, especially in an abuse of dominance inquiry".[24] A second approach would be to direct attention towards an alternative approach. This second approach is herein favoured as it gives opportunity to establish or apply competition rules on a more functional and adaptable platform that would be capable of serving the peculiar needs of emerging markets.

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[19] Ioannis Lianos, Abel Mateus and Azza Raslan, Development Economics and Competition: A Parallel Intellectual History

[20] See Michla Gal, "When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce"

[21] UNCTAD, "Voluntary Peer Review of Competition Law and Policy: A Tripartite report on the United Republic of Tanzania-Zambia-Zimbabwe" Comparative Assessment Overview

[22] This position can be derived from the statement of the Chief Justice Ireen Mambilina on 1st April 2015. See Competition and Consumer Protection commission, "Judges, Magistrates Urged to Quickly Resolve Competition, Consumer Cases" [http://www.ccpc.org.zm/?p=472]

[23] UNCTAD, "Voluntary Peer Review of Competition Law and Policy: Zambia Overview UNCTAD/DITC/CLP/2012/1 para 59

[24] Nnamdi Dimgba, "The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria"

The choice of unconscionability as the alternative standard is supported by a number of reasons. First, a regime unprepared for the realities of the economic assessment of competition issue might find the unconscionable doctrine suitable because of its link with fairness/morality – fairness and morality being concepts that are easier to understand as against the complicated and convoluted baggage that comes with the economic approach.

As noted above, the inadequacy of knowledge and resource scarcity that has bedevilled competition enforcement in developing countries is directly linked to the choice of the economic models. The unholy matrimony has therefore led a mismatch of priorities and outcomes. It is in this regard that unconscionability can help at the time of uncertainty as the spirit of the doctrine to some extent understood and appreciated within many jurisdictions even if it is referred to differently. Moreover, the analysis of the doctrine even within classical discourse such as contract theory often shows that unconscionability has meaning within the context of competition and the market.[25] Such links give further credence to the suitability of unconscionability as a competition law standard.

Moreover, even if on the average, the economic approach helps in reaching a more accurate decisions on abuse of dominance especially when compared with the increasingly disfavoured "legalistic" and "formalistic" approaches, the economic approach might still be undesirable for some competition regimes, particular the young and economically disadvantaged ones. The reasons are self-evident – giving that regimes with adequate expertise and resources remain unconvincing and unconvinced about their methods, one can safely assume that newer and less financially robust regimes could get themselves into deeper flux if they blindly toe the lines of the more matured regimes. This could result in irreparable damages to the economic and development prospects of these newer regimes.

Even if an emerging market has a genuine attempt to apply the economic approach in the near future and is taking concrete steps to achieve this, it might be worthy to, for instance, start off on familiar ground by applying more recognisable and amenable legal and equitable principles which have direct implication for abuse of dominance – one way is to extend the reach of the unconscionability principle to competition cases. Where the circumstance permits, this simpler legal principle can serve as the operational basis for the competition analysis in less advanced jurisdictions.

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[25] See e.g., Melvin Aron Eisenberg, The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance 1416.

As already explained, the practicality of operating and sustaining a thorough economic and empirical competition regime in emerging markets is very much doubtful. However, it would be equally counter-productive to discount the need for a coherent and intelligible alternative to address competition concerns. It is the absence of such a coherent alternative regime that has forced emerging markets to follow economic models even where they are ill-equipped to adopt those methods. The lacuna has also given room to the mature regimes to aggressively advocate for economic models which have helped fuel the dogma that the present mode of analysis (with the variations that exist in between) is the only way to conduct competition assessments. It is therefore imperative that unconscionability-based competition frameworks developed by emerging markets are constructed coherently and is capable of non-arbitrary application.

Hence, unconscionability (like fairness) is an amenable concept which allows for some degree of flexibility in ascertaining its meaning. Thus, if care is not taken, there is the danger that the idea of unconscionability in competition law will suffer the same fate as the pure fairness-based account of competition law which were roundly condemned as "uncritical".[26] As such, it would not be enough to simply brandish the doctrine without any attempt to construct or identify a meaning suitable to competition law. This would however have to be done within the parameters of the established spirit, essence, and interpretation of the doctrine. It is also necessary to convincingly establish it as a concept capable and worthy of underlying competition law and policy assessments particularly for emerging/developing markets.

Part II: Unconscionability as a Veritable Tool for Competition Assessment

Unconscionability can be generally identified in a contractual or tort context. Example of contractual unconscionability is unconscionable bargains while tort claims can be hinged on economic tort/duty of care. Both strands have roles to play in shaping competition assessment. As for contractual unconscionability, this directly relates to the bargaining parties while the unconscionability issues that arise from economic tort relates to the wrong down to other businesses in general. Duty of care can be said to result from the duty owed by the party with superior bargaining position to the wider stakeholders such as consumers.

[26] As referred to by Bork.

The doctrine of unconscionable bargains in contract law has been described as one of the most important development in the area in modern times.[27] This assertion is true as regards both civil law and common law. However, there are variations in the interpretation between these two broad systems and even differences exist within each system. While it is not within the scope of this paper to provide a full analysis of the variations between and within these systems, some reference will be made to different interpretations in order to ascertain the most appropriate elements of the contractual issues assessed in abuse of dominance cases.

It is equally important to ascertain the basis for extending unconscionability via the principles of economic tort and duty of care to the stakeholders who are not privy to the contract. This is even more important given that competition law is tort-based.[28]

As for civil regimes, unconscionability comes up broadly under the umbrella of the law of obligations. However, in the common law world, the doctrine is more established in the contractual context. As example of the civil law doctrine, the German Civil Code declares a transaction to be unconscionable where a person, "by exploiting the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance." Similar provision is contained in Art. 21 (1) of the Swiss Civil code which states that "where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the injured party may declare within one year that he will not honour the contract and demand restitution of any performance already made."

The interpretations given to key terms and phrases in the Swiss Code such as "distress", "inexperience" and "improvidence" are worthy of note. The Swiss Federal Court has likened "distress" to "duress" which could result from economic or political circumstance.[29] Where advantage is taken of the other party's inexperience, this has been said to require merely showing that they are inexperienced in assessing the particular transaction. Thirdly, establishing improvidence does not require any general predisposition of an injured

[27] Melvin Aron Eisenberg. The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance 1415

[28] See e.g., Cristián A. Banfia, "Defining the Competition Tort as Intentional Wrong" (2011) 70(1) Cambridge Law Journal, pp 83-112; Alyse L. Katz, When Business Torts Give Rise to Antitrust Liability
By Kevin McCann and Alyse L. Katz – October 17, 2011

[29]

contracting party.[30] It would suffice if the stronger party was careless and rash when concluding the contract hence failing to take into account the significance and consequences of the transaction.[31] This interpretation of improvidence opens the scope for duty of care assessment.

On the other hand, it is equally important to note the common law position. However, as already noted, there is more than one interpretation of the doctrine within the common law world – the interpretations can be broadly sub-categorised into traditional and progressive. The interpretation one gives to the doctrine will go a long way in either reinforcing unconscionability as firmly and exclusively rooted in contract law or whether the doctrine has a cross-cutting effect such that it blurs the lines between contract and other components of law of obligation particularly tort law.[32] This is important because if it is seen as a purely contractual issue, it will have very limited relevance in contract regulatory fields (such as competition law and consumer protection) that derive from tort doctrines such as economic wrong and duty of care.

The English system holds the traditional position in terms of their interpretation of what unconscionability entails. As understood in English law, an agreement can be said to be unconscionable if two requirements are satisfied. First, it must be shown that the aggrieved party was at a significantly disadvantaged position when the contract was concluded. Second, the other party must have procured the contract through unconscionable means. A third element, though not a requirement, is to ascertain whether the contract confers significant advantage on the defendant. As shown in cases such as Boustany v Pigott,[33] the phrase "significant disadvantage" is to be interpreted quite strictly such that it would be insufficient to prove that a bargain was hard, unreasonable or foolish. Rather it must also be shown that the transaction was imposed on objectionable terms in a morally reprehensible manner.[34] Also, the stronger party's behaviour must be morally culpable.[35] Further, it would not suffice to show that the parties had unequal bargaining power or that the terms were objectively unreasonable. Rather, it has to be proven that the act constitutes an unconscientious or extortionate abuse of power.

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31 Unconscionability in a Civil Law System: An Overview of Swiss Law pg.530-533.

32 As is shown below at xx, this indeed can take place by bringing tort law concepts such as undue influence and duty of care into the doctrine of unconscionability.

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34 See also *Multiservice Bookbinding Ltd v Marden.*

35 See also *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd. Law Quarterly Review 2010 The unconscionable bargain in the common law world 405*

The interpretation in Australia is more progressive as its does not require an injured party to establish that an act is harsh and morally irreprehensible for such act to be considered unconscionable. The case of *Bridgewater v Leahy*[36] shows that even where there is no clear evidence of harsh terms or exploitation of the other party's vulnerable position, unconscionability can be found as long as the situation in which the transaction took place is sufficiently prejudicial to render the transaction unconscionable. This case shows that intention of the alleged infringer need not be immoral as long as there is some situational disadvantage.

Like the Australian approach, the New Zealand approach to unconscionability is also progressive. McMullin J. in Nichols v Jessup[37] said that the Australian and New Zealand doctrines of unconscionable bargain "do not require proof of an active extortion of a benefit, an abuse of confidence, a lack of good faith by the party seeking to hold the bargain. Accepting the benefit of an improvident bargain by an ignorant person acting without independent advice which cannot be shown to be fair, may be unconscionable." This assertion shows that the absence of overt evidence of unconscionable conduct did not prevent the court from holding the grantee in the case liable. This interpretation also infers a duty of care on the part of the stronger party.

Conclusively, common law and mainly English law division between law and equity makes it difficult to conceive of the doctrine of unconscionability outside of the contractual context[38] which narrows its viability for competition assessments. However the civil regimes and indeed the more progressive common law regimes are not impaired by such division and would apply the principle to obligations in general. This flexibility is imperative as without such clear conceptual understanding and appreciation, assessing competition issues through the doctrine of unconscionability would appear to be a flawed move. The lower threshold of proof for the disadvantaged and the relative "strict liability" of the stronger party is also akin to the system in competition law.[39]

Applying this form of the unconscionability doctrine in emerging markets could be advantageous for a number of reasons. First, giving that many emerging markets are concentrated and characterised by dominant players, this interpretation could be deployed to

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38 Peter Cane, The Anatomy of Tort Law 191

39 Cristián A. Banfia, DEFINING THE COMPETITION TORTS AS INTENTIONAL WRONGS The Cambridge Law Journal / Volume 70 / Issue 01 / March 2011, pp 83-112;

diffuse the market in order to broaden market opportunities. Further, using the doctrine to achieve established goals such as consumer welfare might be easier to appreciate than the technicalities of the mainstream abuse of dominance assessment methods.

III. Unconscionability in Abuse of Dominance Applied

The idea of applying unconscionability doctrine in competition cases is not entirely novel. If unconscionability is understood as a doctrine that simply challenges the abuse of a superior bargaining position in contractual relations, then it can be said that it is indeed not at all uncommon. Indeed, "abuse of superior bargaining position" (ASBP) as a standard separate from abuse of dominance is well known in the international circle.[40] Even if one is unconvinced that the idea of ASBP applied by some jurisdiction refers to unconscionability, the unequivocal incorporation of the doctrine into the law in Australia puts issues beyond doubt. A review of the manner in which the doctrine has been applied or incorporated into competition laws is imperative in order to help ascertain its proper scope in emerging markets. First, the concept of abuse of superior bargaining power will be reviewed followed by the unconscionability doctrine in Australia's competition law.

i. Abuse of Superior Bargaining Position

Depending on how it is applied, the concept of abuse of superior bargaining position (ASBP) can mean (almost) the same thing as "unconscionable conduct"; in some sense, the extent to which unconscionability is incorporated depends on whether ASBP is considered to be of a specific character or whether it is seen to be subsumed within the general meaning of abuse of dominance. Those that consider ASBP to be of a specific character tend to interpret the concept in a way that aligns with unconscionability. For example, Japan provides that acts that are categorised as abuse of superior bargaining position are those committed "unjustly in light of normal business practices by making use of one's superior bargaining position over the other party".[41] This indeed is different from typical abuse of dominance in that the threshold for dominance need not be established in order to commence assessment.[42] Here, the position of Korean Authority is instructive. It starts by recognising that the assessment of bargaining position can be undertaken from two standpoints – the entire market or the

[40] This concept could very well be synonymouse to the unconsconscionability doctrine. See generally ICN, xx

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[42] http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/101130GL.pdf. Pg 4

individual transaction. It explained that while abuse of dominance assessment is concerned about the firm's market dominance in the related market" the ASBP examines "the difference in position between the concerned enterpriser and its transaction counterpart." It then summarises quite aptly that "determination of illegality of abuse of superior bargaining position, for which transaction parties' relative position matters, requires examination of unfairness of individual transactions rather than of the entire market competition situation."[43]

On the other hand, the general approach held by other countries such as the US and UK is that the ASBP should be subsumed into the standard abuse of dominance assessment either because there is no need for such specific provision[44] or because such specific provisions could lead to confusion[45] and uncertainty.[46]

One of the reasons generally relied on in support of the specific provisions for ASBP is that it protects competition from negative effects of contract terms that would not occur in the absence of ASBP.[47] Also, it helps to prevent the anti-competitive effect that results from a dominant firm's exercise of market power where such exercise affects only a certain firms.[48] Also, ASBP has been considered necessary in order to protect against exploitation of trade partners.[49]

ii. Unconscionability as Applied in Some Jurisdictions

Without mincing words, Australia is the country with the most conspicuous provision which incorporates the doctrine of unconscionability into competition law. The Australian competition regime takes seriously the interest of SMEs[50] as manifest in the provisions of the Competition and Consumer Act 2010 (CCA). It is in light of its desire to protect SMEs that the Australian system prohibits "unconscionable conduct" through relevant provisions of the Act targeted against "unconscionability" in business dealings.[51]

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45 See Belgium xx
46 See USA pg 34.
47 See Japan
48 Germany
49 See Italy, Korea, Slovak Republic and France.
50 European Competition Law Review
2012
Competition regulation, open markets and small business
Michael T. Schaper 336
51 See generally sections 20-22 of CCA 2010.

However while it seems clear that the provision aims at a noble cause by balancing the gap between small business and big business, some have expressed concern and have contended that the doctrine will cause much uncertainty which will discourage big businesses from entering into trade relations with small businesses.[52] Moreover, they fear that the inclusion of the doctrine will lead to a floodgate of cases to the ultimate disadvantage of consumers and the society in general.[53] In contrast to the foregoing criticism, there are no signs that the fear expressed regarding the dangerous effect that might result from the application of the unconscionability doctrine will be vindicated. Rather, there are signs that the doctrine could indeed work.[54]

Part IV: Conditions for Applying Unconscionability Principles in Competition Law in Emerging Markets

Having shown the congruence between competition law and unconscionability, it must now be noted that it would not be enough to simply contend that a competition law system will apply the doctrine or that its competition regime is built on the doctrine. This is because unconscionability is a fungible term. As such, the law governing it have developed according to the peculiarities and preferences of individual jurisdictions. Thus, while the foregoing analyses have helped to situate the doctrine within the context of competition law, it does not necessarily provide the template for applying unconscionability doctrine in emerging markets. In fact, none of the individual versions of either the general or competition law-specific interpretation of the doctrine can fully capture what the doctrine should mean and how it should be applied in emerging markets.[55] This makes it imperative to develop a suitable mode of understanding and applying the doctrine in emerging markets. However, any such effort would have to be done with due caution.

Indeed, no pretence should be made regarding the possibility of developing a wholesome account that would be applicable to every emerging market. The reality is that there are peculiarities within the different emerging markets based on for example level of development, technical expertise and culture that might require unique application even

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55 Most of the countries are developed countries xx

within this set of economies. The paper will therefore only suggest options rather than prescribe one single mode of applying the doctrine.

Prior to exploring the conditions, it is worthy to respond to likely concerns that may be raised such as the possible uncertainty and arbitrariness that may follow from the use of unconscionability. There is no denying the fact that such competition assessment mechanism will grant a good deal of discretion to the arbiters thereby justifying the concerns regarding arbitrariness and uncertainty. However, it is contended that this concern should not be overstated. First, it cannot be said with any degree of certainty that the potential scope for arbitrariness or uncertainty will be in any way reduced if an ill-equipped developing country were to apply the economic approach. Second, such concerns might be unfounded given that the exercise of discretion is not uncommon in dispute settlement and law enforcement even within the context of the economic models. If anyone contends that competition laws are unique because of their technicalities and as such require almost empirical analyses, such claim would only reveal that such person has failed to grasp the underlying essence of this paper. Moreover, none of the regimes that apply some element of unconscionability doctrine can be said to be in a state of crisis or that the ones that have decided against it have a better and more efficient system. On the contrary, the doctrine can have clear benefits for emerging markets. For example, it could potentially ease the process of and interest in acquiring capacity.

As already noted, while the benefit could be tempting, it must be noted that such benefits might never materialise and indeed more damage may result if all that is done is to transplant the law of another jurisdiction. As such, in order to ascertain the unique (range of) contents for unconscionability in emerging markets competition regimes, it is proposed that three elements of the doctrine should be particularly clarified. First, the meaning and scope of unconscionable bargain. Second, ascertaining the kind of impact that brings an unconscionability claim within the fold of competition law, and three establishing the causal link between the conduct and the anti-competitive outcome.

a. Meaning and Scope of Unconscionability for Emerging Markets

Every jurisdiction must ascertain the appropriate scope of the unconscionability doctrine suitable for their competition regime. As a starting point, it is expected that most emerging markets would benefit from the broader scope which the doctrine affords particularly in comparison to the mainstream interpretation of abuse of dominance – these markets are likely

to benefit from the lower threshold which the concept of "superior bargaining position" will bring because these emerging markets are most often desperately in need of widening up markets. Unconscionability claims will help avoid scenarios where dominant companies are able to evade scrutiny by claiming that certain threshold has not been met. However, a note of caution needs to be made. It is not advisable to make a general statement regarding the appropriate scope for the doctrine in assessing anti-competitive effect, anti-competitive conduct and in the application of unconscionability-based competition rules. This paper will therefore not attempt to make categorical prescriptions. Rather, it would provide guidance and suggestions for economies in different level of development. The three elements (effect, conduct and application) will be detailed in turn:

Effect

Even after establishing the scope, the way the doctrines and its inherent terms are interpreted would play an important role in determining the success or other of the attempt to incorporate the doctrine into competition assessment. For example, unconscionability as applied in Australia becomes operational only when one party to a contract is at a "special disadvantage".[56] Also, in distinguishing the ASBP from abuse of dominance, the Italian authority stated that "there is no theoretical overlap between abuse of economic dependence and abuse of dominant position as far as the interests at stake are concerned. While the provisions on abuse of economic dependence are intended to protect the individual interests of undertakings affected by the exploitative behaviour of a firm enjoying superior market power, competition rules are meant to protect and enhance consumer welfare: therefore, in dominance cases, the alleged abuse will only constitute a breach of the relevant legal provisions when it is likely to result in consumer harm."[57]

While the scope adopted in Australia and Italy are not inherently unsuitable for emerging markets, it is possible that such narrow scope could limit the effectiveness of the unconscionability-based regime. It could also defeat the purpose of turning to the doctrine in the first place. For example, where a country had chosen to build its monopolisation law around the doctrine, it would fail to achieve its ultimate goal if the purpose for unconscionability in narrower context of unilateral behaviour is seen as distinctly varied from a more general abuse of dominance issue. This is because this will give alleged infringers an

[56] The application of the law in Australia seem to focus more on the consumer law dimension.
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avenue to avoid actual scrutiny by hiding under the broader abuse of dominance route which has stricter tests such as the de minimis rule.

Indeed, the proposed alternative would only serve the purpose if unconscionability reasoning is applied towards attaining wholesome competition goals such as preventing distortion of market and enhancement of consumer welfare.

Conduct

Depending on the extent to which an emerging market seeks to adopt the doctrine of unconscionability, it would have to consider how the conduct which falls under the scope of competition assessment is conceived. If such regime seeks to adopt unconscionability as a supplement to the standard assessment of abuse of dominance, it could very well set out criteria required for establishing the two heads of claim. Such approach will be in line with the Japanese position which provides that ASBP requires that a party engages in conduct unjustly disadvantageous to the other party in terms of transaction terms or conditions while "private monopolization" requires business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs.

On the other hand, for a country aiming to base its abuse of dominance assessments firmly on the doctrine of unconscionability, it would be imperative for them to consider the two aspects as overreaching in terms of their conduct covered. This means for example that it should be possible to read exploitative or exclusionary "intent" into conducts which are simply "unjustly advantageous".

Application

As a starting point, it must be noted that the essence of adopting unconscionability will only be achieved if some degree of flexibility is allowed in its interpretation and application. As such, it is not expected that any emerging market that desires this route will adopt a strict version. This would indeed be counterproductive for emerging markets that would only have resorted to this alternative approach because of their limited capacity to generate technical and empirical analysis. Indeed, application of rigid conditions for establishing whether an action or inaction is unconscionable would in no doubt render any crafted alternative framework to be nothing more than a clawless paper tiger. Australia for example had observed that its focus on a rigid requirement of "anti-competitive purpose" rather than a

more relaxed effect analysis set back its competition enforcement many years due to its effectiveness.[58]

Thus, while it might be helpful to set firm and strict conditions for proving unconscionable bargains (i.e., to reign in excessive litigation), it might not be so wise for a developing nation intent on equalising inequalities and strengthening small and medium scale enterprises (SMEs) to follow wholeheartedly the rather tough interpretation which could obliterate the effectiveness of the unconscionability doctrine.

The problem with demanding clear intention is evident in English cases such as *Kalsep Ltd v X-Flow BV*[59] where the court held that as long there was no impropriety in the way the contract was reached, the agreement could not be unconscionable. Also in *Singla v Bashir*, the court held that there had to be transactional imbalance for a claim of unconscionable bargain to succeed. In other words, the claimant would have to show that "he would have done 'significantly better' elsewhere."[60] If a competition regime were to rely solely on this interpretation of the unconscionability doctrine, this would mean that they would have no avenue to ascertain whether a conduct is unconscionable just by its effect absent any clear evidence of improper conduct. Giving that hard evidence are general hard to come by in competition cases,[61] such an approach could greatly undermine competition enforcement.

On the other hand, emerging markets might be better served by the doctrine of unconscionability where it is interpreted and applied partly in light of the general interpretation of the doctrine in civil law regimes and some common law regimes. Valuable insight caould also be gained from the competition law-specific applications such as some aspects of the Japanese interpretation of ASBP[62] and section 20 of the Australia's ACA 2010. Thus if applied appropriately to the context of competition law in emerging markets, this interpretation of the unconscionability doctrine would enable emerging markets make to concrete decisions on alleged anti-competitive conducts even when they do not have the capacity to proffer credible evidence provided the circumstances are such that gives a fair

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[58] Rachel Trindade, Alexandra Merrett, Rhondda Smith "The Grass is Always Greener? The Effect Versus Purpose Debate Resumes (2013) 14 State of Competition (Special issue)

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[60] Xx note that the transactional imbalance here is not synonymous to the idea of dominance but that there must be clear evidence of high-handedness by one party over the other. The point here touches on scope of counterfactual assessment required as addressed below in pg xx.

[61] Because of the clandestine motives behind them coupled with the fact that developing countries may not have adequate resources to obtain hard evidence

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indication of abuse. Moreover, this interpretation of the unconscionability doctrine could serve as the alternative way of conceptualising notions of the per se/hard core infringements.

Applying the foregoing, it could be summarily stated that for regimes interested in this approach, issues raising concerns for abuse of dominance/SBP should be addressed by ascertaining whether a conduct(s) of a "dominant" entity is so sufficiently unfair[63] in its object and/or effect that it impacts on competition either directly or indirectly.

b. Causation in Unconscionability Assessments

This idea of causation is simply about the burden of proof that has to be established to bring a firm's conduct in issue, establish injury and link the alleged act with the injury. In competition law context, the first issue of causation which assess the kind of conduct that fall within the scope of competition law because of their potential for abusive effect is a matter of legal causation which has been indirectly addressed in preceding arguments. Establishing the injury also requires analysis of causation. In competition parlance, the injury caused is termed either as "antitrust injury" or "consumer harm". Depending on the approach adopted by the regime in question, this causation task could be legal or factual or both. This issue has also been addressed in some way. To address in context, factual caution of injury is required where a regime for instance demands that intent be proved before a claim of abuse of dominance can be established or that actual anticompetitive effects in terms of for example increase in price be established before consumer harm can be said to be established. It is needless to exhaustively restate that emerging markets would find this practically impossible to achieve because of the enormity of the task.

It is the third leg of the issue of causation that is of interest here. Caution could also require that a plaintiff or authority establishes a "reasonable connection" between the challenged conduct and the anticompetitive effects.[64] This requires a factual assessment. The threshold required for establishing the causal link needs to be given considerable attention. This is because if it is too high it would discourage claims but at the same time, if it is too low, it could lead to a floodgate of cases.

[63] Fairness here can be understood in similar sense as Stephen Smith's "substantive fairness". See Stephen Smith, "In defence of Substantive Fairness" Law Quarterly Review

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For emerging markets, it is advisable that they set a relatively low threshold because of their peculiar institutional weakness. This is more so important because if this important brick is not properly fit into the unconscionability lego, the whole competition framework could fail.

One can draw inspiration from a rather unlikely source – the US. Even regimes like the US reputed for its insistence of the economic approach did recognise the difficulty of applying a high threshold for establishing causal link. In Microsoft,[65] the court explained that because of the impossibility of reconstructing an appropriate counterfactual, the onus on the plaintiff should be discharged once a "reasonable connection" has been established as the burden of the uncertainty should be on the defendant. The court reasoned that it would be more just that the defendant "is made to suffer the uncertain consequences of its own undesirable conduct."[66]

The less established an enforcement authority is, the more unreasonable it would be to require that an effect resulted strictly from the conduct and no other. In other words, counterfactual assessments should be applied in emerging markets with a great degree of caution. This further underscores why the English interpretation of unconscionability is likely to be unsuitable since, as the case of *Singla v Bashir* shows, it would require almost precise counterfactual proof.

The extent to which the threshold is relaxed may differ from one jurisdiction to another and eve from time to time. In the US, two of the cases that have been decided subsequent to Microsoft have taken different approaches.[67]

Part V: Conclusion

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[66] Michael Carrier, "A Tort-based Causation Framework for Antitrust Analysis

[67] Rambus xx and Broadcom Corp cases xx