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**Regulation of Standard Clauses Use in International
Commercial Contracts
(A Comparative Study)**

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2008



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Commercial Contracts
(A Comparative Study)**

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2008

جامعة بيرزيت
كلية الحقوق والإدارة العامة
برنامج الماجستير في القانون

التنظيم القانوني لاستخدام الشروط النموذجية في العقود الاستهلاكية
(دراسة مقارنة)

Regulation of Standard Clauses Use in International
Commercial Contracts
(A Comparative Study)

رسالة ماجستير مقدمة من الطالبة
سهى نمر الشنطي

إشراف الأستاذ الدكتور
أمين دواس

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أعضاء لجنة المناقشة

- | | |
|--------|------------------------|
| رئيساً | 1- الدكتور أمين دواس |
| عضواً | 2- الدكتور خالد تلاحمة |
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Abstract
Regulation of Standard Clauses Use in International Commercial
Contracts
(A Comparative Study)

The usage of standard terms during the conclusion of contracts plays an essential role in economic life, because they are very connected with daily life for all individuals and their way of living, especially after the appearance of new multiple needs of consumption, which are indispensable these days. That's what reflects their economic and social importance when the needs of today's life face the producing of big consumption types and fulfill individuals' desires.

The usage of standard terms in contracts helps to save time, effort, and expenses needed to prepare them, through the usage of pre-formulated standard forms which are convenient with contractual circumstances. These forms will be used for all similar judicial sentences. This will unify the contract terms, and increase its conclusion without the need of long negotiations between its parties. All that increased the usage of standard terms in international economical contracts, moreover; the national ones.

The practical reality proved that standard terms are becoming more injustice in time, until they reached the bound of unfairness on one of the parties' right, because of the excessive disparity in knowledge between them. One of the parties is professional with high technical experience, he enforces his terms based on his interests and forms the contract terms based on his goals. The other party doesn't know the minimum bound of information related to the contract terms, especially; when they are very advanced and complicated in a way which make this party disqualified to negotiate or discuss them objectively, so he doesn't have the right to edit them, that will cause lacking in his free-will, which he should have in this stage of conclusion the contract.

The study was conducted on standard terms included generally in contracts -these contracts considered as good-faith contracts, in which the consumer buys a product because he needs to conclude a contract, and he is depending on the information provided to him by the professional- and substantive organization to their usage, in order to find correct legal solutions contribute to maintain the contractual balance between parties when their contract contains standard terms, which are frequently unfair. [UNIDROIT Principles of International Commercial Contracts](#), 2004, were taken as a wide field to achieve the study's goals, for their special organizing of standard terms.

The study concluded these results:

- The active role of standard terms in facilitating the conclusion of contracts and big bargains, without much effort or high expenses to create them.
- The usage of standard terms in contracts represents inequality between parties from an economic and technical point of view, which paralyses the application of contractual freedom principle under the light of this contract.
- The usage of standard terms serves unfair-terms contracts. Moreover, they are the modern picture of these contracts. Even if there were some differences that standard terms don't reach the level of a contract; they are only general terms included in the contract.
- The judicial side gave validity to terminate or modify unfair terms included in the contract, especially after proving the failure of traditional theories of Civil Law in fixing the contractual imbalance.
- With the growth of using unfair terms, the consumer's safety and health become inevitable; they must be available with products and services which the consumer buys. The search, on what the consumer desires and determines, becomes important during modern developments.

In light of the results of the study, a series of recommendations were provided, such as:

- Working on improving the circumstances surrounding standard terms, and the mechanism of their use in contracts, especially because these terms get along with international developments in commercial transaction field, through concentrating on taking care of the contractual form origins, also the accuracy and caution during the forming of standard terms, moreover, the appearance of serious attempts to unify some of these exchanged terms in this field to decrease the danger of their usage.
- Working on developing the legal protection matrix for the consumer, in order to maintain the real balance between the producer (or buyer) and the consumer who is the weak party in the contractual process, either it was during the formation of the contract, the conclusion, or the execution.

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² Bonell, Micheal Joachim: "*Unidroit Principles 2004- The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law*", Exclusives Distributor in Australia and New Zealand, The Federation Press p.o box 45, 1998, p. 97-155, available on the internet at: <http://www.unidroit.org/English/principles/contracts/main.htm>.

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3 Bonell, Micheal Joachim: Ibid, p. 100.

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¹ Zweigert, K. & Kötz, H.: "An Introduction to Comparative Law", Second Edition, Clarendon Press, Oxford, 1992, p. 357.

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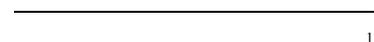
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¹ Bonell, Michael Joachim: Ibid, p. 54.
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¹ Official Comment, Article (2.1.19), no. (2) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex.info>.

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¹ Official Comment, Article (2.1.19), no. (3) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex.info>.

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¹ Official Comment, Article (2.1.18), no. (2) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex.info>.

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¹ Official Comment, Article (2.1.20), no. (2) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex.info>.

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³ Official Comment, Article (2.1.20), no. (3) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex.info>.

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⁴ Zweigert, K. & Kotz, H.: Ibid, p. 366.

¹ Zweigert, K.&Kotz, H.: Ibid, p. 369.

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(Battle of Forms)

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² Blodgett, Paul C.: *"The U.N Convention on the Sale of Goods and the Battle of Forms"*, 18 the Colorado lawyer, march 1989, P. (423-430), available to the internet at: <http://www.cisg.law.pace.edu/cisg/biblio/bib2.htm>.

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Uniform Commercial Code,) .3

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2 Vergne, Francois: "The Battle of Forms" Under the 1980 United Nation Convention on Contracts for the International Sale of Goods", 33 American Journal of Comparative Law, 1985, p. (233-258), available on the internet at: <http://www.cisg.law.pace.edu>.

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.<http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1> :

² Hellener, Jan: "The Vienna Convention and Standard Form Contracts, in: Sarcevic / Volken ed., *International Sale of Goods*" Dubrovnik Lectures, Oceana 1986, p. 335-363, available on the internet at: <http://www.cisg.law.pace.edu>.

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¹ Hellener, Jan: Ibid, p. 345.

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² Official Comment, Article (2.1.22), no. (3) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex>.

³ Farnsworth, E. Allan: "*An International Restatement: The Unidroit Principles of International Commercial Contracts*", 26 university of Baltimore law review, 1997, p. 1-7, available on the internet at: <http://www.cisg.law.pace.edu>.

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¹ Farnsworth, E. Allan: Ibid, p. 1-7.

² Kelso, J.clark: "*The United Nation Convention on Contracts for the International Sale of Goods: Contracts Formations and the Battle of Forms*", 21 Columbia journal of transnational law, 1982, p. 529-556, available on the internet at: <http://www.cisg.law.pace.edu>.

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(Holding B.V & N.N

.²(knock out)

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⁵(2.1.19)

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² Official Comment, Article (2.1.22), no. (3) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex>.

³ Official Comment, Article (2.1.22), no. (4) of the Unidroit Principles 2004, available on the internet at: <http://www.unilex>.

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ق	(19)	1
.59	:	2
"	":	3

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(2.1.22)

(2004

¹ Hellener, Jan: Ibid, p. 345-349.

" : (2.1.22) ²

" : (2.1.19) ³

(2.1.20-2.1.22)

" : (2.1.20) "

" : (2.1.21)

⁴ Farnsworth, E. Allan: Ibid, p. 1-7.

(first shot doctrine)

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(knock out doctrine)

¹(First Shot)

– ²(2-207)

3

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⁴(Knock Out)

.143

" " : 1
" : 2

(mirror image) 3

⁴ Kelso, J.clark: Ibid, p. 529-556.

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²(2-207)

(2-207)

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:	1	46	1995	6	64/4901	1
			.604		()	2
			.95	:		3

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.19 1994 : " 20 "() " : 1
.15 : " : 2

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.212 : 1

.45 : 2

.222 : 3

.50 : : 4

.38 1991

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(149)

²1948 (131)

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.401 2004 "() " : ¹

(150) 1976 (67) (204) " " : ²

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1948 (131)

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[.http://droitcivil.over-blog.com/categorie-3300887](http://droitcivil.over-blog.com/categorie-3300887)

.52 : 2

.113 : 3

.99 : 4

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2006 (67)

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1999 (17)

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⁵(3/246)

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(276) 1999 (17)

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.57 ; 1

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.http://www.lac.com.jo/resear26.htm :

.120 ; 3

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.http://www.lac.com.jo/resear26.htm :

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	:	1	1934/3/8	03/0066		1
.2003		(74)	1976 (43)		(87)	2
	:	16	1965/5/20	30/0379		3

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1948 (131)

1976 (43)

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:	2	16	1965	20	30/379		2
			.602		()		3
			.35		:		4
			.159		:		5
.44	:						6
			.43		:		

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" : (120) 1948 (131)

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:	2	45	1994	12	60/349	1
			.1192		()	
:	45		1994/7/12	60/0349		2
						3
		.2003			(119)	4
:	1	29	1978	13	44/846	5
		.1915			()	

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(131)

(121)

" : 1948

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(152)

: 2 36 1985 31 52/357 1
 .1272 ()
 : 95-94 "() - " : 2
 .2003 (120) 3
 .46-44

¹1976 (43)

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1948 (131) (125)

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.42	1986	"()	1
:	2	48	2
		1997 23 65/8240	
		.952 ()	
:	18	1967/5/11 34/0045	3
:	23	1972/2/15 37/0189	4

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.² (129)

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1976 (43)

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21	53/550	2	44	1993	12	62/663	1
	()			:	1	47	1996

.512
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.2003

(1/128) "

.92 "() - ": 3

1998 46 7-8 1991/10/16 () 1991/475 4

.645

.59 : 5

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" : 1976 (43) _____ (147) ¹

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 .115 "() - " : .2003 2
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.339

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.<https://mudb.mans.edu.eg/Pms/Visitor/Search/default.asp?id=6383=3>

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" : 1948 (131)

.3"

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					.240	:	1
:	2	49		1998	11	67/47	2
					.507	()
	(1/148)	1976	(43)			(202)	3
						.2003	
:	2	48		1997	8	66/6036	4
					.1408	()
:	2	46		1995	12	60/1629	5
					.1363	()

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1998 46 7-8

1978/5/16 () 1978/168 3

.894

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.1257

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(179)

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" : 1948 (131)

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.416	:	1
.437	:	2
	(1/294)	3
.242	:	4
.245	:	5

" : 1976 (43)
(200) "

.2003

.1

.3

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.3()

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	:	07	1956/6/7	22/0313	1
48/0766		28	1977/11/16	44/0421	2
			:	32	1981/12/2
	:	35	1984/3/19	52/2190	3
:		1986/376			
		.1498		()	
	:	4	1944/11/16	13/0115	4

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1948 (131)

(1/150)

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1954/45 1 46
.695 -604

1995 6 64/4901 1
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1998 16 66/11496 4

.521 ()

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		(165)	1976	(43)		(239)	1
							.2003
21	56/253	1	50	1999	30	68/901	2
	()			:	2	45	1994
						.768	
			2003/10/30	()		2003/2822	3
	:		1963/9/29	1963/226			
			.166			()	
	:	1	46	1995	6	64/4901	4
			.604			()	
	" :	1948	(131)			(1/148)	5
(1/148)	1976	(43)		(202)		"	
					.2003		
.224	:		197	"()		" :	6

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1948 (131)

(1/150)

2001/7/30 () 2001/1505 1

.222 : 2

.277 1995 2 1 "() " : 3

: 1 50 1999 30 68/901 4

2005/3/23 () 2004/3123 768 ()

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2609 () :

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.166

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- " : 147 : 1

.240 1995 " -

.149 : 267 : 2

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() .768 () 4

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2005/2/3 () 2004/1744 406

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(131)

(90)

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1948

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		2001/7/30	() 2001/1505	1
(76)	1976	(43)			(93)	2
						.2003
			.46		:	3
		2001/7/30	() 2001/1505	4

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(150) 1976 (.604 (43) (204)) 2
.2003 3

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" : 1948 (131) (2/150)

2"

:	3	40	1989	12	57/388	¹
			.288	()	
	(2/165)	1976	(43)	(2/239)		²
					.2003	

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		.463		1
		.144	:	2
	.56	30	:	3
()		1974/239	4
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(2/165) 1976 (43) (2/239) ¹

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	:	17	1966/3/10	32/0144	1
	:	1974/102			
		.1121		()	
2005/10/23	()	2005/3213	2006/5/10	() 2005/3971	2
37/0443	:	11	1960/5/19	25/0327	3
			:	24 1973/2/17	
2004/12/13	()	2004/2752	2001/7/30	() 2001/1505	4

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2005/2/22 () 2004/3610 : 1

2003/5/18 () 2003/865 2

.201 "() " : 375 : 3

⁴ Cited in: Zweigert, K.&Kotz, H.: Ibid, p. 431.

⁵ Zweigert, K.&Kotz, H.: Ibid, p. 437.

(4.4) "

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(4.1)

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(4.3)

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¹ Official Comment, Article (4.1), no. (2) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>.

² Official Comment, Article (4.3), no. (1) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>.

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(Perforce Recruit Limited & The Rugby Group Limited)

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¹ Official Comment, Article (4.3), no. (3) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>.

2006 (AD Hoc Arbitration & Buenos Aires) 11295

²

<http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13636&x=1>

³ Official Comment, Article (4.3), no. (3) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>.

⁴ Official Comment, Article (4.4), no. (2) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>.

⁵ Official Comment, Article (4.4), no. (1) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>, Zweigert, K.&Kotz, H.: Ibid, p. 348.

⁶

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.1" :

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.233	:	203	"()	":	3
.128	:	380	:	:	4
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1948 (131)

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			.234	:	1
1974/239	840 1	40	1989/3/26	56/1556	2
:	850 -840		()	:	
			2001/7/30	()	2001/1505
			.147	:	3
		(151)		(1162)	4
		.133	:	:	5

2004

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" : (3.10)

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.2004 (2.1.19) ¹

² Gullemard, Sylvette: "*Comparative study of the Unidroit Principles and the Principles of European Contracts and some Dispositions of the CISG Applicable to the Formation International Contracts from the Perspective of Harmonisation of Law*", Laval university, 23 may 1999, P. 29-35, available on the internet at: <http://www.unidroit.org/English/principles/contracts/main.htm>.

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		(2/875)	1976	(43)		(924)	¹
							.2003
21	25/296	1	39	1988	23	52/1276	²
	()		:	2	11	1960
		2000/9/28	() 2000/160		: 334	
				2003/4/7	() 2003/409	³
1998	46	7-8	1999/11/8	() 1999/1234		
							.284
		()	2003	19	2003/24	⁴

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¹ Zweigert, K.&Kotz, H.: Ibid, p. 355.

² Zweigert, K.&Kotz, H.: Ibid, p. 366.

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.142	:	:	1
.161	:	:	2
.250	:	:	3
.164	:	:	4

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" : (2.1.21)

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.203 : 1
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³ Gullemard, Sylvette: Ibid, p. 21.

⁴ Official Comment, Article (2.1.19), no. (3) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>.

⁵ Zweigert, K.&Kotz, H.: Ibid, p. 36.

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.40	:	1
.79	:	2
.169	:	3
.170	:	4

⁵ Gullemard, Sylvette: Ibid, p. 36.

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³ Official Comment, Article (2.1.20), no. (2) of the Unidroit principles 2004, available on the internet at: <http://www.unilex.info>.

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.1976 (43)

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[.http://lawcenter.birzeit.edu/iol/ar/index.php?action_id=20](http://lawcenter.birzeit.edu/iol/ar/index.php?action_id=20)

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[.http://www.boubouche.maktooblog.com](http://www.boubouche.maktooblog.com)

¹1978

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² Zweigert, K.&Kotz, H.: Ibid, p. 366.

³ Zweigert, K.&Kotz, H.: Ibid, p. 370.

.36 : 1

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[.http://lawcenter.birzeit.edu/iol/ar/index.php?action_id=20](http://lawcenter.birzeit.edu/iol/ar/index.php?action_id=20)

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[.http://droitcivil.over-blog.com/categorie-3300887](http://droitcivil.over-blog.com/categorie-3300887)

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.224-210

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.96	:	1
.41	:	2
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.122	:	1
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.447	:	3
.105	:	4
.447	:	5

.446 :

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.41 : .94 : 1
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³ Zweigert, K.&Kotz, H.: Ibid, p. 342.

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¹ Zweigert, K.&Kotz, H.: Ibid, p. 349.

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.1

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² Gullemard, Sylvette: Ibid, p. 39.

³ Murphy, Phil: "*Unfair business practices face ban under EU Directive*", OUT-LAW News, 2003, p. (3655-3660), available to the internet at: <http://www.out-law.com>.

⁴ Murphy, Phil: "*Unfair business practices face ban under EU Directive*", OUT-LAW News, 2003, p. (3655-3660), available to the internet at: <http://www.out-law.com>.

$-I''$: (2/302) (UCC)
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¹ Murphy, Phil: "*Unfair business practices face ban under EU Directive*", OUT-LAW News, 2003, p. (3655-3660), available to the internet at: <http://www.out-law.com>.

² Murphy, Phil: "*Unfair business practices face ban under EU Directive*", OUT-LAW News, 2003, p. (3655-3660), available to the internet at: <http://www.out-law.com>.

³ Murphy, Phil: "*Unfair business practices face ban under EU Directive*", OUT-LAW News, 2003, p. (3655-3660), available to the internet at: <http://www.out-law.com>.

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(Unfair Contract Terms Act 1977) 1977

.310	:	1
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¹ Zweigert, K.&Kotz, H.: Ibid, p. 367.

² Zweigert, K.&Kotz, H.: Ibid, p. 371.

³ Zweigert, K.&Kotz, H.: Ibid, p. 359.

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¹(Reasonableness Test

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²"Let The Buyer Beware"

1977

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² Zweigert, K.&Kotz, H.: Ibid, p. 129.

.304 : 1

.304 : 3

¹1987

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(prohibition orders)

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¹ Stephenson, Graham: "Core Statutes Commercial and Consumer Law", Preston: Law Matters Publishing, 2006-2007, p. 225.

² Stephenson, Graham: Ibid, p. 229.

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⁴ Nebbia, Paolisa: Ibid, p. 225.

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¹ Duca, Ibid, p. 145.

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¹ Schlechtriem, Peter: "The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods", in Galston & Smit ed., International Sales: The United Nations Convention on Contracts for the International Sale of Goods, Matthew Bender (1984), Ch. 6, p. (6-1 to 6-35), available to the internet at: <http://www.cisg.law.pace.edu/cisg/biblio/bib2.htm>.

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UNIDROIT Principles 2004:

Article 1.3 - Binding character of contract

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

Article 1.4 - Mandatory rules

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

Article 2.1.1 - Manner of formation

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

Article 2.1.2 - Definition of offer

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

Article 2.1.3 - Withdrawal of offer

- (1) An offer becomes effective when it reaches the offered.
- (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offered before or at the same time as the offer.

Article 2.1.7 - Time of acceptance

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offer

or. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

Article 2.1.10 - Withdrawal of acceptance

An acceptance may be withdrawn if the withdrawal reaches the offer or before or at the same time as the acceptance would have become effective.

Article 2.1.15 - Negotiations in bad faith

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

Article 2.1.20 - Surprising terms

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

Article 2.1.21 - Conflict between standard terms and non-standard terms

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

Article 2.1.22 - Battle of forms

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly

indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

Article 3.2 - Validity of mere agreement

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

Article 3.10 - Gross disparity

(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.

Article 4.1 - Intention of the parties

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Article 4.2 - Interpretation of statements and other conduct

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

Article 4.3 - Relevant circumstances

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between the parties;
- (b) practices which the parties have established between themselves;
- (c) the conduct of the parties subsequent to the conclusion of the contract;
- (d) the nature and purpose of the contract;
- (e) the meaning commonly given to terms and expressions in the trade concerned;
- (f) usages.

Article 4.6 - Contra proferentem rule

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.