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Introduction

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UNCONSCIONABILITY AROUND THE WORLD: SEVEN PERSPECTIVES ON THE CONTRACTUAL DOCTRINE

Introduction

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This symposium on unconscionability illustrates comparative law's vitality in contemporary American legal studies, and the modern comparatists' approach of concentrating on the evolution of a specific doctrine in various parts of the world.

This symposium includes Articles on unconscionability in the United States, Canada, Australia, India, South Africa, and Switzerland. It also includes a broad comparative study on the development and present status of the doctrine in England, France, Germany, and the United States. These Articles demonstrate the richness and complexity of the doctrine of unconscionability.

In the United States, this doctrine, as stated in Article 2 of the Uniform Commercial Code,[1] constitutes a synthesis of classical equitable doctrines that are well known and widely employed in the common law tradition. These doctrines include duress, undue influence, deceit, mistake, fraud, violence, absence of cause, abuse of confidence, coercion, misrepresentation, forfeiture, restraint of trade, and estop-

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1. U.C.C. § 2-302 (1990).

pel. In addition, the United States' unconscionability law reflects the French theories of *lesion*, *erreur*, *violence*, and *dol*, as well as the German and Swiss principles of loyalty and good faith.

Similarly, the French legal system endeavors to create protective measures against *clauses abusives*, which in Latin American systems are known as *clausulas leoninas*, or "lions' clauses."

These doctrines and theories are inspired by the fundamental and transcendental principles of justice and equity, which are contained in the Greco-Roman-Jewish heritage of Western civilization. The concepts of justice of the Athenian philosophers, and the ideas of *aequo e bono* of Roman law,[2] and *yashar v'tov* of the Bible,[3] have produced a desire in common and civil law systems to establish rules and procedures to protect victims of unfairness and contractual violence.

The sanctity of contracts contained in the Biblical rule of *motzeh sfassecha tishmor*, or "thou shall keep thy word," and in the Roman adage of *pacta sunt servanda*, the modern doctrine of freedom of contract, and the laissez faire spirit all had to be balanced by counter-principles arising from the socio-economic realities and necessities of different times and places. Civil law scholars have referred to state intervention in private agreements as the process of "publicization of private law."[4]

The concept of overpricing, or disproportion between the obligations of the parties, governed by the French,[5] German,[6] and Italian[7] civil codes, the Swiss Code of Obligations,[8] and decisions by courts in common law systems, was well known in Roman law and in Jewish law.

In Jewish law, the principle of overpricing materialized in the rules of *ona'ah*, or "overreaching," which was measured by an

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2. *See* DIG. 1.1 (Ulpianus, libro primo institutionum) ("[U]t eleganter Celsus definit, ius est ars boni et aequi.") (*translated as* "For, in terms of Celsus' elegant definition, the law is the art of goodness and fairness.").

3. *Deuteronomy* 6:18 ("Do what is right and good in the sight of the Lord, that it may go well with you and that you may be able to possess the good land that the Lord your God promised an oath to your fathers . . . .").

4. *See* RENÉ SAVATIER, LES MÉTAMORPHOSES ÉCONOMIQUES ET SOCIALES DU DROIT PRIVÉ D'AUJOURD'HUI (1959).

5. CODE CIVIL [C. CIV.] arts. 887, 1674-85 (Fr.), *translated in* THE FRENCH CIVIL CODE, AS AMENDED UP TO 1906 (E. Blackwood Wright trans., 1908).

6. BÜRGERLICHES GESETZBUCH [BGB] art. 138(2) (F.R.G.).

7. CODICE CIVILE [C.C.] art. 1448 (Italy), *translated in* THE ITALIAN CIVIL CODE (Mano Beltramo et al. trans., 1991).

8. SCHWEIZERISCHES OBLIGATIONENRECHT [OR] art. 21 (Switz.).

amount one-sixth above or below the market price. Where the price discrepancy amounted to more than one-sixth, the transaction was invalid, unless the injured party agreed to settle the difference.[9]

The same idea of *laesio enormis* was consecrated in the Code of Justinian:

> The Emperors Diocletian and Maximian to Lupus. If either you or your father should sell property for less than it is worth, and you refund the price to the purchasers, it is only just that you should recover the land which was sold by judicial authority; or, if the purchaser should prefer to do so, you should receive what is lacking of a fair price. A lower price is understood to be one which does not amount to half of the true value of the property.[10]

Additionally, the Digest of Justinian quotes the famous saying of Ulpian: "Iuris praecepta sunt haec: honeste uivere, alterum non laedere, suum cuique tribuere."[11]

The doctrine of unconscionability and its underlying theories and principles are manifestations of the basic principle of protection of human rights. In recognition and enforcement of foreign judgments, it is universally accepted that the defendant must have been duly served and the foreign decision must be res judicata to guarantee the protection of the basic human right of due process of law. Similarly, the doctrine of unconscionability is a human right that extends legal protection to the weak against impositions by stronger parties. The universality of this doctrine is shown in the Articles that follow.

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9. MENACHEM ELON, THE PRINCIPLES OF JEWISH LAW 215 (1975).

10. CODE J. 4.44.2 (Diocletian and Maximian to Lupus).

11. DIG. 1.1.10 (Ulpianus, libro primo regularum) (*translated as* "The basic principles of right are: to live honorably, not to harm any other person, to render to each his own.").