Subjective Reasons of Gross Disparity and the Presumption of Professional Competence: A Contradiction in the *Lex Mercatoria*?

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Abstract

The article 3.10 of the UNIDROIT Principles flamed a traditional debate among legal writers which reflects to a contradiction between two general principles of international commercial law: On the one hand, the presumption of professional competence of international businessmen is a well established principle of the new lex mercatoria. On the other hand, the article 3.10 of the UNIDROIT Principles, which was drafted by eminent professors of international commercial law recognizes a remedy to the parties which sign a disadvantageous contract because of their "improvidence, ignorance, inexperience or lack of bargaining skill."

What was the aim of the drafters of this article? Does the Art.3.10 really provide that, after conclusion of an international commercial contract, one of the parties to whom the concluded price does not please may rescind the contract with the pretext of his "improvidence, ignorance, inexperience or lack of bargaining skill"? Is the purpose of the presumption of professional competence of international businessmen to enforce an unfair contract in all circumstances, even if the unfairness is caused by the fact that the more powerful party has benefited from the weakness of the other?

I briefy argue in this article that these two principles do not necessarily have to be read in a contradiction, because they are based on different traditions and they are still useful for different purposes. We need, then, to propose an interpretation to read both Art.3.10 and the presumption of professional competence of businessmen so that they do not contradict each other.

In this article I aim to propose a complete and useful reading of these concepts. To do that, I study first the evolution of the concept of contractual equilibrium, with a short look at comparative law, and then I examine the arbitral case law on the application of the presumption of professional competence with particular attention to its relations with the rigidity of the pacta sund servanda rule and gross disparity.

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Art.3.10 of the UNIDROIT Principles of International Commercial Contracts [hereafter, The Principles] has been a ground for a discussion on equilibrium of undertakings within the context of the *lex mercatoria*. The reason why Art.3.10 has called so much attention is that it was touching a fundamental institution of law and it was representing a traditional conflict between two concepts of *lex mercatoria*. On the one hand, Art.3.10 is being criticised by some authors in its inconsistency with the need for certainty in international commerce, and in particular, in its contradiction with the "presumption of professional competence of the parties to an international commercial contract." These authors claim the irrelevance of the Art.3.10 with respect to international commercial transactions.[1]

On the other hand, some authors who favour the position of Art.3.10 argue that the said presumption is only a dated idea of the 19th Century, and it does not fit to actual needs of international commerce.[2]

Shall we, then, talk about two opposing general principles within the context of international commercial law? Does the Art.3.10 really provide that, after conclusion of an international commercial contract, one of the parties to whom the concluded price does not please may rescind the contract with the pretext of his "improvidence, ignorance, inexperience or lack of bargaining skill"? Moreover, is the purpose of the presumption of

[1] Hill, *A businessman's view of the UNIDROIT Principles*, 13 J. Int. Arb. 2, at 166; Alpa, *La Protezione della Parte Debole di Origine Internazionale* in BONELL/BONELLI (eds.) *CONTRATTI COMMERCIALI INTERNAZIONALI E PRINCIPI UNIDROIT* Milan, 1997, at 237; BORTOLOTTI, *MANUALE DI DIRITTO COMERCIALE INTERNAZIONALE, I DIRITTO DEI CONTRATTI INTERNAZIONALI*, Milan 2001 pp. 74-75; Pontiroli, *La protezione del contraente debole nei Principles of International Commercial contracts di UNIDROIT: much ado about nothing?*, Giurisprudenza Commerciale 1997 at 606

[2] Drobnig, *Protection of the Weaker Party* in BONELL/BONELLI (eds.) supra 1 at 217; Bonell, *Policing the international commercial contracts against unfairness under the UNIDROIT principles*, Diritto del Commercio Internazionale 1994 at 267, (and also in BONELL *UN "CODICE" INTERNAZIONALE DEI CONTRATTI* 1995 pp. 111-112); Timoteo, *Nuove regole in materia di squilibrio contrattuale: l'articolo 3.10 dei Principi UNIDROIT*, Contratto e Impresa/Europa, 1997, at 142

professional competence of international businessmen, to enforce an unfair contract in all circumstances, even if the unfairness is caused by the fact that the more powerful party has benefited from the weakness of the other?

Not exactly; however, it is true that a traditional conflict is involved, and it is raised up by the debate on the provision of the UNIDROIT Principles. This article aims to propose a complete perspective of this tension which bases on two opposing concerns, studying the grounds of these concerns and their reflections to some institutions. I do not think that these two principles necessarily have to be considered in a contradiction, because they are based on different traditions and they are still useful for different purposes. We need, then, to propose an interpretation to read both Art.3.10 and the presumption of professional competence of businessmen so that they do not contradict each other.

In order to propose a more correct and useful reading, I will study first the evolution of the concept of contractual equilibrium, and then I will examine the presumption of international commercial law with particular attention to its relations with the rigidity of the *pacta sund servanda* rule and gross disparity.

I. A HISTORICAL AND COMPARATIVE PERSPECTIVE

A. 'Laesio Enormis' and Its Interpretations

The most referred Roman basis of gross disparity is the concept of *Laesio Enormis* based on the Justinian Code 4.44.2 of the *Corpus iuris civilis*.[3] This Code provides a right to rescission to whom has sold a real property for less than half its effective price.

The Code gives us little but precious traces on Roman conception of contractual equilibrium. It belongs to post-classical period of Roman Law, and seems to be enacted for a particular purpose: This is a special code that aims to protect the sellers (thus owners) of land only and does not allow the same remedy to buyers. Therefore, we may observe that when this code was enacted the effects of the liberal ideas of classical period were not so strong anymore as to prevent legislator's interference into contractual relationships (and that the legislator preferred to use its power to protect the wealth of land rather than the wealth of money). A second observation is that this code requires an objective and excessive disproportion, and does not refer to any subjective reason. Thus, the distinction between commercial and non commercial transactions was not yet matured enough as to talk about subjective grounds. Thirdly, we may observe that this disproportion between undertakings

[3] DI MARZO, *LE BASI ROMANISTICHE DEL CODICE CIVILE*, Torino, 1950 at 265: "L'art. 1448, che accorda un'azione generale di rescissione per lesione, se in un contratto sia sproporzione fra la prestazione di una parte e quella dell'altra, è poi una della più larga applicazione della vandita perlsione, detta dei glossatori 'enorme', …, riproducendo un istituto introdotto da Giustiniano, per cui il venditore, che avesse venduto un immobile per un prezzo inferiore alla metà del suo valore effettivo, poteva far rescindere il contratto, a meno che il compratore non preferisce ritenere l'immobile, pagando il supplemento al giusto prezzo ('*vel si emptor elegerit, quod deest iusto pretio recipies*': C.4, 44, 2 interat) Questa rescissione per lesione non aveva luogo in favore del compratore, ma nel medioevo si accordò anche a lui. E del resto l'inflesso del cristianesimo finì col determinare il riconoscimento di un'azione generale di rescissione per lesione nel caso in cui il bisogno di una delle parti fosse stato causa delle lesone stessa."
With respect to the Art 3.10 UNIDROIT Principles, Bonell and Schipani refer to *laesio enormis*: See Schipani, *I Principi UNIDROIT e Il Diritto Romano* in *STUDI (IN ONORE DI) RESCIGNO* Milan, 1998, at 763, and Bonell, supra 2, at 127

gives a right to rescind the contract, but does not make the contract initially invalid; although the institutions regarding validity of contracts were already well established. This fact means that gross disparity was not considered as important as the other grounds of invalidity.

If we read this Code together with Digest 19.2.22.3 and Digest 4.4.16.4 which provide that "It is permitted by nature for one party to buy for less and the other to sell for more, and thus each is allowed to outwit the other"[4], we may conclude that in classical and post classical periods Roman Law did not have a clear principle dealing with contractual equilibrium, and that the Code 4.44.2 was just an exception.

Thus, the principle of equality between the undertakings has found its full sense much later than the enactement of the Code 4.44.2. The reason why this Code is referred as the ground of this principle is that Glossators had based their interpretation (or invention) of the principle of contractual equilibrium on this code. Only after the interpretation of this code by Glossators, the principle of contractual equilibrium has begun to apply to both parties and to all kinds of contracts. It would not be exaggerated to say that their sensitive interpretation has been a cornerstone in the history of the principle of equality in exchange. Glossators' interpretation was focused on such a clear understanding of contractual equilibrium that according to them, the disproportion did not need to be excessive for rescinding the contract if the disproportion was an intentioned result.[5]

With the growing up of commerce in Europe in 12th and 13th Centuries, a more progressive evolution of the principle of contractual equilibrium through more comprehensive interpretations of the Justinian Code is observed. In the 13th Century, the scholastic thought interpreted the Code 4.44.2 under the light of the principle of commutative justice of Aristotle, arguing that this code was an application of the general principle of equality in exchange.[6] Then, in the 14th Century, Baldo degli Ubaldi claimed the existence of the idea of contractual equilibrium in Roman Law, lancing a passage from Digest, which reads the words of Aristotle:[7] D. 12.6.14 (and also D. 50.17.206):[8] "*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*"

In this period, as the distinction of commercial and non-commercial transactions appeared in a clearer manner, leading to the emergence of the subjective grounds of the remedy for non-merchant parties. Baldo degli Ubaldi wrote that a disproportion between

[4] "... per ciò che attiene il prezzo di una compravendita, è naturalmente lecito ai contrenti raggirarsi a vicenda" SCHIPANI (ed.), *IUSTINIANI AUGUSTI DIGESTA SEU PANDECTAE TESTO E TRADUZIONE*, Milan, 2005, at 321

[5] Gordley, *Equality in Exchange* in 1981 CALIF. L.R. 1578, pp. 1639-1640, referring to PORTIUS, *SUMMA CODICIS* Frankfort/Main, 1968; VACARIUS, *LIBER PAUPERUM* Selden soc. 1927; BRACHYLOGUS III, xiii, 8 Frankfort 1743 observes that "By the thirteenth century, Code 4.44.2 had been expanded into a generalized remedy for one-sided contracts by a school of jurists known as the Glossators that originated when the academic study of Roman law first began around 1100... They began by presuming that [disparity in price was an evil] and then distinguished the case where such a result was produced intentionally from the case in which it was not. In the former case, there would be a remedy even for small disparities; in the latter, Code 4.44.2 would apply and there would be a remedy only for disparities that exceeded half the just price."

[6] Gordley, supra 5, at 1638 "Thomas Aquinas and Duns Scotus considered the Roman text (Code 4.44.2.) to be an application of the Aristotelian principle." (referring to AQUINAS, *SUMMA THEOLOGICA*, II-II, a.1, ad 1 SCOTUS, *QUESTIONES IN LIBRUM QUARTUM SENTENTIARUM DIST. XV Q2 IN 18 OPERA OMNIA*, pp. 277 -318, 1894.)

[7] ARISTOTELE *ETICA NICOMACHEA* V 1132 b

[8] BALDO DEGLI UBALDI, *COMMENTARIA* to Code 4.44.2 no 18. "no one should be enriched at another's expense."

undertakings may be the result of a personal deficiency, especially in non-commercial contracts or in contracts where the parties are of different skills of knowledge.[9] His ideas have reflected to the late-scholastic thought of the 16th Century in two principal personal deficiencies which enabled the disadvantaged parties to rescind the contract: Ignorance and necessity.[10]

B. The Liberal Thought Of The 18th Century And Its Effects On National Codifications

The influence of liberal thought on the law of contracts started to be observed with the criticisms of Hobbes and Locke on Aristotle's concepts of distributive and equitative justice.[11] Their criticisms were rather targeting the interpretations of scolastic thought which had constructed its understanding of equality in exchange on the concept of equitative justice of Aristotle. Under the influence of these criticisms and the liberal economic thought of the 18th Century, the jurists of the era developed an idea of absolute contractual autonomy which was free from any limits. In the 18th Century Thomasius argued that "the value depends on the 'mere judgement of men,' and in a contract, on the judgement of the contracting parties themselves, not of other people."[12]

Endemann[13] in Germany and Berlier in France followed the path of Thomasius. According to Berlier "Things do not in general have a true price, just a price; they are worth less to one person, more to another... but the price is known only by the agreement itself"[14] Their thoughts reflected to the French Civil Code as we will see below.

Accordingly, the principle of sanctity of contracts (or *pacta sunt servanda*) used to rule in such an absolute manner that the revision of contract used to be out of question. According to liberal jurists, a contract could not be revised by third persons: Given that it was impossible -according to liberal economics- to precise another "just price" than the one concluded by the parties, there should be no reason for a contract to be examined by a third person.[15]

Their ideas were not totally unreasoned; the interference of third persons into the contractual relationship should certainly have a limit. Even the Justinian Code had allowed

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[9] BALDO DEGLI UBALDI, *COMMENTARIA* to Code 4.44.2 no 21

[10] Gordley, supra 5, at 1643 "Several late scholastic jurists pointed out that the same ignorance or necessity that led one party to accept an unfair price would also lead him to waive the remedy." (referring to PARISIUS, *CONSILIA* cons. XII, no 88 Venice 1543; COVARRUVIAS, *VARIARUM EX IURE PONTIFICIO, REIO ET CAESAREO RESOLUTIONUM II*, iv no. 3, Lyon 1568; MOLINA, *DE IUSTITIA ET IURE*, disat 349, no. 14, Venice 1614)

[11] Gordley, supra 5, at 1591 "According to Hobbes and Locke, society exists to preserve the kind of benefits people might have enjoyed in an asocial state of nature, benefits such as life (for Hobbes) or life, liberty and property (for Locke). Since such benefits belonged to individuals prior to the formation of society, such theories leave little room for distributive justice. They also leave little room for commutative justice in the sense of preserving a given distribution of wealth." (referring to HOBBES, *LEVIATHAN*, London, 1968, pp. 223-224 and LOCKE, *Second Treatise* in *TWO TREATISES OF GOVERNMENT*, Cambridge, 1960)

[12] Gordley, supra 5, p. 1592, referring to THOMASIUS, *DISSERTATIONUM ACADEMICORUM VARII INPRIMIS IURIDICI ARGUMENTI 43*, Haale a.d. Saale, 1777, § 14, 15, 19

[13] Gordley, supra 5, p. 1593, referring to ENDEMANN, *HANDBUCH DES DEUTSCHEN HANDELS-, SEE-, UND WECHSELRECHTS*, Leipzig, 1882, pp. 555-556

[14] Gordley, supra 5, p. 1593, quoted from LOCRÉ 12 *LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE*, Paris, 1826, at 65

[15] Gordley, supra 5, pp. 1590-1603

the remedy only for a disparity of more than half the just price. However, also with the influence of the revolution sprit[16], indifference to contractual equilibrium had excessive results. The revolution was the victory of the wealth of money against the wealth of land. Accordingly, political conditions could not allow anymore an efficient protection to the owners of land. Consequently, the remedy was temporarily suspended in France just after the revolution by decrees of 3 and 12 October 1789.[17] Although the decrees were subsequently retired, their effects have remained in the codification of French Civil Law which will be studied below.[18]

This liberal conception of contractual equilibrium did not limit with Frech Law but has also influenced other european codifications of the era. For instance, before finding its expression in French codification, the liberal approach was formulated by the Prussian Code *Allgemeines Landrecht* of 1794 where it is stated that: "a disparity in price would not invalidate a contract in and of itself" (§ 58).[19]

In the French Civil Code of 1804 the impacts of the liberal thought and the influence of the decrees of 3 and 12 October 1789 have been even more obvious and reflected in the negative formulation of the article 1118:

" Gross disparity does not vitiate agreements but only in certain contracts and with regard to certain persons..."[20]

According to this article, the rule was not to allow the remedy, the exceptions of which were stated in the Civil Code and other codes.[21] With the expression of liberal approach in the Napoleon's Civil Code and political conditions of that period, this approach was adopted by many other legislators and the negative formulation of the French Code influenced many subsequent legislations.

In the *Allgemeines Deutsches Handelsgesetzbuch* of 1861, the French modal is followed. § 286 of the Code provided that "gross injury, including injury over the half, does not void contract."

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[16] GHESTIN, *LES OBLIGATIONS – LE CONTRAT: FORMATION*, 2. ed. 1988 at 625. Also Gordley, supra 5, at 1593 "It has sometimes been thought that this argument [equity of contracts required a just price] lost out because of the bourgeois or liberal spirit of the French Revolution."

[17] "*Décret qui abolit l'action en rescision des contracts de vente 14 fructidor An III*", and "*Décret qui renvoie au comité de législation un projet de décret relative aux ventes attacquées pour cause de lésion, 9 fructidor An III*"

[18] GHESTIN, supra 16, at 625 "Sous l'influence de la doctrine économique libérale du XVIIIè siècle les Révolutionnaires ont proclamé la liberté du prêt à intérêt et se sont montrés hostiles à la rescission pour lésion. En fait la dépréciation des assignats avait donné une importance pratique considérable à cette institution que les vendeurs à crédit utilisaient pour tenter de se dégarer d'opérations devenues désavantageuses. Pour écarter le danger que présentaient ces actions à l'égard du nominalisme monétaire, la convéntion, par un décret du 14 fructidor an III, a supprimé l'action en rescission pour lésion. Une loi du 19 floréal an VI la rétablissait cependant. Ces événements expliquent cependant les restrictions apportées à l'exercise de cette action dans le Code Civil."

[19] However, even in that period the need to recognise the principle of equality in exchande dominated and the remedy was given on another ground than the disparity between undertakings: "Mistake would be presumed when the buyer paid twice the normal price" (§ 59).

[20] "La lésion ne vicie les conventions que dans certains contracts ou à l'égard de certains personnes…"

[21] Exceptions to the Civil Code are mentioned below in the part II - c - i

Another example to be noted is the negative formulation of the art. 165 of the Ottoman *Mecelle* of 1878, which provides: "mere gross disparity does not result to the right to rescind the contract if a deceit is not involved."[22] As this Code applied in a vast region, it influenced the codifications of many countries in the Middle East. For instance the Iranian Civil Code of 1928 puts in the art. 206 that: "If one concludes a contract in economic difficulty or urgent needs, he will not be considered as a distressed person, so such a contract will be valid."[23]

C. The Subjective Theory And Contractual Equilibrium In Contemporary Legislations

As we come to the era of modern codifications, we have two different positions with the influence of Roman Law on the one hand and the liberal influences on the other hand. Modern codifications and case law became the scene of the conflict between the sensitivity regarding the contractual equilibrium and the rigidity of liberal conception of contract law. As we will see below, the solution to the excessive rigidity of modern codifications is usually found in case laws.

i) French Law

The fact that the owners of land regained their political power during the domination of Napoleon reflected, to a limited extent, in the codification of the French Civil Code. Articles from 1647 to 1685 of the Civil Code let the rescission of the contract of sale of land sold for 5/12 of its effective value. Although the article 1118 of the Civil Code had a harmful effect on the principle of equality in exchange, the exceptions to this principle in the Civil Code or in other codes have allowed French judges to an expansive interpretation, and consequently, a wider application of the theory of *lésion*. Besides the articles 1647 et seq., articles from 1706 to 2052 on partnership provide that a contract (or a provision of it) can be rescinded if there is a gross disparity over 1/4.[24]

French judges have also been referring to the lack of "cause of contract" according to the article 1131 of the Civil Code in cases where the price was excessively low or "*dérisoire*".[25]

Another method by the French courts to let the remedy which was not permitted by the article 1118 was the subjective theory. According to this theory in a case of gross disparity between parties' obligations, a defect in the parties' will is presumed.[26] Although the theory has never found its expression within the context of French legislation, it influenced other legislations.

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[22] On the institution of *Gabin* in Islamic Law which corresponds to gross disparity, see also ANSAY *HUKUK TARIHINDE İSLAM HUKUKU*, Ankara 2002, pp. 54-55

[23] It should also be mentioned that the Iranian Civil Code contains an article on gross disparity: Art. 416 lets the rescission of the contract on the grounds of gross disparity between undertakings. See also Izadi, *Iran* in BONELL (ed.), *A NEW APPROACH TO INTERNATIONAL COMMERCIAL CONTRACTS: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS*, the Hague 1999, pp. 155-156

[24] For other exceptions see GHESTIN, supra 16, pp. 626-627

[25] LANDO-DROBNIG, *EXPLANATORY REPORT UNIDROIT 1980, STUDY L-DOC. 17*, at 25 "However, French courts have held contracts for sale of goods invalid for lack of cause in accordance with art. 1131 of the Civil Code if the price was scandalously law (dérisoire) (see Plainol & Ripert, "Traité pratique de droit civil français VII, Obligations, 2. ed. Paris 1952, at262). This rule may also apply to other contracts."

[26] Cass. Soc. [1957] J.C.AT II no. 9762 del 4/5/1956. See also Gordley, supra 5, at 1601

ii) German Law

In German Law, the traces of subjective theory are more obvious. § 138 (2) of the BGB of 1896 reads as: "Void in particular is a transaction whereby one person, with exploitation of the distressed situation, inexperience, lack of judgmental ability or grave weakness of will of another, is promised or acquires, for himself or for a third party, economic advantages whose value exceeds the value of his own performance to such a degree that, under the circumstances, there is a striking disproportion between them."[27]

This article does not only refer to subjective deficiencies such as "distressed situation, inexperience, lack of judgmental ability or grave weakness of will" as first pronounced by Baldo degli Ubaldi, but also provides the subjective criterion of being "striking" for the disproportion. We may conclude that this article constitutes a wide and subjective exception to the rule of § 286 *Allgemeines deutsches Handelsgesetzbuch* of 1861.

An important feature of the subjective theory is that the contract (or an article) that brings disproportion is not rescindable but invalid *ab inizio*, due to the defect in the parties' will.[28] Consequently, the German Code, differing from Roman tradition, does not provide for the adaptation of the contract.

The subjective theory was indeed a reaction to liberal codifications. However, the liberal thought has responded to this reaction by the conception of commercial law as a special field which is subject to specific regulations:[29] § 347 (1) of the *Handelsgesetzbuch* (Commercial Code) of 1898, which is still in force indicates a duty to "observe the standard of care of a prudent merchant" for parties to a commercial contract.

§ 347 (2) of the Code explains the effect of the first paragraph as follows: "The provisions of the Civil Code, according to which the debtor is in certain cases liable only for gross negligence or is required to apply only such degree of care as he usually applies in his own affairs are not affected."[30] That is, "inexperience, lack of judgmental ability or grave weakness of will of another" are not excuses available to merchant parties, but only "distressed situation" is permitted as an excuse.

This article is the expression of a sensibility for the need for certainty in commercial transactions. It also bases on the concern of a probable abuse of the remedy by a professional party who does not deserve the protection of the § 138 BGB. The purpose of this article is justifiable, given that also Baldo degli Ubaldi lets the personal grounds of the remedy only to non-professionals[31], and that letting them to professional merchants could result in abuses and unfairness.

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[27] Before the revision in 1976, the subjective deficiencies were listed as "necessity, indiscretion or inexperience" by the § 138 of the BGB of 1900.

[28] Basedow, *Germany* in BONELL (ed.) supra 23, at 140

[29] For a study of the tension between the autonomy of the commercial law and the commercialisation of the private law, see PELLIZZI *SAGGI DI DIRITTO COMMERCIALE*, in particular, Pellizzi, *Diritto Commerciale o "Droit des Affaires"?*, Milan, 1988

[30] COREN, *GERMAN COMMERCIAL CODE HANDELSGESETZBUCH*, Colorado, 1998, at 151

[31] supra note 9

However, the problem with the § 347 *Handelsgesetzbuch* is that it assumes all merchants as professionals and it's being a mandatory rule. This article is a typical example of the crisis of positive law which appears the most in the rigidity of the binding provisions. In order to deal with excessive results of the § 347 the German jurisprudence has developed its own methods. In the cases of gross disparity in commercial contracts especially where reference to personal deficiencies is impractical, German judges referred besides the subjective theory, to § 138 (1) as well according to which "a transaction that offends good morals is void."

iii) Italian Law

In the article 1448 of the Italian Civil Code of 1865, the influence of the rigidity of the French Law may be observed. This article provides a right to rescission (but not initial invalidity) of the contract which brings disproportion between the parties' obligations with the condition that the disproportion "arises out of urgent needs of a party" and that the disproportion (*lesione*) exceeds "half of the value of the performed or promised obligation by the damaged party at the time of the conclusion of contract." The criterion of disproportion is objective and strict.

Differing from French doctrine and jurisprudence and German legislation, Italian law did not leave room to the subjective theory. This resulted in the absence of any distinction between commercial and civil contracts with respect to gross disparity: The remedy on the grounds of personal deficiencies is denied in all circumstances. This contradiction between the regulations of the Italian Code and of the UNIDROIT Principles leads up to objections to the approach of the Principles among Italian authors.[32]

In addition to an expansive interpretation of the art.1448,[33] the solution that the Italian jurisprudence has offered for one-sided contracts which do not satisfy the conditions of this article has been to declare these contracts invalid on the basis of the absence of the *causa*.[34] With the influence of the particular importance of the *causa* of the contract in the context of the Italian Civil Code of 1942, some Italian jurists evaluate also the art.3.10 of the UNIDROIT Principles according to the importance of the cause.[35]

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[32] See Alpa, supra 1, at 237; BORTOLOTTI, supra 1, pp. 74-75, Pontiroli, supra 1 at 606

[33] TERRUGGIA, *LA RESCISSIONE DEL CONTRATTO NELLA GIURISPRUDENZA*, Milan 1994, at 19 "La giurisprudenza ritiene rilevante anche una difficoltà economica di carattere contingente e perfino una momentanea mancanza o deficienza di denaro liquido." Referring to the decision Cass., 2 luglio 1953, n. 2067, in Giust. Civ. 1953, 2209.

[34] The central importance of the "cause" of contract in the Civil Code of 1942 merits particular attention. Referring to the decision of Cass., 20 novembre 1992, n. 12401, in *foro it.*, 1993, I, c. 1506 Galgano observes that "Ben oltre si era già spinta la giurisprudenza, che aveva equiparato alla mancanza di causa la sproporzione fra le prestazioni contrattuali." Galgano, *Squilibrio Contrattuale e Mala fede del Contraente Forte* 2, Contratto e Impresa 417, 1997, at 419. See also Ferri, *L' 'invisibile' Presenza della Causa del Contratto*, Europa e Diritto Privato, 2002, pp. 897-914

[35] Sicchiero, *Tramonto della Causa del Contratto?* 1 Contratto e Impresa 2003, 100, pp. 118-129 "Riallecciando allora il filo sopra interrotto e prendendo spunto dai Principi Unidroit, si può ricordare anzitutto che aotorevolmente la causa è stata qui individuata nello scopo del contratto cui si riferiscono ad es. gli artt. 3,10, 4.3, 4.8 e 5.2... Soluzione che sembra in definitiva connotare il pensiero di chi, ritenuto il ruolo ambiguo che la nozione di causa avrebbe potuto svolgere 'nelle mani dei giudici' ed approvata quindi l'idea di averlo esclusa dai requisiti del contratto, preferisce 'lasciar capire che la funzione della causa' potrebbe al limite essere assolta anche, sia pure parzialmente, da altri concetti (es qualli di bouna fede o *gross disparity*)."

iv) Turkish Law

Articles 21 of the Turkish (and also Swiss) [36] Code of Obligations provides a right to rescission for gross disparity "if the disparity is a consequence of the distressed situation, or improvidence, or inexperience of the disadvantaged party." Although this article does not provide for a criterion for the amount of disproportion, Turkish case law gives the impression to have adopted the amount of 50%.[37]

Differing from the regulations of the Principles and those of the BGB, we observe that personal deficiencies are a condition to let the remedy[38] but not only "a factor to which regard is to be had." So far, only Swiss-Turkish position has given so much importance to personal deficiencies as to declare them a condition for the establishment of gross disparity. On the one hand, this approach makes the situation of personal deficiencies clearer; but on the other hand it makes the application of the rule more strict, thus strengthens legal certainty.

The sensitive approach of the Code of Obligations is reacted in a regulation of the Commercial Code: Following the example of § 347 of the *Handelsgesetzbuch*, art.20 of the Turkish Commercial Code puts a duty of "to behave as a foresighted businessman" for the merchant parties. That is, personal deficiencies are available to non-merchant parties only.[39]

Turkish jurisprudence, then, makes a distinction among personal deficiencies and lets merchant parties to rely on their "distressed situation" only but not on their "improvidence", or "inexperience". Turkish judges use an expansive interpretation of the "distressed situation" in order to let the rescission of the disproportioned contracts which do not satisfy the requisitions of the Code of Obligations and the Commercial Code.[40] This interpretation is especially employed after the economic crisis of the 2000, in cases in which banks could not pay the high overnight interests that they had promised in the need of liquidity.[41]

The position of Turkish Law is likely to change following the adoption of the new draft for Code of Obligations: although gross disparity is considered as a matter of validity and its remedy has been rescission so far, the new draft for the Turkish Code of Obligations puts in the art.28 also the remedy of asking for restoration of the contractual equilibrium. If this regulation passes, Turkish Law will be one step closer to the UNIDROIT Principles on this issue.

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[36] In 1926, Turkey adopted the Civil Code and the Code of Obligations of the Switzerland, thus the provisions are identical.

[37] YHGK., 12.2.1969 T., E. 1-420, K. 101, Y. 1. HD., 6.5.1980 T. E. 4135, K. 6218.

[38] See UYGUR *AÇIKLAMALI-İÇTIHATLI BORÇLAR KANUNU*, Ankara, 2003, at 1042

[39] In a decision of the Turkish High Court 19. HD E. No 2003-8339 K. No 2004-6999 of 10/06/2004 it is ruled that "although the bank, as a merchant, cannot refer to inexperience or improvidence mentioned in the art.21 of the Code of Obligations, it may rescind the contract in cases in which there is a gross disparity between undertakings because of an exploitation of a distressed situation." ("Tacir olan banka BK. nun 21. maddesinde belirtilen hiffet veya tecrübesizlik hallerine dayanmazsa da müzayaka halinden istifade suretiyle meydana gelen edimler arasında açık bir nispetsizlik bulunan hallerde akdi feshedilebilir") See also KARAYALÇIN *TICARET HUKUKU I. TICARI İŞLETME*, Ankara 1968, at 221; BAŞBUĞ *BORÇLAR HUKUKU*, İzmir 1977, at 90

[40] For an expansive interpretation of the distressed situation of merchant parties see 11. HD E. No 2003-3533 K. No 2003-10450 of 04/11/2003.

[41] See also 11. HD E. No 2003/1229 K. No 2003/6784 of 23/06/2003; 11. HD E. No 2003/3039 K. No 2003/9230 of 13/10/2003 where the availability of the remedy to the banks on the grounds of distressed situation is concerned.

v) English Law

"*The doctrine of inequality of bargaining power*" lanced by Lord Denning in his famous decision of *Loyds Bank v. Bundy* [42], seems to characterise the English approach to gross disparity. In this case, the court let a farmer who agreed to pay a very high interest rate for a credit to rescind the contract on the grounds that it signed it under economic distress. English Law does not refer to any objective criterion for the amount of the disproportion and lets subjective grounds to remedy. This doctrine is based on other doctrines that precede it, such as "*undue influence*" or "*unconscionability.*" The *doctrine of undue influence* rather targets to protect the weaker parties in fiduciary or confidential relationships, such as the relationship between a patient and a doctor.[43] The feature of this doctrine is that it puts the burden of proof of inexistence of undue influence on the alleged dominant party.[44]

Even if the liberal thought had a reflection also in Britain, its effects have been limited comparing with France. Thus, the exceptions to the rigidity of *sanctity of contracts* or *pacta sund servanda* were already present in the court decisions of the late 19th Century, much earlier than *Loyds Bank v. Bundy* decision. In *Akerblom v. Prize*[45] it was confirmed that: "If the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust, the court will disregard it and decree what is fair and just."

We should also mention the *Unfair Contract terms Act 1977* according to which exemption clauses that do not satisfy the criterion of *reasonableness* are invalid.

vi) The Laws of the U.S.A.

In the United States, unfairness in a contract has not been a direct reason for granting a remedy to disadvantaged parties for long time. However, in the mid 20th century, the application of some doctrines has leaded to the evolution of a sensitivity to unfairness in contracts.

In late 19th and early 20th centuries, the *doctrine of consideration* used to apply in a way to allow the performance of any unfair contract, as it did not consider the fairness or the adequacy of consideration.[46] This late liberal approach has changed just after the Second World War, and with the influence of the Second Restatement of Contracts[47] the doctrine started to apply in the opposite sense as to prevent unfairness.[48] This interpretation leaded to the evolution of the *doctrine of unconscionability.*

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[42] *Loyds Bank Ltd. v. Bundy* (1975) QB 326, 339 for a detailed study of the decision see Ricci, *Inequality of Bargaining Power*, 1 Contratto e Impresa/Europa 2005, at 414

[43] http://www.icsahome.com/infoserv_articles/nievod_abraham_undue_influence_law.htm

[44] www.atypon-link.com/VAT/doi/abs/10.1350/ijep.7.4.221.21945

[45] *Akerblom v. Prize* (1881) 7 Q.B.D. 129

[46] Gordley, *An American Perspective on the UNIDROIT Principles*, Saggi, Conferenze e Seminari, 22, Rome, 1996, at 2 "The meaning of the doctrine, according to Anglo-American Jurists of the 19th and early 20th centuries, was that as long as the parties had made a bargain, the law would enforce their contract whether or not it was fair. That was how they interpreted the ancient maxim, 'the common law will not consider the adequacy of consideration.'"

[47] Some paragraphs of the Second Restatement of Contracts were referring to "fairness" such as § 41, 87, 89

[48] Gordley, supra 46, at 5

According the *doctrine of unconscionability* which is developed by the courts[49] unfair and onesided contracts are unenforceable as they are assumed to be made in lack of consideration.[50] Among the decisions which referred to the *doctrine of unconscionability*, the *Jones v. Star Credit* is also referred by the authors of the first draft of the art.3.10 of the UNIDROIT Principles, and the criteria of excessiveness in the first comment of the article ("to shock the conscience of a reasonable person") seems to be inspired from this decision.

After the adoption of the *Uniform Commercial Code* [U.C.C.] the *doctrine of unconscionability* is started to apply in U.S. courts more often.[51] The U.C.C has regulated the *unconscionability* in the § 2.302 which reads as follows:

"If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, as to avoid any unconscionable result.

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making determination"

Although this paragraph is set forth for sale contracts, it applies to other contracts as well.[52] However, we should mention that its application for the purpose of giving remedy to buyers who bought for excessive prices is very relevant.[53] As in the U.S. laws, there is no distinction between civil and commercial transactions, this article apply both to consumer and commercial transactions.

Another doctrine applied by the U.S. Courts to terminate unfair contracts is the English doctrine of *undue influence*. The tendency of applying this doctrine has been even stronger than it was in England.[54]

One last word to conclude the part II: We may extract from all these mentioned above that, after the influence of the liberalism on the contractual equilibrium in the 18th and 19th Centuries, domestic courts have been serving from a vast range of institutions in order to refuse the execution of one-sided contracts.[55] Below, we will see that the art. 3.10 of the

[49] *Jones v. Star Credit Cooperation* 59 Misc. 2d 189, 298 N.Y.S.2d. 264 (Suat Ct. 1969), *Frostifresh v. Reynoso* 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Suat Ct. 1966), *American Home Improvement, Inc. v. MacIver* 105 N.H. 435, 201 A.2d 886 (1964)

[50] Gordley, supra 46, at 6

[51] Lando, *Renegotiation and Revision of International Contracts, An Issue in the North-South Dialogue*, 23 Germ. Y.B. Int'l. L. 37 (1980), at 45

[52] In a decision of West Virginia Supreme Court of Appeals, the court applied this paragraph to a franchising contract: Ashland Oil, Inc. v. Donahue,—W. Va.—, 223 S.E.2d 433 (1976)

[53] Lando, supra 51, at 45

[54] Lando, supra 51, at 45

[55] LANDO-DROBNIG, supra 25, at 24: "There is, and has always been, a need to make it possible for the courts to police explicitly against the contracts or the contract clauses which are unconscionable. In many countries such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance, by stating the contract to be lacking it's 'cause' or the contract clause to be contrary to public policy or to the dominant purpose of the contract. A court must be able to pass directly on the unconscionability of the contract or a particular clause therein and to set it aside or to mitigate it." Gordley, supra 5, at 1655 "In France, Germany, and in the United States, then, courts have been giving remedies when a contract is one-

Principles is representing at the same time, a meeting point of the institutions employed for this purpose.[56]

II. CONTRACTUAL EQUILIBRIUM IN THE LEX MERCATORIA AND POLITICAL GROUNDS OF THE UNIDROIT PRINCIPLES' APPROACH

A. The Principle Of Contractual Equilibrium Of The Lex Mercatoria

There is an opinion that the *lex mercatoria* does not consider the validity of contracts, and that *pacta sund servanda* is observed by the *lex mercatoria* in all circumstances.[57] This opinion is a contemporary reflection of the absolute liberalism of the 18th Century, and it is free from reasoning with respect to new *lex mercatoria*. Such a conception is also dangerous because it leads up to legitimacy concerns about the system of transnational commercial law.

The fact that *pacta sund servanda* is a functional principle to maintain the certainty in international transactions does not make it a principle free from exceptions.[58] Instead, the new *lex mercatoria* has already produced a list of principles on the validity of contracts[59], and *favor validitatis* does not rule as a principle within the context of transnational commercial law[60]

Accordingly, there is a general principle of transnational commercial law on the equilibrium between parties' undertakings': As expressed in the ICC award no: 2291, in 1975: "... any commercial transaction is based on a balance between the reciprocal obligations."[61]

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sided… Generally speaking, the greater the deviation and the more obvious the weakness of the disadvantaged party, the more likely it is that the courts will give a remedy."

[56] In the part III – b

[57] The said opinion reflects to the criticisms to the approach of the art. 3.10 of the Principles. Hill, supra 1, at 166 "It is relatively unusual for parties to have exactly equal bargaining power for a particular deal. But the side that has less bargaining power one day is likely to have more the next day, so things tend to even out over time... Provisions that seek to alter this fact of life would appear to go against free market principles and the fundamental rule that *pacta sund servanda*."

[58] Goldman, *Le Lex Mercatoria dans les Contrats et l'Arbitrage Internationaux: Réalité et Perspectives*, 106 J.D.I. 475 (1979), at 495 "Ainsi, quelle que soit la force légitimitement reconnue au principe *pacta sund servanda*, la jurisprudence arbitrale ne refuse pas systématiquement de prendre en compte les exigences de la justice, et plus prosaïquement, celle de la 'fiabilité' des contracts en presence des bouleversements économiques."

[59] BERGER, *THE CREEPING CODIFICATION OF THE LEXMERCATORIA*, the Hague 1999, pp. 278 et seq. See also www.tldb.net, FOUCHARD, GAILLARD, GOLDMAN, *FOUCHARD – GAILLARD – GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION*, Gaillard, Savage (eds.), the Hague 1999, pp. 821 et seq.

[60] FOUCHARD, GAILLARD, GOLDMAN, *idem*, at 822 "The principles of apparent authority and the presumption of competence tend to favor the validity of contracts. However, this is not to say that there is a general principle of *favor validitatis*. The validity of a contract, in itself, is not something deserving protection. Instead, that validity is conditioned on the complience with the applicable rules of law, be they those of a national law or general principles. In fact, a number of general principles tend to clarify the conditions under which a contract can be held void."

[61] ICC award no. 2291/75 J.D.I. 1978, at 989 "...toute transaction est 'fondée sur l'equilibre des prestations réciproques." Translation taken from FOUCHARD, GAILLARD, GOLDMAN, supra 59, at 825. See also Goldman, supra 58, at 492; Goldman, *Lex Mercatoria*, Forum International, Lecture No. 3, November 1983; also Schmitthoff, *International Trade Usages* in Institute of International Business Law And Practice Newsletter, Special Issue, ICC Publ.440,4, Paris 1987, at 47, under the title of "Some Rules of the Autonomous Lex Mercatoria" Schmitthoff refers to the principle in the fifth position: "Fifthly, there may be a principle of 'equilibrium of reciprocal undertakings'." Kahn, *'Lex Mercatoria' et Pratique des Contrats Internationaux: L'Expérience Française* in *LE CONTRAT ECONOMIQUE INTERNATIONAL: STABILITÉ ET EVOLUTION*

In ICC case no. 2291 a contract of transportation is involved, according to which a French party was obliged to transport load that included a sheet iron, from France to Africa for an English party. The French party, after discovering that the quantity and dimensions of the goods to transport were excessively higher than it had supposed, asks from the arbitrator to increase the price of transport. In the price revision clause of the contract reference is made to railway tariffs of France and Belgium. However, the tariffs do not include a price for an iron sheet. The sole arbitrator decides to increase the price anyway with respect to the iron sheet, referring to the principles of equilibrium between undertakings, interpretation of the contracts in good faith, and the presumption of the professional competence of the parties to an international commercial contract. The reference to the presumption of competence will be studied below, in the part IV.

As in this case the disproportion already exists at the moment of the conclusion of the contract and it is caused by a negligence of one of the parties, we may fairly sat that this case constitutes a pure case of gross disparity, and not a case of hardship where the equilibrium of the contract is harmed by a subsequent event. However, we must note that the principle of contractual equilibrium expressed in the ICC award no. 2291 constitutes at the same time the basis of price revision clauses in international commercial contracts[62] and also of the institution of ***hardship***.[63]

We should read this principle under the light of the economical-political conditions of the post war period in which it has been expressed. The political aspect of this principle not only serves to satisfy ethical concerns[64] but is based also on the necessity to protect the new weaker parties of the international commerce of the 20th Century. In this sense, we should consider first the needs of the actors from the countries of south and of east which had recently acquired their independence and thus, the possibility to administrate their own natural

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Brussels-Paris, 1975, at 196 "Le prix est donc fixé en fonction des conditions existant au moment de la conclusion du contrat et il variera en fonction des paramètres qui reflètent les variations des valeurs des differents éléments qui composent le produit ou la prestation."

[62] Kahn, ***idem***, at 198 "Nous sèrions tentés de voir, dans le nombre des clauses de variation de prix, dans leur relative uniformité quant aux principes, une règle de la ***lex mercatoria*** qui veut dire que des prestations à exécution suivie restant équilibrées sur le plan financier."

[63] ICC award no 2291 "...[le principe] selon lequel les prestations contractuelles doivent rester équilibrées dans les transactions internationales, est habituellement assuré par l'insertion dans les contrats des clauses permettant leur adaptation aux modifications des circonstances éxterieures. Tel est l'objet des clauses de ***hardship***" Referring to Oppetit, ***L'Adaptation des Contrats Internationaux aux Changements de Circonstances: La Clause de Hardship*** J.D.I. 1974, at 704; and also Silard, ***Clauses de Mantien de la Valeur dans les Transactions Internationales*** J.D.I. 1972, at 512. Also in a case of ***amiable composition*** in Switzerland, published in J.D.I., 1959, at 1074 a hardship decision was based on the principle of contractual equilibrium. In this case, a partial performance of a contract on railway construction in Yugoslavia by a French company is concerned. The work is suspended because of political reasons and the Second World War. The French company, having performed the contract from 1932 until 1937, asks ***amiables compositeur*** in 1956 to fix a payment equal to the actual value of its performance. ***Amiables compositeur*** does so by referring to the parties' will to stipulate equal undertakings. The ***amiables compositeur*** decides to a sum about thirty times higher than the sum alleaged by the Yugoslavian Government, considering that: "Attendu qu[']... il était manifestement dans l'intention des parties, au moment où elles ont conclu le contrat, de stipuler des prestations économiquement équivalentes; qu'il est d'ailleurs conforme à l'équité que le paiement, du fait qu'il était différé sur un assez grand nombre d'années, corresponde à la valeur réelle des prestations dont a bénéficié le gouvernement yugoslave...".

[64] Loquin, ***Où est la lex mercatoria?*** in ***SOUVERAINETÉ ETATIQUE ET MARCHÉS INTERNATIONAUX À AL FIN DU 20ÈME SIÈCLE***, Dijon 2000, at 33 "Ces règles [de la ***lex mercatoria***] peuvent intégrer des préoccupp.ions transcendantes eu égard au seul intérêt commun des parties: intérêt du marché, satisfaction des besoins du commerce international, préoccupp.ions éthiques, recherche d'un équilibre idéal du contract..."

sources.[65] In 70's, the fact that most contracts concluded between the governments of southern countries and companies from the north on the extraction of natural resources were or succesively become too burdensome for these countries leaded to increased demands for a new international economic order.[66] As these contracts were effecting the living conditions of large groups of people, their unfairness leaded to a greater sensitivity towards the unfairness in international contracts.[67] The situation of these countries has also had a public international law aspect regarding their international debts. [68]

In the following decades, the concerns about the protection of the weaker parties even increased because of the reason that the impact of the globalisation has been to insert many new non-professional parties into international business.[69] In particular, the fall of the eastern block in 1989-1991, liberalisation of the latin american economies at since mid 80's and liberalisation of far eastern (in particular, Chinese) markets changed fundamentally the constitution of international commercial environment. The impact of the common use of internet for commercial purposes shall also be mentioned. Today, a new environment of global commerce is involved, which is more expansive, with actors from diverse origins, diverse traditions, diverse educations[70] and, thus, diverse powers of negotiation.

[65] Schmitthoff, *Standard Contracts and the Protection of the Weaker Party in International Trade Relations* in FERRY D. (ed.) *NEW DIRECTIONS IN INTERNATIONAL TRADE LAW* VOL. 1, New York 1977, at 184 "The interests which call protection in international trade are thus mainly those of the former colonial countries which have gained independence and of other countries which have lagged behind the rapid industrial development of the United States of America, the Soviet Union and the other European counties. The need to protect the weaker parties in international trade is thus a corollary to the end of the exploitation of their material resources. It is an obligation which rests on the industrially highly developed countries. Without the whole-hearted and willing performance of this obligation the expansion of world trade and ultimately the maintenance of world peace is impossible."

[66] Lando, supra 51, pp.37-28

[67] Lando, supra 51, at 55 "Many contracts of duration made between the governments or enterprises of the South and private enterprises of the North will affect the welfare of large groups of people who are extremely vulnerable even to minor changes in their standard of living. These contracts often have far-reaching effects upon the welfare and health of such people, and some contracts affect entire nations. This consideration calls for a greater degree of sensitivity towards initial unfairness and supervening hardship than has hitherto been accepted by most Northern legal systems."

[68] The public law aspect of the problem of international debts were discussed in seminars and conferences held in Rome in years 1992 and 1995, and presented papers were published in SCHIPANI/ANDRÉS (eds.), *DEBITO INTERNAZIONALE PRINCIPI GENERALI DEL DIRITTO – CORTE INTERNAZIONALE DI GIUSTIZIA*, Roma 1993; SCHIPANI (ed.), *DEBITO INTERNAZIONALE: PRINCIPI GENERALI DEL DIRITTO*, Padova 1995; SCHIPANI/ANDRÉS (eds.), *IL DEBITO INTERNAZIONALE*, Roma 1998

[69] Timoteo, supra 2, at 165 "L'impulso maggiore a riconsiderare i rapporti commerciali internazionali anche in un'ottica di riequilibrio delle posizioni contrattuali è certamente derivato dall'emergere in modo sempre più deciso, delle esigenze dei paesi in via di sviluppo e di un 'New International Economic Order', peraltro ancora in via di definizione."

[70] Bonell, supra 2, at 252 "... the drafters of the UNIDROIT Principles wanted to take into account new developments in international trade: cross-border trade relationships are no longer restricted to countries with more or less similar political and economic conditions, but extend over the entire globe thereby bringing together business people with sometimes considerably different backgrounds and experience."

B. The Approach Of The UNIDROIT Principles

i) The Formulation of the article 3.10

These concerns have reflected to the formulation of the article 3.10 of the Principles.[71] The wording of this article represents a political position concerning about the increasing need for fairness in international commerce.[72] Thus, article 3.10 has been drafted in a manner to let the remedy in a case of disproportion between undertakings in all circumstances, and without leaving room to any exception to exception.

This article reads as follows:

"(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to
(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and
(b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly."

In the first paragraph, the article provides the remedy of rescission of the contract (or a clause of it) on the objective basis of gross disparity between undertakings. Following the German and Swiss modals, article 3.10 (1) (a) refers to subjective deficiencies as the basis of the disparity. However, following the German modal and differing from those Swiss and Turkish, article 3.10 does not provide these subjective deficiencies as a condition to comply for letting the remedy. Instead, these are factors to which "regard is to be had" and they are not exhausted, but are indicated "among other factors."

Although the Principles are "Principles of International Commercial Contracts", the fact that this article makes a complete list in the subparagraph (1) (a) of all the subjective deficiencies attires attention. By letting the merchant parties to rely on their personal deficiencies, the Principles seem to be manifesting the liberal approach of the German and Turkish commercial codes

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[71] Drobnig, supra 2, at 221: "The third type of personal deficiencies, improvidence, ignorance and especially inexperience and lack of bargaining skill, obviously may also occur in international trade. A respectable merchant may be loath to invoke such disqualifying weakness; but it would be futile to count on such self-respect by all trading partners. And certainly, occasionally one may encounter newcomers, especially from the second or the third world who may deserve protection for a very short initial period."

[72] Fontaine, *The Unidroit Principles: An Expansion of Current Contract Practice?* in Special Supplement – ICC International Court of Arbitration Bulletin 2002 Unidroit Principles of International Commercial Contracts: Reflections on their use in International Arbitration, Paris 2002, ICC Publication No 642 E, at 95: "Some of the rules may even reflect what could be called 'political options'. The provision on gross disparity (art. 3.10) is an illustration of this: it represents a stand taken in favour of fairness in contractual relationships, in reaction against certain abusive practices."

Following the French and Italian modals, the subparagraph (1) (b) refers to "the nature and purpose of the contract". In conformity with the § 2.302 of the U.C.C., and differing from the BGB, the paragraph (2) provides the possibility to adapt the contract to "*reasonable commercial standards*" (the criterion adopted by the *Unfair Contract terms Act 1977*). In the paragraph (3), the possibility to request the adaptation of the contract is indicated for the party who receives the notice of avoidance. The reference to the paragraph (2) signifies the *favor validitatis* policy of the Principles.

ii) Repercussions to the article 3.10

The fact that the article 3.10 lets the remedy on the basis of subjective deficiencies has been criticised in its non-conformity to the presumption of international commerce for professional competence of the businessmen.[73]

It has also been argued that this article might find a very limited sphere of application[74] in the business world where professional businessmen already have or have easy access to the required technical knowledge.[75] According to some authors who are suspicious about the article 3.10, this article is more convenient to consumer contracts, and it is not very clear why the authors of the Principles have formulated this exceptional situation as a general principle of international commercial law.[76]

The criticisms about the (prospective) sphere of application of the article 3.10 are not fully free from reasoning. However, the fact that this article may be applied only in exceptional cases should not obscure its importance. This article refers to a fundamental institution of the law of obligations. Even if it did not find any application yet, it expresses a sensibility regarding the new conditions of international commerce.[77] A principle on

[73] BORTOLOTTI, supra 1, at 74 "Ciò anche sulla base del principio generalmente riconoscuito a livello dei rapporti commerciali internazionali che un imprenditore commerciale deve sapere cosa fa e non può invocare come scusante la proprie inesperienza. Considerando tutto ciò, è difficile comprendere come i redattori dei principi abbiano potuto includervi una norma che sarebbe stata più adatta a disciplinare i rapporti con i consumatori che un contratto 'business-to-business.'" Alpa, supra 1, pp. 237 e 244 "L'imperizia, l'inesperienza, l'ignoranza, la mancanza di abilità a trattare sono tutte qualità negative che incidono sulla sfera di rischio di cui la parte deve farsi carico e che non può nè trasferire su, nè ripartire con l'altra; esse risultano pertanto irrilevanti (a meno che non si versi in caso di errore, violenza, dolo)... Si tratta tuttavia di un duplice attacco alla teoria classica: si considera non solo il funzionamento del meccanismo contrattuale dal suo interno, ma si considera anche la posizione soggettiva del contraente ignaro, insipiente, poco abile."
Sicchiero responds Alpa in supra 35, at 119: "Ma per l'osservazione che 'l'imperizia, l'inesperienza, l'ignoranza, la mancanza di abilità a trattare sono tutte qualità negative che incidono sulla sfera di rischio di cui la parte deve farsi carico e che non può nè trasferire su, nè ripartire con l'altra' tesi su cui si dovrebbe sicuramente convenire in astratto, ma che nei Principi sembra subire invece una considerazione diversa, considerazione che dunque può venir disattesa solo a pp.to di ritenere quegli indici di per sé sempre irrilevanti, essendo allora consentito l'annullamento del contratto, in presenza di *gross disparity*, a prescindere da qualsiasi altro requisito."
[74] Although in the ICC award no. 9029, Roma, 03.1998 the application of the article 3.10 of the UNIDROIT Principles has been discussed, the arbitrators have concluded that this article was not relevant in the case.
[75] Pontiroli, supra 1, pp. 604 - 605
[76] Pontiroli, supra 1, at 606 "Il quesito: *much ado about nothing?* non appare dunque retorico, in quanto – anche se le sue disposizioni non sembrano destinare a trovare applicazioni nel commercio internazionale se non sporadicamente – l'art. 3.10 dei *Principles* sembra avere un'altra funzione: quella di offrire agli interpreti municipali il modello per l'adeguamento delle pp.tuizioni private alle loro opinioni in merito alla giustizia contrattuale. Gli imprenditori commerciali, operino essi sui mercati nazionali od internazionali, dovrebbero piuttosto salutare l'art. 3.10 ricordando il monito '*timeo Danaos et dona ferentes*'."
[77] Ricci, supra 42, at 441 "Nella dottrina ha suscitato perplessità il terzo gruppo di ipotesi (imperizia, ignoranza, inesperienza, mancanza di abilità a trattare), previsto... per tutelare i soggetti 'neofiti' del commercio

contractual equilibrium is proved to be useful in the case of the ICC award no. 2291. With respect to a national law, the rule on gross disparity of the Turkish code has been employed in order to overcome the harmful effects of the economic crises of the 2000.

In which other exceptional circumstances, then, we may serve from the article 3.10? The illustration in the official comments may give us an idea: here a state entity of a developing country buys an outdated assembly line of cars for a "manifestly excessive" price. The illustration does not tell us how a state entity could make such a disadvantageous business without examining the market conditions. But do we not already know it? In the business world, one may come across to such contracts as consequences of either a corruption or a political reason. Given that the corruption is an organised crime, it is not always easy to prove it, especially with respect to contracts to which a state is a party. In cases which it is not practicable to refer to the principle of the *lex mercatoria* that the contracts against *bonos mores* and obtained by corruption are invalid[78], shall we consider the contract valid and give up the public benefit? It would not be exaggerated to pretend that application of the gross disparity rule before the economic crisis of the 2000 in Turkey could even prevent harmful results of the crisis that Turkish judges have tried to minimise referring to this principle.

Such an important necessity of the international commerce could be satisfied only by a transnational codification. Given that the UNIDROIT Principles are the unique list of principles aiming application in the whole globe, there could not be a more convenient text to include this article.

I, thus, welcome this article as an expression of the sensibility on which it is based; and I believe that this article should be assessed under the light of the concerns mentioned above.

III. THE PRESUMPTION OF THE PROFESSIONAL COMPETENCE OF THE PARTIES TO AN INTERNATIONAL COMMERCIAL CONTRACT

In the new lex mercatoria, "there is a presumption of the professional competence of the parties to an international commercial contract. The parties may therefore not argue that they were not aware of the significance of the contractual obligations to which they have agreed."[79]

As studied above, this presumption is not as rooted as the principle of equilibrium of contractual undertakings, but it bases on the evolution of commercial law as an independent discipline and specific needs of commercial transactions such as a stronger certainty.

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internazionale, provenienti dei Paesi del secondo e terzo mondo." Timoteo, supra 2, at 142 "La disposizione dei Principi offre dunque l'occasione per una riflessione sul tema che si spinga oltre l'ambito dei contratti con i consumatori (rispetto ai quali il controllo di contenuto sul presupposto della disparità di potere contrattuale è un dato acquisito) per addentrarsi fino ad un settore, come quello del commercio internazionale, tradizionalmente vocato alla 'sanctity of contract' più che a preoccupazioni di giustizia contrattuale." Copari, *L'Equilibrio delle Posizioni Contrattuali nei Principi UNIDROIT*, 1 Europa e Diritto Privato 2002, at 39 "Le norme sull'equilibrio delle posizioni contrattuali... costituiscono, del resto, esempio della rilevanza di una definizione che, rispondendo alle esigenze del commercio internazionale, esprime l'avvicinamento e l'evoluzione delle diverse culture giuridiche del contrato."

[78] FOUCHARD, GAILLARD, GOLDMAN, supra 59, pp. 822 et seq. FRIGNANI *L'ARBITRATO COMMERCIALE INTERNAZIONALE/UNA PROSPETTIVA COMPARISTICA*, Padova 2004, at 145

[79] BERGER defines the presumption this way in supra 59, at 301 and also in www.tldb.net

This presumption does not function as a specific rule which aims to prevent the remedy of rescission because of disproportion between contractual obligations; but it is a general principle which serves in diverse situations. It is true that its application in cases of disproportion between undertakings represents a need for certainty in transactions, which had reflected also to national codifications such as the § 347 of the *Handelsgesetzbuch*, and the article 20 of the Turkish Commercial Code. As in national laws, a justifiable concern of preventing an abuse of the remedy of rescission of the contract reflected also to the application of this principle.[80] However, this is true only for two cases[81], and the application of the presumption in a case of gross disparity is as exceptional as the application of the principle of the equality in exchange.

Thus, this principle does not serve as the authors who criticise the principle of equality in exchange allege it, to maintain disproportioned contracts (or clauses) valid even if they are concluded by non-professionals; and in fact, there is not a real contradiction between these two principles of the *lex mercatoria*. It could be useful to take a short look at the application of the presumption in the awards which refer to it to see that there is not any case in which arbitrators referred to the presumption in order to enforce a one-sided contract without examining the degree of care of the disadvantaged party.

We may also observe that this principle is not a specific rule about the initial validity of contracts, instead it is referred as a general principle also in cases of *hardship*, *force majeur*, interpretation *contra proferentem* and even in a case regarding interpretation of a C&F term. One of the awards referring to the presumption, interesting enough, is the ICC award no. 2291 studied above.

i) Application of the presumption in cases regarding the equilibrium of undertakings

There are two awards in which arbitrators employ the presumption in order to prevent an abuse of the principle of contractual equilibrium:

In the ICC award in case no. 1990,[82] a concession contract is concerned according to which an Italian party permits a Spanish party to sell its products in Spain. A clause in the contract provides the transformation of the sale concession into a concession for production in case if the importation of the products from Italy to Spain becomes impossible or objectively difficult. In that case the Spanish party would have to pay a commission of 10% to the Italian party. After a few months from the conclusion of the contract, the Spanish party begins to production with the pretext of the fluctuation in the currency of Spanish peseta, but it does not pay the commission. When the Italian party brings the case before arbitrators, the Spanish party argues that its intention was not to obtain a sale concession, however it did not have the possibility to bargain with the Italian party. Arbitrators decide that:

[80] Gordley, supra 5, pp. 1602-1603 "The fact that these nineteenth-century slogans have become unpopular should not blind us to the strength of the argument… When a court judges the wisdom of the agreement, it is making the decision normally reserved for the parties. Moreover, a contract would not be binding if the mere fact that an agreement was unwise or unprofitable were a reason for giving relief. After all, any party who tries to escape from a contract will have found it unwise or unprofitable"

[81] I refer to ICC awards in case 1990, J.D.I. 1974 and case 2438, J.D.I. 1976.

[82] ICC award no. 1990, J.D.I. 1974, at 897

"Une fois engagée par sa signature, elle ne peut pas s'en libérer quelques mois plus tard sous le prétexte qu'elle ne se rendait pas exactement compte de ce qu'elle a signé... "

Another ICC award, in case no. 2438,[83] is on a conflict about a contract which obliged a French party to furnish, assemble and to put in service the materials to produce citrus juice for a Spanish company. The French party suspends the work claiming that the costs exceeded the amount it had provided, and asks for an increase in price. Arbitrators decide that the seller was bound by what it had concluded on the grounds that there was no reason for not being able to provide the costs for an international merchant, like the French party.

In both cases, the application of the presumption is justified in the prevention of an abuse of the remedy of rescission by professional parties. One may also observe that the presumption is not applied in an absolute manner so as to deny the remedy without questioning the level of competence of the parties.

ii) Application of the presumption in other issues

Other arbitral awards which refer to the presumption employ it in a wide range of fields. There are two awards in which the presumption is referred to while determining the allocation of risks. In the ICC award no. 3130,[84] the sole arbitrator refers to the principle while deciding on a dispute of a sales contract under C&F terms saying that the parties should be admitted "to have signed the sales contract in perfect knowledge of the particular characteristics of international sales contracts C and F."

In the other award on the ICC case no.1512[85], a Pakistani bank issues a guarantee in favour of an Indian bank. However the Pakistani bank does not pay the guarantee claiming the emergency legislations in Pakistan caused by the armed conflict between these countries. Arbitrators decide in this case that when Pakistani party undertook the guarantee, it could predict the risk of war; and thus should bear this risk. Here the purpose of the reference to the presumption is not to deny the institution of ***hardship*** and the principle of contractual equilibrium on which it is based, but rather to determine the distinction between a situation of ***hardship*** and the risks allocated by the parties.

The presumption has also served to interpret the content of the contracts: The ICC award in case no. 3380[86] refers to the presumption of interpretation of an applicable law clause, in a very close sense with the ***contra proferentem*** rule. In an investment contract between the Syrian government and an Italian firm there are two applicable law clauses. One of them refers to the general principles of law and equity, whereas the other refers to the Syrian law. On the claim of the Syrian party for the application of the Syrian law, arbitrators decide that the clause referring to general principles cannot be denied given that professional representatives of the Syrian government accepted it.

Another ICC award, in case no. 5346[87] is about a consortium aiming the expansion of a cement factory composed of the owner of the factory, a French firm and an Egyptian

[83] ICC award no. 2438, J.D.I. 1976, at 969
[84] ICC award no. 3130, J.D.I. 1981, at 932
[85] ICC award no. 1512, Y.C.A. 1976, at 128
[86] ICC award no. 3380, J.D.I. 1981, at 927
[87] ICC award no. 5346, J.D.I. 1991, at 1059

firm. After the foundation of the consortium, the owner of the factory and the French party conclude another contract to which the Egyptian party was not invited and which provided for the construction of a line of production. The Egyptian party argues that this work makes part of the purpose of the consortium, protests the contract of the other members of the consortium and initiates arbitration procedures. The arbitrators decide in favour of the Egyptian party, and rule that: "All the parties are sophisticated companies which possess experience with respect to important construction contracts. It is therefore certain that they have taken great care and attention to the wording of their contract."

As for the ICC award in case no 2291 studied above on the determination of the price of transportation of an iron sheet, the arbitrator refers here to the presumption of the professional competence with respect to "parties' duty to observe a normal, useful and rational degree of care in the protection of their interests". That is, the professional competence of merchants requires them to prevent the others' losses, even if this loss signifies a profit for them. In this case the sole arbitrator uses the presumption of professional competence for the same purpose of the principle of equality in exchange: To restore the balance of the contract. This reference to the presumption of professional competence in the same award in which the principle of equality in exchange was referred to proves that there is not a genuine contradiction between these two principles; instead they can even be employed in the same case.

IV. CONCLUSION

From all above discussion we may extract the observations that: First of all, the principle of equality in exchange is superior to the presumption of professional competence, and that the presumption (and its application in the field of contractual equilibrium) represents the limits to the general principle. Secondly, neither the principle, nor the presumption is absolute. The distinction between them is drawn by economic and political needs. It would not be fair to choose and favour one of them against the other, as they have different scopes of application.

It is possible to predict that the presumption of the professional competence of businessmen would not be applied in cases where a weaker party of international commerce needs the protection of the article 3.10 of the Principles; and vice versa, the principle of contractual equilibrium is not likely to be employed when it may result to an abuse of the remedy by a professional party. There is no contradiction in this situation. Instead, fairness and justice requires the common presence of both principles. If arbitrators observe good faith and fair dealing in the application of them[88], there will be no room to worry about any abuse of the principle of contractual equilibrium, nor any excessive effect of the presumption. The two principles have to be conceived according to the needs on which they are based. The jurisprudence tells us that (exceptional) application of these two principles will go on in cases where economical and political conditions will require them.

[88] Schipani, *Unità e Specificità del Sistema Giuridico Latinoamericano e 'Principi di UNIDROIT' Cenni per un Programma di Lavoro* in BONELL/SCHIPANI (eds.), *PRINCIPI PER I CONTRATTI COMMERCIALI INTERNAZIONALI E IL SISTEMA GIURIDICO LATINOAMERICANO*, Roma 1996, at 324 "Nei contratti, particolarmente in quelli internazionali, l'accordo fra le parti è elemento costitutivo centrale; ma il fondamento del valore vincolante dell'accordo è, a cominciare dal *ius gentium*, la *fides bona*, e quindi la volontà vincola nella misura in cui si fonda sulla buona fede."