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ABUSE REGULATION IN COMPETITION LAW: PAST, PRESENT, FUTURE

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UNCONSCIONABLE CONDUCTS IN FRANCE

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I.- Unconscionable conducts : a definition

1.- Preliminary views on the concept. The *unconscionable conduct* concept is, *a priori*, quite easy to understand because the terms are familiar. But a *legal definition* poses particular difficulties.

Firstly, the term *conduct* is very broad and has several meanings. It could mean what the French scholars call a "legal fact" such as an aggressive advertising campaign or a commercial pressure exercised on competing firms or on customers. But such a term may also include "legal acts" like contracts or general terms and conditions of sale. In short, the term "conduct" covers a very broad range of actions, irrespective of their legal form or qualification.

Secondly, the term "unconscionable" is even vaguer. The term seems to refer to a value judgment without us knowing in which normative order one can find these values: economic order? moral order? Or is the legislator to say what is or is not conscionable?

Here, the law would set up a list of criteria to define the concept. Or is the court fully free to characterise what is conscionable at its own discretion?
The answers vary among legal systems that enshrine the concept, especially in the United States and Australia.

2.- Unconscionability in the US. It seems that the "unconscionable" concept has emerged in the middle of the twentieth century in the United States[1].

The Uniform Commercial Code provides today that "(1) *If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.*
(2) *When it is claimed or appears to the court that the contractor 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*"[2].

The American system has the following characteristics:
1° The scope of application of the text *ratione personae* is very broad: the victim of the unconscionability is "a contractor". Nothing indicates that this contractor shall be in a situation of weakness[3]. In practice, it is often consumers who invoke the unconscionability defence against businesses. However, obviously, the UCC provision defines a wider scope. It is taught that courts have been sceptical about finding unconscionability when dealing with a case where the parties are well informed and sophisticated[4].

[1] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967). See also : William B. Davenport, Unconscionability and the Uniform Commercial Code, 22 U. Miami L. Rev 121, 130 note 32 (1967).
[2] UCC, §2-302. See also the Restatement Restatement (Second) of Contracts (§ 208): "*If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result*".
[3] Jane P. Mallor, Unconscionability in Contracts between Merchants, 40 SW L.J. 1065 (1987).
[4] E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 589-590 (3rd ed. 2004).

Ratione materiae, the object of the unconscionability is a provision of a contract, not a practice or the way a contractor behaves. The concept is used in a narrow sense. And, according to the wording of the text, the court may assess the unconscionability of the contract at the time of the making of it.

2° The scope is broad but, surprisingly, the UCC does not give any definition of what is *unconscionable*, nor any criteria to fulfil this vague notion. The official comments to UCC section 2-302 only say that the principle is one of "*the prevention of oppression and unfair surprise*"[5].
So the court has a great role to play: it has to characterise what is unconscionable or not without any guidance in the law. Moreover, the court determines the appropriate remedy: refusal to enforce the contract, partial enforcement, or limitation of the application of a clause.

3° In the absence of a legal definition, the concept has been defined by one hand, case law and the other by the doctrine.

Firstly, the primary source for finding out what unconscionability actually means is case law. The leading case on unconscionability is *Williams v. Walker-Thomas Furniture Co*.[6], about a clause that gave the seller a right to repossess all previously purchased goods upon default on the current purchase. It contains an often quoted description of unconscionability: "*[A]n absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party*". When defining the unconscionability the court also explained that the clause should be "*so extreme as to appear unconscionable according to the mores and business practices of the time and place*"[7].
That means, and the case law confirms that assertion, that the court must, firstly, scrutinize the bargaining process and the respective positions of the contractors. For instance, law of education, lack of negotiation of the contract, understandability of the

[5] UCC § 2-302 Official Comment (2010).
[6] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).
[7] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

wording of the contract, are factors to take into account[8]. A situation of economic dependence is also a relevant factor[9].

As regards to the definition of the unconscionable provision itself, the issue here are contracts that are excessively one-sided : abusive interest rates, waiver-of-defence clauses or clauses for exclusion of liability for consequential damages, for instance. In *Williams v. Walker-Thomas Furniture Co.*, provisions stipulated that Walker-Thomas retained ownership until an item was fully paid, and that any payment made should be credited towards each outstanding debt in proportion to its size and that, in the event of default of any monthly instalment the item could be repossessed.

To summarise the lessons learnt from the case law, unconscionability is a contract defence advanced in cases in which there is a combination of unfair contract terms and deficient bargaining.

Secondly, the notion has been refined by the doctrine, especially by the seminal work of Arthur Allen Leff in *Unconscionability and the Code – The Emperor's New Clause*[10]. Professor Leff distinguishes two categories of unconscionability: *procedural unconscionability* refers to the procedures of contract formation and involves deficiencies in how the contract came to be. It refers to various ways in which proper consent may be absent: fraud, mistake, necessity, duress, adhesion contracts, imbalance of the bargaining process… The other aspect of the concept is *substantive unconscionability.* It refers to the contract terms themselves when they are particularly one-sided, unfair, exploitative. This distinction between procedural and substantive unconscionability has been used by a number of authors and seems to correspond to an undeniable practical reality.

Beyond this effort to define the concept, American scholars seem to have spend a lot of their energy to discuss the legitimacy itself of the unconscionable concept in American contract law. In a very famous article, Richard A. Epstein used economics to argue for

[8] In *Williams v. Walker-Thomas Furniture Co*. the court mentions "*obvious education or lack of it*", 350 F.2d 445, 449 (D.C. Cir. 1965). See also E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 583-584 (3rd ed. 2004) who mentions employment of sharp bargaining practices, the use of fine print and convoluted language, a lack of understanding and inequality of bargaining power

[9] *Weaver v. American Oil Co*., 257 Ind. 458 (1971).

[10] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).

the elimination of substantive unconscionability[11], and Judge Posner also showed that the unconscionability defence hurts poor people by making transactions more expensive, while helping a few of them (the ones who make use of the defence)[12]. Conversely, others authors underline that these analysis ignore the idea that the state should not be complicit in unjust agreements. "*Justice, in all of its infuriating vagueness, remains the ultimate goal*"[13].

3.- Unconscionable conduct concept under Australian Law. The *unconscionable conduct* concept is mainly used in Australia. From a French Lawyer's perspective, the comparison of the French rules with the Australian ones is full of insights because, as we'll see below, the Australian market presents similarities with the European ones: Australia is characterised by concentrated grocery retail markets[14] and, like in France, large retailers often dictate their own conditions to suppliers. The *unconscionable conducts* provisions play the same role in France: a tool to protect the suppliers against the bargaining power of the retailers.

The *unconscionable conduct* concept is used in the 2010 Competition and consumer Act[15]. A *Chapter 2* deals with *General protections.* A *Part 2-1* is devoted to *Misleading or deceptive conduct*, and a *Part 2-2* to *Unconscionable conduct*. The unconscionable conduct provisions in the ACL prohibit anyone who is in trade or commerce to behave unconscionably in the connection with the supply, or possible supply of goods or services.

These rules cover not only consumer contracts, but also business-to-business transactions on the vertical chain.

The Australian system has the following characteristics:

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[11] Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293 (1975). See also Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines,* 60 U. CHI. L. REV. 1, 2-3 (1993).

[12] Richard A. Posner, *Economic Analysis of Law* (7th ed. 2007) p. 117-118.

[13] Brian Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, Quinnipiac Law Review. 2000;19:715. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 205-06 (2000): According to this view, the state, via the courts, should not enforce private agreements whereby one party exploits or takes unfair advantage of the other.

[14] Barbora Jedličková, Vertical issues arising from conduct between large supermarkets and small suppliers in the grocery market: law and industry codes of conduct, E.C.L.R. 2015, 36(1), 19-29

[15] Section 21, Australian Consumer Law (hereafter ACL). Its precursor : s 51AB(1) of the *Trade Practices Act 1974* (Cth)

1° Firstly, as regards to the scope of the provisions of the ACL, one cannot find any definition in the ACL of what a "unconscionable conduct" is but the term "conduct" refers to any kind of legal act or behaviours, whatever the form ("*a contract*" or "*any conduct hat the supplier or the customer engaged in*"[16]). The legal relations concerned are those between a supplier and a customer, and also the relations between a supplier and an acquirer (i.e. situations where the supplier is in the weak position). As regards to the term unconscionable, the concept has been developed on a case-by-case basis by courts.

2° Secondly, the ACL provides very specific instructions to the court when defining the unconscionability concept. For instance, the Australian code foresees what the judge may not consider when qualifying a behaviour as unconscionable: "*the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention*"[17]. Conversely, the ACL fixes in great details the matters the court may have regard to for the purposes of the definition of what is an unconscionable conduct[18], even if the list of criteria is not limitative.

The judge will implement a body of evidence, the individual circumstances of impugned conduct which may not of their own be characterized as unconscionable, may interact with other circumstances to create a continuum of conduct which does warrant such a characterisation.

As regards to the relations between a supplier and a customer, the ACL invites the judge to take into account:

- the bargaining power of the parties ("*the relative strengths of the bargaining positions of the supplier and the customer*"),
- the adequacy of the consent to the contract of the customer ("*whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services*", and "*if there is a contract between the supplier and the customer for the supply of the goods or services (…) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer*")
- but also related to the economic equilibrium of the transaction ("*the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier*") and the legal

[16] Section 22, ACL.
[17] S. 21.3, a)
[18] S. 22.1, j) ACL.

equilibrium ("*whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services*").

3° This list is not limitative, and the court may refer to others criteria. In this regard, it is quite obvious that the *unconscionable conduct* concept refers to moral value such as fairness and good faith. Besides, the notion of "good faith" is used by the ACL as a factor that can be taken into account by the judge[19]. The Australian Competition & Consumer Commission website defines the concept very broadly: a "*conduct may be unconscionable if it is particularly harsh or oppressive. To be considered unconscionable, conduct it must be more than simply unfair – it must be against conscience as judged against the norms of society*"[20]. About "door to door" and "in home" sales, the Federal Court of Australia stated that "*The word "unconscionability" means something not done in good conscience: for example, Hurley v McDonald's Australia Ltd [1999] FCA 1728 at [22]; ACCC v Allphones Retail Pty Ltd (No 2) [2009] FCA 17; 253 ALR 324 at [113]; Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389 at [291], [293], and the cases discussed therein. No argument was put that required any consideration of the authorities. Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty*"[21].

4.- Preliminary definition. Given the American and the Australian experiences when using the unconscionable concept, one could broadly define unconscionable conducts as acts and behaviours contrary to the values of a given legal order, in relationships

[19] S 22.1 (l).
[20] Australian Competition & Consumer Commission website, V° Unconscionable conduct.
[21] Federal Court of Australia, 15 august 2013, *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90. About the nexus between good faith and unconscionability, E. Peden, When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability, Journal of Contract Law, vol. 21, p. 226, 2005, Sydney Law School Research Paper n° 06/57.

characterized by a bargaining power imbalance. This concept is clearly a tool in the hands of the court to protect the interests of a party in a situation of weakness.

II.- Unconscionable conduct's Law in France

5.- Unconscionable conducts' Law, an historical overview. Although the term "unconscionable conducts" is not used, France is an excellent example of a legal system in which the legislator and the courts have joined forces to fight against unfair behaviours. Labor laws and consumer law are very sophisticated and they offer a very energetic protection for the supposed weak parties. However, the "unconscionable conduct" notion would be useless here because it would duplicate other legal tools. We will focus on relationships between professionals.

For a long time, French law was based on the idea that what has been agreed between the parties has the force of law[22]. Especially, that means that the court is not entitled to change the contractual balance intended by the parties. The 1804's French civil code offered to the judge only a very few means to sanction the contractual abuses by the dominant party. The French commercial code also contained very few provisions favourable to parties in a situation of weakness[23].

Things changed, in France, in the 1970s. The French Supreme Court (*Cour de cassation*) has interpreted the Civil code in such a manner to protect weak contractor, especially retailers in long duration contracts. In particular, the French supreme court has deemed void many contracts in which the dominant party was empowered of the unilateral right to set the price of the goods in long duration exclusive dealing contracts[24]. A few years later, the commercial law was reformed to integrate provisions designed to protect the weak businesses: in 1986, a very important Act laid the groundwork of modern French

[22] Civil code, art. 1134.1 and 1134.2 : "Agreements lawfully entered into have the force of law for those who have made them.
They may be revoked only by their mutual consent, or for causes allowed by law".
[23] See, however, a 1943 Act (codified today in Commercial Code, §. L. 330-1), about exclusive dealing obligations: "The period of validity of any exclusivity clause by which the purchaser, transferee or lessee of movables undertakes with regard to the vendor, assignor or lessor not to use similar or additional items originating from another supplier shall be limited to a maximum of ten years".
[24] C. cass., com., 27 avril 1971, *D.* 1972, Jur., p. 353, comm. J. GHESTIN ; C. cass., com., 11 octobre 1978 ; *RJcom.* 1979, p. 373, comm. Ph. LE TOURNEAU.

competition law and contained, meanwhile, provisions favourable to the weak parties. §8 of the 1986 Act provided that "*Is prohibited … the abusive exploitation by an undertaking or group of undertakings of the state of economic dependence of a client or a supplier which has no equivalent solution*"[25]. §36 of this Act provided as well numerous dispositions to prevent the dominant party from abusing of its bargaining power (discrimination, refusal to deal, tying sales). In 1989, the legislator imposed the supplier to disclose pre-contractual information before entering a long-term contract[26] and a Galland Act, in 1996[27], has greatly enhanced the protection provisions of the 1986 Act.

However, the 1986 and 1996 Acts have not led to many judicial implementations and have been revised, significantly, in 2001[28] and 2008[29].

6.- Abuse of rights and unconscionable conducts. Nowadays, the regulation of unconscionable conducts is made with the concept of abuse. The abuse regulation of unconscionable conducts takes many forms.

In antitrust law, the concept of abuse of a dominant position can catch up conducts by witch a powerful firm exploits clients by setting high prices. It's quite rare that the French competition authority sues a firm for exploitative abuse, but the case-law offers a few examples. For instance, in *Ethicon* case[30], the *Autorité de la concurrence* stated that "*An excessively high price practice can be established whether there is a clear disproportion between this price and the value of the corresponding service, and that this*

[25] Ordonnance, 1er déc. 1986, § 8.

[26] Doubin Act, 31 dec. 1989 : "*Any person who provides to another person a trade name, brand or corporate name, by requiring therefrom an exclusivity or quasi-exclusivity undertaking in order to carry out their activity, shall be bound, prior to the signing of any contract concluded in the common interest of both parties, to provide the other party with a document giving truthful information allowing the latter to commit to this contract in full knowledge of the facts.*
This document, whose content shall be determined by decree, shall specify in particular the age and experience of the business, the state and development prospects of the relevant market, the size of the network of operators, the term and the conditions of renewal, termination and assignment of the contract and the scope of the exclusive rights.
Where the payment of a sum is required prior to the signing of the contract indicated above, particularly to obtain the reservation of an area, the benefits provided in return for this sum shall be specified in writing together with the reciprocal obligations of the parties in the event of renunciation.
The document specified in the first paragraph and the draft contract shall be notified at least twenty days before the signing of the contract or, where applicable, before the payment of the sum indicated in the above paragraph."

[27] Galland Act, 1er July, 1996, law on loyalty and balance of trade relations.

[28] New economic regulations Act, 15th may 2001.

[29] Modernisation of the Economy Act, 4th august 2008.

[30] Aut. conc., décis. n° 09-D-38 du 17 dec. 2009 relative à des pratiques mises en œuvre par les sociétés Ethicon SAS, Tyco Healthcare France et le syndicat national des industries des technologies médicales.

disproportion is not based on any economic justification. Thus, in principle, the assessment of an improperly high price must at first be assessed on the cost of the service. If it is not possible to establish this disproportion by review of costs, it is permissible to use an assessment by comparison with the prices charged by companies in equivalent situations".
The abuse of a dominant position qualification is not considered as an efficient tool to struggle against unconscionable conducts.
However, the regulation of unconscionable conducts is structured around the abuse concept in France (a). There are some caveats to put on (b).

a.- The regulation of unconscionable conducts through the concept of *abuse*

7.- Procedural unconscionability in French contract law. Considering, firstly, the unconscionability in a procedural sense[31], one must observe that French contract law has always provided that the court can pronounce the nullity of a contract if the consent of a party is vitiated. But it is necessary, under the Civil Code, to prove that the consent of the contractor was vitiated by an error, or by deceit (civil code, art. 1109 et seq.). Here, there is gap between the reality and what the contractor believed. An imbalance in bargaining positions is not a sufficient reason for a judicial review of the contract, unless the contract was signed because of a very important physical or moral violence (civil code, art. 1111). If the content of the contract was entered into knowingly, the contract is supposed to be fair, even if the contract was entered into by the parties in different economic positions and even if the weak contractor wished a greater benefit from the contract.

Things are changing. A situation of economic dependence can be analyzed as a particular circumstance to trigger the application of consent protection rules. First, the French Supreme Court held that economic duress can be considered as a matter of violence, stating that "*the transaction may be challenged in all cases where there is violence, and economic duress is linked to violence and not to the lesion*"[32], and that "*the abuse of a*

[31] About the distinction between procedural unconscionability and substantive unconscionability, see above n°2.
[32] Cass., civ. 1re, 30 may 2000: *Bull. civ. I, no 169.*

position of economic dependence, made to take advantage of the fear of a harm directly threatening the legitimate interests of the person, may vitiate consent of violence"[33].

Second, the legislator will soon revise the French civil code. A new §1142 provides that "*There is also violence when a party is abusing the state of necessity or dependence in which is the other party to get a commitment that the latter would not have signed if it had not been in this weak situation*". So the court may 1) identify a state of necessity or (economic) dependence – in other words, a situation of weakness, 2) characterize an abuse of the situation of weakness. The abuse is defined as the fact of obtaining an advantage that the other party would not have granted if he had not been in a position of weakness. However, it is impossible to reconstruct the will of the contractor, as it could have been. So the abuse would be constituted by the fact of obtaining undue (or unconscionable) advantage of the contract. 3) The court may cancel the contract or award damages to the weak contractor.

The concept of abuse is central of this new regime of protection.

8.- Procedural unconscionability in French antitrust law. The concept of abuse is also at the heart of the French antitrust rules applied to unconscionable conducts. The French commercial code provides today that: "*The abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings is also prohibited, if it is likely to affect the functioning or structure of competition. This abuse may include a refusal to sell, tie-in sales or discriminatory practices mentioned in I of Article L. 442-6 or in product range agreements*".

The French competition authority may enforce these provisions and so they do not duplicate the protection rules of the civil code that can be implemented by the civil court. The main interest of this text is to provide a protection to contractors in a situation of economic dependence by an authority that has significant material and human resources. Besides, the competition authority is not required to demonstrate the existence of a dominant position of the undertaking concerned, but only an affectation of the market.

Nonetheless, the implementation of this text has encountered several obstacles. The first problem stems from the interpretation of the condition of an affectation of the *"functioning or structure of competition".* The text requires here an assessment of the

[33] Cass., civ. 1re, 3 apr. 2002: *Bull. civ. I, no 108.*

effects of the abuse on the market. In many cases, the abuse of the economic dependence of a client seems unfair, but it has no anticompetitive effect on the market[34]. The second problem explaining the under-enforcement of this provision is related to the definition of what is "*a state of economic dependence"*. According to the supreme court, this concept is linked to the notion of "alternatives": the undertaking is not economically dependent if it has the choice to contract with another supplier or, broadly speaking, if it has alternatives. According to the French supreme court, "*Economic dependence is defined as the inability for a company to have a solution technically and economically equivalent to the contractual relationships it has established with another company*"[35]. In other words, in the absence of an exclusivity obligation, a client that has not diversified its sources of supply cannot claim to be in a state of economic dependence[36]. The French supreme court said, for example, that "*in the absence of exclusive contractual relationships, the importance of the turnover represented by the licensor brand products is irrelevant in the assessment of the dealer's economic dependence*". This interpretation of the text is questionable because the text only mentions an economic situation of dependency. It should not lead to question whether this dependence originates from the negligence of the buyer. This interpretation shows that the court is reluctant to enforce the text broadly.

The French Parliament is currently considering a bill to reform this text. First, the text would provide that the abuse may affect the structure of competition "*at short or medium term"* so it wouldn't be necessary to demonstrate an actual effect of the abuse. Second, the text would define what a state of economic dependence is: "*A situation of economic dependence is characterized when: firstly, the termination of business relations between the supplier and the distributor could hamper the continuation of its business; secondly, the supplier does not have an alternative to the trade relations, which can be implemented in a reasonable time*". This new wording, recommended by the French Competition Authority, would result in reversing the position of the Supreme court.

9.- Substantive unconscionability in French contract law. In contract law, it is accepted that the judge cannot redo the contract. According to the French civil code (§1134.1), "*Agreements lawfully entered into have the force of law for those who have*

[34] For instance, Cass. com., 22 feb. 2000, *Bull. civ. IV, n° 35.*
[35] Cass. com., 12 feb. 2013, n° 12-13.603.
[36] For instance : Cass., com., 20 may 2014 – n° 12-26.705, n° 12-26.970, n° 12-29.281.

made them. They may be revoked only by their mutual consent, or for causes allowed by law''. Only the penalty clauses may be reduced if they are excessive (§1152 civil code).

Case law, however, has interpreted the Civil Code so as to enable the Court to review the exercise by the creditor of his contractual rights in the name of good faith. Several famous judgments of the *Court de Cassation* thus prohibits the contractor who has the right to unilaterally set the price of a long-term contract to abuse his right[37]. The concept of abuse of rights is central in this control but this tool is not for general application since it is limited to a particular stipulation of framework contracts.

However, the legislator in the fight against substantive unconscionability has dedicated a generally applicable tool: the concept of *abusive clause* (or, more usually said, "unfair term"). This concept allows the judge to withdraw from the contract a clause that causes a significant imbalance between the rights and obligations of the parties. Initially, this mechanism was dedicated in relations between professionals and consumers in the fight against abuse in a contractual situation of procedural unconscionability. The French Consumer code foresees that "*In contracts concluded between a business and a non-business or consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are abusives*"[38].
So it is sufficient that the judge finds that an excessive clause was stipulated in the contract, provided that this is a consumer contract.

But in recent years, by a contagion effect, this mechanism has been introduced in the relationship between professionals. First, the Commercial Code provides since 2008 that "*Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused*… *subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties"*[39].

[37] C. cass., Ass. Plen., 1st dec. 1995, n° 91-19653: "*A clause in a franchising agreement referring to the tariff in force at the date of supply orders to intervene does not affect the validity of the contract, the abuse in pricing will lead simply to termination or compensation*".
[38] Consumer code, § L132-1.
[39] Commercial code, §L442-6, I, 2°, see below n°10.

Above all, the concept of abusive clause will soon join the civil code. A project to reform the Civil code has been issued by the Government. §1169 provides: "*A clause that creates a significant imbalance between the rights and obligations of the parties to the contract can be removed by the judge at the request of the contractor at the expense of which it is stipulated. The assessment of the significant imbalance does not relate to the definition of the object of the contract nor to the adequacy of the price to the performance*"[40].

This text calls for several comments:

- The scope of the text is very broad *ratione personae*: nothing indicates that there is an economic imbalance between the parties. This means that the judge may remove the clause even though each party could read, negotiate, understand the contract. This is a second round in the game, this time before the judge…
- In contrast, the economic substance of the contract shall not give rise to an intervention of the judge: "*The assessment of the significant imbalance does not relate to the definition of the object of the contract nor to the adequacy of the price to the performance*". Only accessories clauses may be removed: those relating to consequences of a breach of the contract, to the allocation of damages, for instance.

This is an important reform to French law, very controversial. It is interesting to notice that the same arguments can be found on the other side of the Atlantic Ocean about unconscionable terms of the UCC.

10.- Substantive unconscionability in French competition law. Since 1996, the French legislator has integrated in the Commercial code many rules to protect the businesses. They are codified in § L. 442-6 of the French commercial code, which provides that: "*Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused*:

1° Obtaining, or seeking to obtain, from a trading partner any advantage unrelated to a commercial service effectively rendered or which is clearly disproportionate to the value of the service rendered…

[40] Projet de réforme du droit des obligations, Code civil, §1169.

2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties;
3° Obtaining, or seeking to obtain an advantage, as a prerequisite to the placing of orders, without providing a written undertaking concerning a proportionate volume of purchases and, if appropriate, a service requested by the supplier which is the subject of a written agreement;
4° Obtaining, or seeking to obtain clearly abusive terms concerning prices, payment times, terms of sale or services that do not come under the purchase or sale obligations, under the threat of an abrupt total or partial termination of business relations…
5° Abruptly breaking off an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices…".

This text is of great interest for the study of unconscionable conducts under French competition law. It holds the attention for several reasons:

- First, the wording of the text does not reserve its application to contracts in which one party is in a position of weakness. He intended to apply to all contracts between professionals. In other words, the legislature does not address the procedural unconscionability, but only substantial businesses.
However, we must qualify this statement. Consulting the case law reveals that most often, the text is applied to unbalanced relationships, particularly in the retail sector. This is also the sector that was taken into consideration during the adoption of the text. Further more, the case law seems to pay attention to individual positions of the parties. The French Supreme courts states that § L.442-6, I, "*leads to appreciate the context in which the contract is concluded and its economy, so that the significant imbalance is characterized after a concrete and comprehensive assessment of the contract or contracts in question*"[41]. The Paris court of appeal held that "*the particular circumstances of the parties must be taken into account, but this should not preclude a more comprehensive understanding of a set of situations when is claimed an imbalance caused by certain*

[41] Cass., com. 3 march 2015: Dalloz actualité, 23 mars 2015, obs. Constantin; D. 2015. Actu. 620.

clauses of a standard contract aimed at various suppliers, some of which are more in a position to negotiate than others and whatever the goods concerned"[42].

- Second, the wording of the text is quite vague[43]; especially when one considers the concept of "abusive clause". This concept has given rise to several judgments. Case law assesses the clauses on a case-by-case basis. For instance, the following clauses have been deemed abusive: the clause under which the distributor's purchase price is based on the lowest resale price charged by other distributors[44]; termination clause for underperformance of a product compared to sales targets[45]; payment of disproportionate trade penalties[46]; surplus back clause[47]. The problem with such a vague wording is that it can lead to quite different interpretations. For instance, the assessment of damages clauses under §L.442-6 I, 2° differs from one court to another[48]. It's all about a matter of circumstances, which is not good for legal certainty.

- Lastly, another feature of this text is that it has not resulted in many applications for many years. Several laws were taken over to improve the regulation, but in vain. This situation of under-enforcement could be explained easily enough by the fact that victims of abuses are often contracting in a precarious economic situation. They prefer to suffer abuse than to sue whoever is responsible, because the legal proceedings will consequence the loss of a hardly substitutable economic partner.

The French legislator is aware of that obstacle to the regulation of unconscionable conducts. For this reason, the commercial code gives the power to several public

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[42] Paris, 4 july 2013: CCC 2013, n° 208, obs. Mathey; RJDA 2013, n° 1053; RLC janv.-mars 2014. 43, note Grall et Tourret.

[43] Curiously, the French Constitutional Council held that the text is note vague at all… "*In determining the purpose of the prohibition of unfair commercial practices in contracts concluded between a supplier and a distributor, the legislature referred to the legal concept of "significant imbalance" between the rights and obligations of the parties contained in art. L. 132-1 C. consum.; in reference to this notion, the content is already specified in case law, the offense is defined under conditions that allow the judge to make decisions without incurring the criticism of arbitrariness, so that given the complexity of the practices that the legislature intended to prevent and punish, the offense is defined in sufficiently clear and precise terms for not breaching the principle of legality of offenses*", Cons. const. 13 jan. 2011: Dalloz actualité, 19 janv. 2011, obs. Chevrier; D. 2011. 415, note Picod.

[44] Commercial Practices Study Commission (« CEPC »), Opinion, n° 10-09, 3 june 2010.

[45] T. com. Meaux, 6 dec. 2011: CCC 2012, no 62, obs. Mathey; RJDA 2012. 103, note Comert.

[46] T. com. Lille, 7 sept. 2011: D. 2012. Pan. 579, obs. Ferrier.

[47] Paris, 23 may 2013: RTD com. 2013. 500, obs. Chagny; CCC 2013, no 208, obs. Mathey.

[48] Comp. Paris, 29 oct. 2014: *AJCA 2015. 39, obs. Pecnard et Tournaire; RTD com. 2014. 785, obs. Chagny; RJDA 2015, n° 146 and* Bordeaux, 11 march 2014: *AJCA 2014. 181, obs. Dany.*

authorities, including the Minister of the Economy, to sue the abuser, even if the victim does not consent to such action. According to the text: "*The action is brought before the competent civil or commercial courts by any person with an interest, the public prosecutor, the Minister for the Economy or the President of the Competition authority when it finds, on the occasion of the matters within its jurisdiction, a practice mentioned in this article*"[49]. The French supreme court held that "*The action of the minister for the economy, exercised under the provisions of art. L. 442-6-III, which tends to the cessation of practices mentioned therein, to the finding of invalidity of illegal clauses or contracts, to the recovery of overpayments and the imposition of a civil fine is a autonomous action to protect the functioning of the market and competition that does not require the consent or presence of suppliers*"[50]

b.- Some caveat about the regulation of unconscionable conducts in France

11.- Reasons for the increase in the concept of abuse to regulate unconscionable conducts. An outside observer might be surprised to find such a progression of the concept of abuse in France, nowadays. In my views, there are several reasons.

The first one is a matter of economic policy: many protection rules were adopted in consideration of the retail sector. French commercial law demonstrated a certain stubbornness; the legislator wants to regulate this sector because it is convinced that disciplining the large retailers will lower their prices. We know that France often prefers demand-side policies.

The second reason is a more theoretical reason: the French legislature, as the European one, wants to stimulate intra-brand competition rather than inter-brand competition, which leads to protect the distributor. This irritates many European lawyers when American lawyers tell them: "*you protect competitors, we protect competition*". It seems to me that this is often true!

The last reason is cultural: our country has an ancient tradition of state intervention in private affairs, even in economic matters. The ideal of contractual justice is deeply rooted in the mentality of our judges, and they do not remain insensitive to the complaints of the weak contractors.

[49] Commercial Code, §L442-6, III.
[50] Cass. com. 8 juill. 2008: *Bull. civ. IV, n° 143.*

12.- Some objections to the French regulation of unconscionable conducts. The regulation of unconscionable conducts seems to raise some objections. I do not place myself in the economic field although I am sensitive to the arguments on the ineffectiveness of this regulation. Besides, the French case demonstrates that. Our regulation is largely a failure in the sector of supermarkets and I think that the cost relating to the implementation of the rule is greater than its advantages – at the benefit of very few contractors (most of the time, without their consent…). Moreover, everyone knows that this type of regulation is problematic for the fluidity of economic structures.

From a legal point of view, the French regulation raises, at least, two concerns.
- First, it is problematic that French rules allow the judge to intervene in the contract relationship without any proof of defect in the contract negotiation process. In other words, there should not be any substantive unconscionability without procedural unconscionability. The French rules lead to unfair situations where a party, which had badly negotiated the convention, could get compensation. It could be objected that the prudence of the court has the result that these texts are not applied in situations where neither party deserves protection. This is not convincing. First, there is nothing to preclude that. Then, the effect of a rule is wider than its judicial representation and this rule will hinder the negotiation and execution of contracts. In my views, the French law should be amended so the civil and the commercial code could limit the scope of the protection rules to specific situations: those where a bargaining imbalance is obvious.

- Second, supposing that one should protect the weak contractor against unfair conducts (which I doubt), we need, in French legislation, and this is also the case in the United States, legislative guidelines to the judge when regulating this type of behaviour. The criteria of the Australian ACC could be emulated. Letting the judge appreciate alone what is an abuse is not good for anyone, neither for the judge himself or for the parties or for the attractiveness of French law.