VALIDITY UNDER CHAPTER 3 OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

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Three points leap out at an American common lawyer who reads the Validity chapter of the UNIDROIT Principles ("Principles"):

It stands in sharp contrast to the Convention on the International Sale of Goods ("CISG"), which expressly eschews any attempt to regulate validity.[2] The CISG is positive law[3] but its application may be excluded by the parties to a contract.[4] The jural force of the Principles is less clear in both respects.

The Validity chapter is similar in many ways to the parallel portions of the American Law Institute's Restatement (Second) of Contracts ("Restatement (Second)"),[5] which is very influential in the United States of America.

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2 CISG, Article 4: "[E]xcept as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; ..." See Hartnell, Helen Elizabeth, "Rousing the Sleeping Dog: The Validity Exception to the Convention on the International Sale of Goods", 18 *Yale J. of Int'l L.*, 1 (1993).

3 CISG, Article 1.

4 CISG, Article 6.

5 Compare, *e.g.*, Principles Article 3.4 (Definition of mistake) with Restatement (Second) 151 and Comment *a*; Principles Article 3.5 (*Relevant Mistake*) with Restatement (Second) 152-55 and Comments; Principles Article 3.9 (*Threat*) with Restatement (Second) 175 and Comments. That is not to say that there are no differences. For example, the fraud provision of Article 3.8 does not deal with non-fraudulent but material

One article, however, the gross disparity provision of Article 3.10, is radically different from existing common law, and appears to be an extension of law even in many civil law systems. This provision, and related ones in other chapters of the Principles, will, I believe, cause great concern in the United States of America. Without claiming any expertise in Canadian law, I suspect that there also will be concern over these provisions in the common law (that is, English-speaking) provinces of Canada.

I will briefly go through the Chapter and then focus on Article 3.10. At the risk of intruding on other papers, I will also consider what role the Principles are likely to play, particularly if Canadian and American lawyers attempt to exclude the Principles from contracts, as is commonly done with the CISG.

An Overview of Chapter 3. The Validity chapter begins by excluding from its scope lack of capacity or authority and immorality or illegality[6] and then eliminates lack of consideration as a validity issue by substantively eliminating any requirement of consideration or *cause*.[7] It also excludes initial impossibility as a validity issue,[8] treating the issue as one of non-performance, to be dealt with either as a matter of force majeure[9] or under the hardship section of Chapter 6 (Performance).[10]

misrepresentation, as does Restatement (Second) 164, and the discussion in Article 3.9 of when a threat is unjustified is written only in broad terms ("wrongful in itself, or... wrongful to use... as a means to obtain the conclusion of the contract"), while the parallel discussion of Restatement (Second) 176 includes a number of specific categories such as threats of crimes, torts and criminal prosecution as well as a residual category of the use of power for illegitimate ends. Nonetheless, it seems fair to say that most of the first half of Chapter 3 would be quite familiar to an American lawyer raised on the Second Restatement of Contracts.

6 Principles, Article 3.1.

7 *Idem*, Article 3.2.

8 *Idem*, Article 3.3: "1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract. 2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract". Comment 1 to Article 3.3 indicates that the main reason for this provision is to reject the older rule of some jurisdictions that treats as void a contract for the sale of goods no longer in existence at the time of contracting.

9 See *idem*, Article 7.1.7.

10 See *idem*, Articles 6.2.1.-2.3.

The next six articles deal with three topics that are quite familiar to common lawyers: mistake, fraud and "threat" (we would say "duress"). Mistake requires four articles, fraud and threat, only one apiece. As noted earlier,[11] while there are minor differences, the three categories are quite similar to existing common law rules, as described in the Restatement (Second) of Contracts.

Passing for the moment Article 3.10 on gross disparity, most of the remainder of Chapter 3 deals with procedural and similar matters. Article 3.11 allows a contract to be avoided because of acts of fraud, threat, gross disparity or mistake when made by a third party for whose acts a party is responsible. It also applies if the party knew or should have known of the third party's acts, or if the party has not relied on the contract. Articles 3.12 through 3.17 deal with the procedure for the avoidance and confirmation of contracts when there has been an event that triggers an invalidity claim. Article 3.18 says that damages are available whether or not the contract has been avoided.[12]

The last two articles of Chapter 3 are of greater interest. Article 3.20 (unilateral declarations) says that the provisions of Chapter 3 "apply with appropriate adaptations to any communication of intention addressed by one party to the other". This should be read along with Article 3.2, which dispenses with consideration or *causa* as long as there is an agreement. The two provisions show an unwillingness to allow contract formalities to be used as a defense when a validity issue arises. Article 3.19 reads: "The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake". Thus, the gross disparity provisions of Article 3.10 may not be disclaimed, although the question whether the Principles can be avoided is more complex; I will discuss Article 3.19 as part of the question of disavowal later in this chapter.

If Article 3.10 were not included, Chapter 3 would have been quite unremarkable. The other validity provisions are modest but protective and are in broad enough terms so that they will be adaptable when they are applied to new forms of conduct in future years. It is, however, the gross disparity provision that deserves detailed attention.

11 See note 5, *supra*.

12 "[S]o as to put the other party in the same position in which it would have been if it had not concluded the contract". Principles, Article 3.18.

Gross Disparity. Article 3.10 reads in its entirety:

> 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
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> 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
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> 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 acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.[13]

This provision is a lineal descendant of the Roman *laesio enormis*, which permitted a contract to be avoided when the discrepancy between the values exchanged was two to one or more.[14] The French concept of *lésion* applies a similar mathematical approach, but only to sales of real property.[15] The new Civil Code of Quebec, however, makes *lésion* applicable generally to contracts: "La lésion résulte de l'exploitation de l'une des parties par l'autre, qui entraîne une disproportion importante entre les prestations des parties; le fait même qu'il y ai disproportion importante fait présumer l'exploitation." ("Lésion results from the exploitation of one of the parties by the other, which involves an important

13 Article 3.13(1) involves avoidance for mistake and provides that if the disadvantaged party seeks to avoid but the other party is willing to perform the contract as understood by the party claiming mistake, "the contract is considered to have been concluded as the latter party understood it". Article 3.13(2) provides: "After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective". According to the Comments, this means that if a party entitled to avoidance requests adaptation only, it loses its right to avoidance.

14 See Bonell, Michael Joachim, "Policing the International Commercial Contract Against Unfairness Under the UNIDROIT Principles", 3 *Tulane J. Int'l & Comp. L.*, 73, 88 n. 95, citing Gordley, James, "Equality in Exchange", 69 *Cal. L. Rev.*, 1587, 1643 (1981).

15 Code Civil article 1674: "Si le vendeur a été lésé de plus de sept douzièmes dans le prix d'un immeuble, il a le droit de demander la rescision de la vente..."

disproportion between the benefits of the parties; the very fact that there is an important disproportion causes a presumption of the exploitation.")[16] The Obligations Volume of the Mexican Civil Code does not seem to have such a provision; at least I, with my limited Spanish, could not find one there. Our colleague, Joseph Perillo, however, has pointed to Article 17 of the Mexican Civil Code, which in translation reads: "When any person taking advantage of the supreme ignorance, notorious inexperience or extreme poverty of another, obtains an excessive profit which is evidently disproportionate to the obligations assumed by him, the person damaged has the right to demand the rescission of the contract, and if this be impossible, an equitable reduction in his obligation."[17]

The adjectives in the quoted language suggest that it is limited to the very poor, gullible or uneducated, while Article 3.10 has no such limitation.

In American law, the most similar provision is Section 2-302 of the Uniform Commercial Code, authorizing the courts to refuse to enforce contracts or terms that are "unconscionable".[18] This section has been very influential, but has only rarely been applied to price disparity[19] and then only in consumer cases.[20]

16 Code Civil du Quebec artículo 1406. The English translation is my own. "Fait présumer" does not translate very well into English. "Makes to presume" is not idiomatic English, so I have rendered it "causes a presumption of".

17 Perillo, Joseph M., "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review", 63 *Ford. L. Rev.*, 281, 293 n. 74 (1994), citing Civil Code [C.C.D.F.] *Article* 17 (Mex.). Similar provisions can be found in German and Scandinavian contract law. Bonnell, *supra* note 13, at 86 n. 87. The European Economic Community's famous Council Directive 93/13 of April 5, 1993 in its Article 3(1), holds a standard form contract unfair "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". It is, however, by its own terms, limited to contracts of adhesion involving consumers.

18 "*Unconscionable Contract or Clause* (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

19 See Farnsworth, E. Allan, *Contracts*, 329-30 (2d ed. 1990). Professor Farnsworth played a major role in the production of both the Restatement (Second) of Contracts and the UNIDROIT Principles.

20 *Idem*., at 330. See, *e.g*., American Home Improvement *v*. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); Jones *v*. Star Credit Corp., 59 Misc. 189, 298 N.Y.S. 264 (1969); Toker *v*. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (1970); Perdue *v*. Crocker Nat'l Bank, 38 Cal. 3d 913, 702 P.503 (1985).

The Uniform Commercial Code is positive state law, having been enacted by each of the fifty state legislatures. (Article 2, covering transactions in goods, which includes the unconscionability section, was not adopted in Louisiana, which has an idiosyncratic civil law system reflecting its French and Spanish roots.)

A similar provision was included in the Restatement (Second) of Contracts 302, which unlike the Uniform Commercial Code, is not positive law, but is the product of a private organization seeking to advance the law. Although UNIDROIT is a public body, there is an obvious parallel between the Principles and the Restatement of Contracts. The Restatements have been very influential in the United States, having been cited by American courts more than 100,000 times in the past 70 years. American courts have definitely used the unconscionably doctrine in contexts not covered by the Uniform Commercial Code, so the Restatement claim that unconscionability has become a common law doctrine in the United States appears justified. Nonetheless, it should be understood that unconscionability is an exceptional doctrine that is not widely used by the courts, though it has provoked a great deal of commentary.

The jurisprudence of unconscionability was early-on influenced by a famous law review article by the late Arthur Leff of Yale Law School[21] in which Leff divided the concept into "procedural" (small print, adhesion contracts) and "substantive" (unfair terms) unconscionability. American courts have usually required both factors to be present before they act,[22] though some conservative writers have argued that only procedural unconscionability should be an invalidating factor.[23] In any event, "price unconscionability" has not prospered in the American courts, particularly in dealings between businesses, which are generally deemed capable of bargaining on their own behalf.

The Comment to Article 3.10 gives only one illustration, A, the owner of an automobile factory, sells an outdated assembly line to B, a governmental agency from a country eager to set up its own automobile industry. Although A makes no representations as to efficiency of the assembly line, it succeeds in fixing a price which is manifestly excessive.

21 Leff, Arthur A., "Unconscionability and the Code — The Emperor's New Clause", 115 *U. Pa. L. Rev.*, 485 (1967).

22 Farnsworth, *supra* note 19, at 334.

23 See, *e.g.*, Epstein, Richard, "Unconscionability: A Critical Reappraisal", 18 *J. L. & Econ.*, 293 (1973).

B, after discovering that it has paid an amount which corresponds to that of a much more modern assembly line, may be entitled to avoid the contract.

(One notes that implicitly the seller is from a developed country while the buyer is from a developing one.)

Curiously, at least two of the three other invalidating factors in Chapter 3 could have been invoked, but avoiding the contract would not have been an easy case under these provisions. Although the seller is said to have made no representations, it is still possible to argue that it committed a fraudulent non-disclosure or worse by at least implying that the studio was worth the price and suitable for the buyer's needs.[24] Nonetheless, the concept of non-disclosure as a misrepresentation is still controversial and unclear.[25] In addition, the buyer was clearly mistaken about the value and usefulness of the studio.[26] However, Comment 1 to Article 3.5, says that "[n]ormally in commercial transactions certain mistakes, such as those concerning the value of goods or services or mere expectations or motivations of mistaken party, are not considered to be relevant," and Comment 2 says that "[i]n order to avoid the contract the mistaken party must also show that the other party was under a duty to inform it of its error."

24 See Principles Article 3.8, which allows avoidance for "fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed."

25 According to the leading contemporary treatise in the United States, American "courts have had great difficulty in dealing with the extent to which candor, as distinguished from honesty, is required." Farnsworth, E. Allan, *Contracts*, 4.11, at 252 (2d ed. 1990). Professor Farnsworth discusses the situation of a mistake in a basic assumption as some length, *idem* at 254-56, and, although he is rather skeptical, still concludes that "[a] court is more likely to expect a party to disclose if that party has special knowledge or a special means of knowledge not generally available to those in the position of the other party. This may explain why the burden is more often imposed on sellers than on buyers." *Idem* at 256.

26 See Principles, Article 3.5(1), allowing avoidance if the mistake was of such importance that a reasonable person in the same situation as the party in error would have only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and
(a) the other party... knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error...

The third category, "threat", found in Article 3.9, seems too far removed for an economic duress argument on the facts of the illustration.

Article 3.10, however, makes the attack both easier and more focused.[27] There are, however, constraints on using Article 3.10. It is clear from both the text and the Comments that more than just a bad bargain must be involved. The critical words of the text are "*unjustifiably* gave the other party an *excessive* advantage".[28] Comment 1 to the Article says that the weaker party's dependence must arise independent of the market,[29] and that the disparity in price must be great enough to "shock the conscience of a reasonable person." [30]

Like the American unconscionability provisions, Article 3.10 appears most likely to be enforced when there is a combination of procedural and substantive unfairness.[31] This is borne out by the structure of Article 3.10(1). The opening sentence, dealing with unjustifiable and excessive advantage could be read to allow avoidance simply for disparity, but the article continues, somewhat obliquely,

> Regard is to be had, among other factors, to
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> (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.

The Comments make clear that for a contract to be avoided (or modified) under Article 3.10 (1)(a) on the ground of price disparity, it would be necessary to show not only a shockingly excessive or shockingly small price but also action by the favored party that took advantage of the disadvantaged party. The only example that the Comments give on this ground is the automobile assembly line illustration, which we have already discussed, and in which we noted elements of overreaching.

But part (1) (b) of Article 3.10 says that regard is also to be had to "the nature and purpose of the contract", and Comment 2b, discussing this provision, says that "[t]here are situations where an excessive advantage is unjustifiable *even if the party who will benefit from it has not*

27 The origins and history of Article 3.10 are told in some detail by Professor Bonell, *supra* note 13, at 85-89. It was a compromise based on proposals made by Professors Ulrich Drobnig of Germany and Ole Lando of Denmark. *Idem* at 85.

28 Principles article 3.10(1) (emphasis added).

29 *Idem*, Comment 2.

30 *Idem*, Comment 1.

31 Bonell, *supra* note 14, at 85.

abused the other party's weak bargaining position".[32] The Comment here gives two examples, one that is quite close to a standard unconscionability situation, the other that is quite different.

The "easy" one is that a contract term providing for an extremely short period for giving notice of defects in goods or services to be supplied may or may not be excessively advantageous to the seller or supplier, depending on the character of the goods or services in question. One might imagine a situation where a company buys a used sorting machine from a fruit-selling company. The seller in no way uses either excessive bargaining power or misleading practices, but it uses a standard clause from its fruit sale contracts, where a short complaint period is needed because the product is perishable. Now the buyer of the machine complains of a defect after the short notice period has run, and the Comment says that the short period may deemed excessively advantageous to the seller without any overreaching on its part.

Despite the lack of any "procedural" unconscionability in the example, it is very possible that an American court applying UCC 2-302, would reach the same result. Comment 1 to 2-302, although it states the principle of the unconscionability section to be the prevention of oppression *and* surprise, also states the "basic test" to be "whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract".

This sounds more like "substantive" unconscionability, and this conclusion is buttressed by the Comment then citing a number of cases involving clauses that were struck down, apparently without oppressive behavior by the favored party.[33]

The other example given by the comment to Article 3.10 of the Principles involves a different, and I think, more controversial type of disparity.

> [A]n agent's fee expressed in terms of a fixed percentage of the price of the goods or services to be sold or rendered, although justified in the event

32 Emphasis added.

33 UCC 2-302 Comment 1. Some of the actual cases may have involved overreaching, but the Comment makes no reference to this.

> of the agent's contribution to the conclusion of the transaction being substantial and/or the value of the goods or services concerned not being very high, may well turn out to confer an excessive advantage on the agent if the latter's contribution is almost negligible and/or the value of the goods or sevices are extraordinarily high.

Here the argument is that the percentage arrangement works out unfairly, and was presumably not intended by the parties. I suspect however that many American courts would view the matter as simply one of the parties' risktaking, and refuse "to rewrite the contract for the parties." There is, however, an American doctrine that permits the courts to intervene when a party's reasonable expectations are defeated by the literal words of a clause in a standard form contract. But this is usually limited to insurance contracts, and I cannot recall any involving a fee arrangement.[34]

This does not quite exhaust the gross disparity article. Although the blackletter text says nothing on this point, the comments quite reasonably state that "[o]ther factors may need to be taken into consideration, for example the ethics prevailing in the business or trade".[35] This certainly makes sense, but its expansiveness and indefiniteness may only add to the concern that Article 3.10 will cause conservative American business lawyers.

Probable Criticisms of Article 3.10. The analysis so far should make clear that it is unlikely that Article 3.10 will lead to wholesale avoidance or revision of international commercial contracts just because someone got a bad deal. Nonetheless, I expect American lawyers to be very distrustful and to seek to avoid the Principles. The grounds listed in Part (1)(a) of Article 3.10 —"dependence", "economic distress", "urgent needs", "improvidence", "inexperience", "lack of bargaining skill"— all sound like invitations to a lawsuit whenever a deal does not turn out to be profitable, particularly if the other party is a company in a developing nation. When there is added the power in Parts 2 and 3 of courts (and, perhaps more important, arbitrators[36] to revise challenged contracts

34 See Slawson, W. David, "Standard Form Contracts and Democratic Control of Lawmaking Power", 84 *Harv. L. Rev.*, 529 (1971). Compare Principles 2.20, making ineffective "surprising terms" in standard form contracts.

35 Principles, Article 3.10, Comment 2c.

36 See Principles, Article 1.10 ("'court' includes an arbitral tribunal").

to make them "accord with reasonable commercial standards of fair dealing",[37] conservative business lawyers who do not like surprises will look for ways to avoid the Principles. Their fears will be exacerbated by the many references to good faith, fair dealing and similar terms throughout the Principles.[38]

Displacing the Principles. Lawyers seeking to avoid Article 3.10 will likely try to exclude the Principles. This is done as a matter of routine with respect to the CISG,[39] but Article 1.5 of the Principles provides that "[t]he parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, *except as otherwise provided in the Principles*".[40] Article 3.19 provides that "[t]he provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake." Since none of the exceptions relates to price disparity, Article 3.10 is mandatory and may not be excluded.

That does not, however, mean that the Principles will govern most American-written international business contracts. According to the Preamble, the Principles are "*shall* be applied" only when the parties have agreed that their contract shall be governed by the Principles. They

37 See *idem*, Article 3.10(2) (at request of party entitled to avoid the contract or term); *idem*, 3.10(3) (at request of party receiving notice of avoidance). A related provision is the power of courts to revise contracts in light of "hardship" due to changed circumstances. *Idem*, Article 6.2.3.(4)(b). The issue of whether courts should be able to "cut the baby in half" in cases of impracticability has engendered vigorous debate in American contract literature. Compare Speidel, Richard E., "Court-Imposed Price Adjustments Under Long-Term Supply Contracts", 76 *Nw. U. L. Rev*., 369 (1981), and Young, William F., "Half Measures", 81 *Colum. L. Rev*., 19 (1981), with Dawson, John P., "Judicial Revision of Frustrated Contract: The United States", 64 *B. U. L., Rev*., 1 (1984).

38 *E.g*., Articles 1.7, 2.15, 3.10, 4.8, 5.2. Although both the Uniform Commercial Code and the Restatement (Second) of Contracts assert that a duty of good faith is involved in every contract, the American courts have been uneven in their use of good faith, and my impression is that many American contracts litigators do not believe in the concept (whether those who write the contracts and the businesspeople who carry them out distrust the concept as completely is less clear to me). For a defense of the Principles against expected criticisms by American lawyers, see Linzer, Peter, "The UNIDROIT Principles of International Contracts: Should American lawyers Pull Their Hair Out Over Them?", 13 *Texas Transnational L.Q*. 2, (1992).

39 See CISG article 6. I have never seen an American contract dealing with international trade that did not exclude the CISG. I haven't seen that many, and I'm sure some do exist, but I've never seen one.

40 See Principles, Article 1.5 (emphasis added).

"*may* be applied" when the parties agree that their contract is to be governed by general principles of law or by the *lex mercatoria*. A lawyer hostile to the Principles can avoid both of these provisions simply by refusing to agree that either the Principles or the general principles of law or of the *lex mercatoria* govern the contract. The Preamble continues by stating that the Principles "may provide a solution" when it is impossible to establish the relevant rule of the applicable law and that they "may be used to interpret or supplement" international uniform law instruments and "may serve as a model" for national and international legislators.[41] Thus, on first blush at least, lawyers who wish to avoid the Principles need only choose a domestic law that does not recognize them. While Article 3.10 can no more be disclaimed than the provisions of the Restatement of Contracts, if the parties choose Texas or Chihuahuan or Manitoban law, they would appear to be able to circumvent Article 3.10 and the rest of the Principles.

But it may not be quite that simple. First of all, it is possible that domestic courts will choose to apply the Principles to international commercial contracts, in effect adopting the Principles as part of their own domestic law, as virtually every American jurisdiction has done with at least some of the provisions of the First and Second Restatements of Contracts. Second, international arbitrators, who in practice have much less concern with precedent than do common law courts, may well begin to apply the Principles. (In his contribution to this proceeding our colleague Professor Michael Joachim Bonell has told us of two recent arbitral tribunals that applied the Principles without clear adoption by the parties to the contract involved. In one, the contract had no choice of law clause but the panel decided that New York law governed. The issue was one of a duty to bargain in good faith and the panel found that New York (whose law is quite confused on this point) would find a duty and butressed its conclusion by referring to the UNIDROIT Principles.[42] In the other, the contract's choice of law clause chose "Anglo-Saxon law" and the panel ruled that included the UNIDROIT Principles.

Finally, parties, particularly those from developing nations, may insist on the Principles being included in the choice of law clause in contracts. As their bargaining power increases their demands may be acceded to,

41 *Idem*, Preamble (emphasis added).
42 See *idem*, Article 2.15.

especially since it is difficult to explain why one is unwilling to agree to be bound by principles of good faith and fair dealing.

For these reasons, the validity provisions of the Principles may have more force than their detractors might wish. In practice this is not likely to be as radical as it might sound. We have known for many years that most businesspeople do not push their contract rights to the limit, and that compromise is the usual way in which businesses deal with disputes.[43] The anecdotal evidence that I have heard suggests that international business practice works the same way. Unless a company is primarily out for a quick, one-time profit ("a fast buck" in American slang) it will rather adjust a price than lose a customer. Article 3.10 encourages compromise through its empowering of courts and arbitrators to revise unfair contracts. It also will have the effect of protecting businesspeople who want to make an accommodation but are afraid of criticism that they are wasting company assets out of sentiment. While the provision will be controversial and attempts will be made to avoid it, there appears to me to be a good chance that it will play an important role in future years in policing price disparities both through courts and arbitrators and by the parties' voluntary actions in renegotiation. I am inclined to think that this is all to the good and look forward to seeing what influence Article 3.10 has on the law of international contracting.

43 See Macaulay, Stewart, "Non-Contractual Relations in Business: A Preliminary Study", 28 *Am. Soc. Rev*., 55 (1963). Professor Macaulay's classic study has recently be reaffirmed by an elaborate survey carried out by Professor Weintraub, Russell J., "A Survey of Contract Practice and Policy", 1992 *Wis. L. Rev*., 1.