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# ECONOMIC DURESS AND SIGNIFICANT IMBALANCE: TWO DIFFERENT APPROACHES OF CONTRACTUAL IMBALANCES

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# **Economic Duress and Significant Imbalance: Two Different Approaches of Contractual Imbalances\***

**Faustine Jacomino<sup>1</sup>**

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## **Abstract**

In France, the draft order of February 25th 2015 devotes two new tools permitting the control of contractual imbalance: economic duress on the one hand, and significant imbalance on the other hand. These two mechanisms attest to the interest given to this issue and to the renewal of traditional tools in favour of mechanisms which are inspired by consumer and competition laws. While economic duress sanctions the abuse of economic dependence, significant imbalance shows a broad scope for its implementation, which raises many interrogations. The challenge is to determine the goals of such tools and to ensure the consistency and readability of general contract law.

## **Résumé**

Le projet d'ordonnance portant réforme du droit des contrats en date du 25 février 2015 consacre deux nouveaux outils de contrôle de l'équilibre contractuel : la violence économique d'une part, et le déséquilibre significatif d'autre part. Si ces deux dispositifs témoignent de l'intérêt porté par le législateur à la question du déséquilibre contractuel, ils attestent dans le même temps d'un renouvellement des outils traditionnels au profit de mécanismes inspirés du droit de la consommation et du droit des pratiques restrictives de concurrence. Alors que la violence économique sanctionne l'abus de dépendance économique, le déséquilibre significatif de droit commun soulève par sa généralité, des interrogations quant au champ d'application qu'il s'assigne. La difficulté consiste alors à déterminer les enjeux de tels dispositifs, en assurant à la matière la cohérence et la lisibilité dont elle entend se munir au travers de cette réforme.

**JEL Classification:** K12 - K20 - K21

**Keywords:** Significant imbalance - Economic duress - Contractual imbalance - Restrictive practice - Unfair term - General contract law

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Economic duress and significant imbalance are about to make their appearance in our future civil code and they attest to the attention paid to contractual imbalances. These tools embody two different visions of contractual imbalance with two different goals. Before going into detail, it is important to say a few words about the background of this draft reform. The draft order of February 25th 2015 is presented by a large part of the doctrine as an update of our rules. It means that the project doesn't propose a new vision of civil law. It is not true, at least on the issue of contractual imbalance. While the legislator decided to remove the *cause*, he chose to devote several mechanisms remedying contractual imbalance. These instruments embody different visions of contractual imbalance. The difficulty comes from the objectives of each of the instruments and more generally of the purpose of general contract law. While the reform brings economic duress closer to the abuse of economic dependence (I), significant imbalance appears as an unwieldy tool, based on the effects of contractual imbalance (II).

## **I. Economic Duress: From the Subjective Defect of Consent to the Objective Abuse of Dependence**

Defects of consent traditionally refer to the psychology of the parties. However, the draft order enshrines a new defect of consent based on an external constraint. This atypical defect of consent (A) presents specific conditions of implantation (B).

### **A. An atypical defect of consent**

Economic duress is incorporated in the civil code by the draft order as a new defect of consent. The admittance of the economic duress had already been enshrined in the *Avant projet Catala, Terré*, and the Principles of European Contract Law, and subsequently the Draft common frame of Reference also introduced in identical terms an autonomous defect of consent when one party has abused the weakness of the other. The proposal for a regulation of the European Parliament and of the council on a common European sales law also enshrines the concept of unfair exploitation of a state of dependence when the other party knew or could have been expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage. However, the French courts have been reluctant to accept this notion for several years and have preferred the notion of psychological violence. To this day, only one ruling of

the Court of Cassation has upheld the notion of economic duress (Civ. 1re, 30 mai 2000 : Bull. civ. I, n°169). Indeed, judges show great severity in the characterization of this defect of consent. The legislator's choice to introduce such a notion shows the influence of the common law on French law and more generally the European harmonization in this field. What strikes the reader of the draft order is the fact that economic duress is presented as a defect of consent whereas it looks like something different, close to the competition law concept of abuse of economic dependence.

A priori, economic duress is a subjective tool in the same way as mistake and fraud. It means that the consent of the party is vitiated. The defects of consent are said to be subjective because we need to appreciate the validity of the consent of the party in order to characterize this defect of consent. However, economic duress is a particular kind of defect of consent in so far as it is an external constraint which pushes the party to enter into the contract. The duress does not come from the contractual partner but from the economic context. The will of the parties does not matter in the appreciation of the defect of consent. The judges will consider the nature of the relationship, the economic power of the parties involved, their possible dependency ratio or possible state of necessity. More generally, we could say that economic duress is an objective tool for monitoring contractual balance because it allows a third party to monitor and sanction the balance intended by the parties.

First of all, the draft order in its presentation reveals an ambiguous unity of defects of consent. Economic duress is presented in paragraph three of sub-section 1 entitled « defects of consent ». Economic duress is placed after the definition of duress and its sanction. The concept is introduced by the adverb « also » so that we think that it is a specific assumption of duress with specific characteristics. Indeed, the reading of article 1142 shows a different definition of article 1130. The duress is due to the economic environment surrounding the conclusion of the contract. It does not come from the other party or a third party.

Contrary to traditional duress, economic duress requires the proof of an abuse. The weaker party has to prove that the other abused her state of dependence or necessity, whereas article 1139 does not mention the abuse. Moreover, the result of the economic duress is different. Indeed, the article 1142 specifies that in the case of economic duress the applicant will have to prove that without such an abuse he would not have entered into the contract. The article 1130 specifies however that there is duress if the applicant had entered into the

contract with substantially different terms. Does it mean that, in the case of economic duress, the contracting party has to demonstrate that without such a defect of consent he would not have entered into the contract at all? As a result, all of these conditions give the impression that economic duress is more difficult to prove than physical or psychological duress. The party in situation of dependence or necessity would be less protected than others.

## **B. The conditions of implementation**

Traditionally, duress must be: characterized, decisive and illegitimate. Article 1142 of the draft order appears for its part to highlight three criteria for identifying economic duress: a state of necessity or dependence, being determinative of the consent of the debtor, and the creditor abuse.

- *Dependence and necessity*

The first question is: Does the state of necessity and the state of dependence refer to the same situation? Dependence is a competition law term. General contract law does not refer to the notion of dependence. Abuse of economic dependence refers to the anti-competitive practice covered by article L. 420-2 paragraph 2 of the commercial code. While the state of necessity designates the situation where the debtor has entered into the contract due to financial necessity, the state of dependency does not mean that the debtor has had such a need to conclude the contract and refers more to the idea of constraint. The economically dependent debtor from the other party is indeed forced to conclude the contract not because he feels a personal necessity but because her situation doesn't offer an alternative. Therefore the state of dependency corresponds to the competitive definition of economic dependence which is characterized by the absence of an alternative solution.

The dividing line between these two hypotheses is difficult to draw as soon as these two situations can be combined. The criterion for this distinction seems so based on pre-existing contractual relationship between the parties. The necessity designates the case in which a debtor is obliged to conclude a contract with the creditor when there was no contractual relationship beforehand, while economic dependence designates the situation in which the debtor has undertaken under the influence of economic stress due to the prior contractual relationship he had with the creditor. Criminal law also clarifies the distinction

between state of necessity and state of dependence. Indeed, the state of necessity designates the situation in which a person commits an act facing an actual or imminent danger. Following this definition, the state of necessity would be characterized when a party has undertaken considering the danger to his person, his family or his property.

The law of May 15th 2001 had already devoted the restrictive practice to "abuse of the relationship of dependency in which it holds a partner or its power of buying or selling by submitting it for commercial or unjustified obligations conditions." However, the law of August 4th 2008 repealed this article and today this notion refers to the anti-competitive practice. There is a big difference between these two different approaches to the concept of dependence. Whereas the draft order uses this term in a general way, the article L. 420-2 paragraph 2 refers to economic dependence of a client company or a supplier. Should we have to interpret article 1142 of the draft order in the light of the anti-competitive practice ? The Court of Cassation answered a similar question a few months ago concerning the notion of significant imbalance which is used by consumer and restrictive practices laws. The court affirmed that significant imbalance must be interpreted according to the concept as defined by consumer law. If we follow this reasoning, economic dependence should be interpreted in the light of the anti-competitive practice.

However, contrary to competition law, the other party does not need to prove an infringement of the market. The goal is not the same in the two situations. In the first one, this tool is used to protect the proper functioning of the market, and in the second one this tool aim to protect the weaker party. In terms of competition law, economic independence can be positively defined as the possibility for an economic actor to act freely in a market unfettered by the actions of its competitors. Negatively, economic dependence designates the economic actor who "has no alternatives on the market." The Competition Authority stated in a decision of 18 August 2003 that the notion of dependency implies the absence of equivalent solution." While competition law conceives the parties to the contract as unequal economic players driven by market constraints, common law conceives the contractors in the abstract, their equality being raised as a precondition. The draft order does not use, unlike the competition law, the term "economic dependence" but the more general term "dependency", so that economic dependence is a possible hypothesis among all dependencies. If the abuse of economic dependence allows the punishment of an infringement of the free functioning of the market, it does not pursue that objective when it comes to economic duress. Dependence is

not appreciated on the scale of the market; the objective here is not preservation. Rather, it is to ensure compliance of some balance and punish defects of consent by which one party may have imposed on the other excessive imbalance. Consequently, abuse of economic dependence does not refer to the same situations in the two cases.

- *The abuse*

How to prove such an abuse? In reality, this element doesn't mean the party has to prove a subjective behaviour. For some commentators, this abuse would be a manifestly disproportionate economic advantage. The abuse would not return in this case to the consideration of the conduct of the creditor, but to the consideration of the result. The manifestly disproportionate benefit received by the creditor who exploited the economic dependence of the debtor is the very manifestation of abuse. The abuse is embodied in this disproportion. The Principles of European Contract Law, and after them the Draft common frame of Reference do not refer to the abuse but prefer to use the expression of « taking an excessive benefit or grossly unfair advantage ». Such reading of abuse would not extend the scope of application of economic duress but it would allow the clarification of the concept.

- *The decisive nature of the duress*

All the defects of consent require the proof of their decisive nature in the conclusion of the contract. Indeed, the applicant will have to demonstrate that without such a defect he would not have signed the contract. It designates the relation of cause and effect between the situation of dependency or necessity of the debtor, and the commitment. It is necessary that the commitment has a causal relationship with the debtor's state of economic dependence. The subjective nature of this defect of consent is weakened. Indeed, it is an objective analysis of the circumstances in which the parties entered into the contract and the result obtained which characterizes this vice. These facts do not rely on a subjective search for the intention of the debtor but rather on the economic situation of the parties and the result obtained.

## **II. Significant Imbalance: Limits of an Effects-Based Tool**

Significant imbalance is one of the most commented provisions of the draft order. Contrary to economic duress, the significant imbalance doesn't refer to a defect of consent. The quality of the victim of the significant imbalance is indifferent as well as the co-contractor's behaviour. This tool only focuses on the result: a significant imbalance between the rights and obligations of the contracting parties. Between restrictive practice and unfair term (A), significant imbalance under general law is an inappropriate tool in so far as its scope seems unlimited (B).

### **A. Between restrictive practice and unfair term**

Significant imbalance is not a neutral concept. It comes from the consumer code which punishes unfair terms that create a significant imbalance to the detriment of the non-professional or consumer. It is also punished by the LME law of August 4th 2008 which considers it as a restrictive practice when it affects contracts between professionals. This tool is inspired by consumer and competition law so it's difficult to give an autonomous definition of significant imbalance.

- An instrument for regulating

Significant imbalance is above all an instrument for regulating, that is to say an instrument which facilitates the proper operation of an economic sector unable to ensure his own balance. That is why it is surprising to see this notion in the civil code which does not aim to regulate a sector of the economy.

- Unfair term

The consumer code punishes the significant imbalance between a professional and a non professional or a consumer. This imbalance is based on the difference of economic power of the contractors. The status of consumer and non professionals both justify this remedy. Standard form contracts used in consumer contracts and the absence of negotiations justify the implementation of this tool. The goal of the significant imbalance is also important.

Concerning the consumer law, this tool aims to protect the consumer and above all his purchasing power. The consumer law is presented today as a tool favouring growth. The market economy favours fierce competition between market actors, which can harm consumers.

- Restrictive practice

Regarding the right of restrictive practices of competition, the significant imbalance was instituted to fight against the contractual imbalances imposed by major distributors to their suppliers. Even if today the article L. 442-6, I, 2° is written in general terms, it was originally written to protect the suppliers. There is no question that this tool boosts competition and the purchasing power of French consumers. Moreover, this tool refers to the behaviour of the co-contracting party.

## **B. An inappropriate tool**

Contrary to his two homonyms, the draft order consecrates a general significant imbalance. The status of the parties is irrelevant as well as the behaviour of the co-contracting party. It is an effects-based tool. The only criterion is the presence of a significant imbalance between the rights and obligations of the contracting parties. How should this significant imbalance be interpreted? In the light of the consumer code and the commercial code? That's a difficult question because even if the Court of Cassation said that the significant imbalance of article L. 442-6, I, 2° of the commercial code must be interpreted in the light of the significant imbalance provided by the consumer code, the recent jurisprudence of the commercial division reveals some differences between the two notions. So it is impossible to give a single definition of this concept.

It also raises the question of the scope of article 1169 of the draft order. Consumers contracts are governed by consumer law so that the contracts made between professionals could be the target of this article. Indeed, the significant imbalance of article L. 442-6, I, 2° is strictly interpreted by judges who apply this article almost exclusively in the field of general distribution. For example, significant imbalance in his commercial version requires a previous business relationship between the parties. This criterion excludes a large number of contracts from the scope of article L. 442-6, I, 2° of the commercial code. The civil code could be the

solution for professionals who are victims of significant imbalances. Contrary to the commercial code or the consumer code, the civil code postulates equality between co-contracting parties. The contractual imbalance is sanctioned when it results from the weak situation of the debtor or when it results from a lack of consideration. The substantive inequality of bargain is limited to very specific assumptions. The draft order reaffirms that the absence of equivalence between obligations is not a cause of nullity.

#### *An instrument of protection for the weaker party*

The presentation of the draft order by the custody of the seals reveals a different ambition: the protection for the weaker party. This expression is used by Ministry of justice as well as the social dimension of the fight against the contractual imbalances. However, significant imbalance seems an unwieldy tool because of the generality of its object. The Article 1169 could be limited to the cases in which the party was dependent and the other party knew or could reasonably be expected the first party's situation by taking an excessive benefit or grossly unfair advantage. This is the solution adopted by the principles of European contracts and it is closer to the social ambition of this reform. The protection of the weaker party refers to the situations in which the economic power of a co-contracting party allows her to impose conditions that create an imbalance to the detriment of the other. General civil law traditionally ignores these situations because significant imbalance is judged in the light of the conditions for the validity of the contract and not in the light of the economic power of the creditor.

A solution could be the admission of the *lésion qualifiée*, that is to say the sanction of contractual imbalance when it comes from the exploitation of the state of dependence or necessity of the debtor. If economic duress is close to this tool, they are not identical. Economic duress is based on the notion of abuse of economic dependence. Economic duress doesn't mention the contractual imbalance whereas the *lésion qualifiée* is based on a contractual imbalance. The *lésion qualifiée* is an effects based tool but not as radical as the significant imbalance in so far as it makes the situation of weakness of the party a condition of implementation. The *Avant projet Terré* had agreed to this solution which has the advantage of protecting the weaker party whilst simultaneously sanctioning contractual imbalances. The legislator's choice reflects the french vision of general contract law since Bonaparte. The contractual imbalance is never punished itself, but only for the abuse it

reveals. The paradox of significant imbalance is the fact that it is focused on contractual imbalance and not on the situation of the parties. The competition protection devices of the weaker party make the objective of such a tool difficult to read.

The first solution would be to clarify the objectives pursued by general contract law. If the protection of the weaker party is the main objective, it would be better to renounce the concept of a significant imbalance, which is too much influenced by consumer and competition laws. However, it doesn't help to resolve the problem of contractual imbalances. More generally the contractual imbalance cannot be sanctioned only by this instrument. The *cause* of the contract and its functions are only partially taken over by the draft order. The flexibility and adaptability of the *cause* allow its adaptation to new imbalances. Placed in condition of validity of the contract, the *cause* allowed the judge to penalise contractual imbalance when it revealed the economic uselessness of the contract and its inefficiency. While the significant imbalance is designed to purge the contract of its wrongfulness, the *cause* of the contract allowed the judge to completely cancel the contract.

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