IN MEMORIAM MIRCEA MUREŞAN

LESION AND ITS FUNCTIONAL EQUIVALENTS. A GLANCE AT FRANCE, QUÉBEC, LOUISIANA AND THE UNITED STATES COMMON LAW[1]

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Abstract*: The current work is dedicated to lesion and beings that are its functional equivalents. The study encompasses no less than five parts. The Introductory Speech is followed by a Part that presents the French, Québécois, and Louisianian lesions; the three entities are also compared. Some remarks on lesion's foundation and the concepts that explain it are contained in the same Part. The third Part looks at unconscionability and places it face to face with lesion. Part IV embraces lesion's other functional equivalents. The fifth and last Part includes the Final Observations.*

Part I. Introductory Speech

1. Aim of the current research project.

The protection of consent (when the latter is affected by some "*malady*") and the absence of balance at the time a contract is made represent a phenomenon to which France, Québec, Louisiana, and the Common Law of the United States are not insensitive.

The backbone or the thesis of this work may be summarized as follows: France, Québec, Louisiana, and the Common Law of the United States contain legal techniques that protect consent (or, if at times they do not, nonetheless they ought to care for it); these legal techniques, usually, are concerned with the problem of a "*diseased*" consent, and the primordial contractual imbalance. Furthermore, the following aspect must not escape us: in the context of these legal techniques (*e.g.*, lesion), at the surface, one sees only the initial conventional imbalance, but, if one goes deeper, usually there is also a "*sickness*" of consent.

Of course, one must not forget the following aspect: in the enumerated legal systems, there is a clash between two opposing forces that have distinct desires; the common law lawyer might see this in the form of "*Force 1 v. Force 2*". The first force is represented by legal techniques (*e.g.*, lesion and unconscionability) based on ideas such as commutative justice, or morality; these legal techniques, as commanded by the concepts underlying them, desire[2] to fight the initial conventional imbalance by placing their hands on the contract and touching it (this touch may be a rather gentle one, leading to the alteration of the contract, but letting it live; the touch might be a brutal one, or a strong

grip that chokes the convention to a retroactive death or to a *ex nunc* death). The second force is freedom of contracts, or security, or stability of conventions; this force desires that the contract is left untouched. France, Québec, Louisiana, and the Common Law of the United States seem to favor the second force. Thus, the legal techniques that are the first force and the concepts serving as their foundation, usually, kneel before freedom of contracts.[3] However, sometimes, more or less rare, the first force and the concepts on which it stands have their day.

Of course, some readers might pose at least a few questions. Specifically, I could be interrogated as to why I talked about "*legal techniques that protect consent (or, if at times they do not, nonetheless they ought to care for it)*"? Why did I use the word "*usually*" within the final part of my thesis? What do I mean by "*legal techniques that at times do not protect consent, but nevertheless, they ought to do so*"? My answer is this: in regard to unconscionability,[4] the Québécois lesion,[5] the Louisianian lesion,[6] and even in relation to some of the French lesion,[7] one might talk about protection of consent. The trouble is represented by the French lesion that occurs in the case of persons of full age (for details *see infra* nos 6 and 10). This type of lesion is seen through the eyes of the objective conception, and, as such, it has nothing to do with consent.[8] The French Court of Cassation said the following: "*il importe peu que les parties aient donné leur adhesion en pleine connaissance de cause, la lésion constituant en soi une cause de rescision, indépendamment de tout vice de consentement*" (it is less important that the parties were fully aware when they expressed their adhesion, because lesion is by itself a motive of rescission, independently of any vice of consent).[9] This would mean that this type of lesion appears even if the parties were fully aware of everything; that is, it appears even though there was nothing wrong with consent. Lesion, in the objective conception, does not concern itself with consent, but this type of lesion is a perversion (*infra.* no 10). Lesion ought to always protect consent, as it will be discussed below *(infra* no 10); as such, I have formulated a thesis that accepts that lesion protects consent (in general), and when it actually does not do so, it ought to protect consent.

I have already mentioned that lesion is a legal mechanism or doctrine designed to fight the initial contractual imbalance between advantages; of course, the protection of consent may be seen as part of lesion's function; in the end, lesion's function may be seen as a complex one (*infra* no 2). Where lesion is absent (either completely, as it happens in the U.S., or only in regard to some contracts[10]), the legal systems do contain some functional equivalents to lesion. It is worthwhile to add that the comparatist in search for functional equivalents requires imagination.[11] That means that the scholar must adopt a broad view that allows him to understand how mechanisms, apparently made for accomplishing one task, have in reality the power to also perform another one. Furthermore, the comparatist "... *should go as deep as possible into his chosen systems*".[12] As such, the search for functional equivalents to lesion will take me into various fields of the law (*e.g.*, contracts, where one can find the vices of consent; real securities, where one may notice *lex commissoria*). Perhaps walking in these areas of the law will give the impression that I am present in many places, but being in those places seems to be commanded by the need to go deep into the elected systems, that is, by the desire to be thorough.

From the very beginning at least one aspect must be grasped by the reader. These functional equivalents may be used to protect the "*diseased*" consent and attack the imbalance that exists when the contract is made. However, it does not mean that their primary function is to protect the "*tainted*" consent and battle the lack of equilibrium; their primary function might be a different one, and only their secondary function might serve to protect the "*sick*" consent and fight against the primordial contractual disequilibrium. This would mean that some mechanisms are lesion's functional equivalents from the perspective of the former's secondary function (*see*, *e.g.*, *infra* no 22).

Finally, when I have indicated the thesis of this paper, I used the expression "*legal techniques*" before mentioning concepts such as "*consent*". I did so because technique will be privileged. The current study will embrace a "*technical*" perspective: my attention will be focused on the nature, scope, requisites, and the remedies connected to the legal mechanisms that shall be discussed. Be that as it may, the concepts that justify the existence of these legal mechanisms will not escape the analysis. A paragraph to be found below (*infra.* no 10) will bring into the light the ideas that serve as lesion's foundation; furthermore, the very same paragraph shall encompass a few remarks on the tension between, on one hand, lesion and the concepts underlying it, and, on the other hand, freedom of contracts. Paragraph no 10 will contain some remarks on how *the law of lesion is* (at times) and on how *it ought to be*.

2. Lesion – definition and function.

One of the points of departure of a work called "*Lesion and its Functional Equivalents. A Glance at France, Québec, Louisiana and the United States Common Law*" will naturally be represented by an indication of the meaning of the institution under consideration.

Lesion was given the following signification: damage suffered by one party, in the context of a contract or of a partition, because of the primordial inequality between the reciprocal obligations or lots.[13] Briefly, the being under analysis involves a certain disproportion between the parties' reciprocal obligations.[14] The imbalance is one that shows itself at the time the contract is forged. The instant this creature is observed certain remedies are provided: relative nullity, damages, the reduction of obligations or a supplement (*infra.*, Part II). The trouble is that acceptance of lesion encroaches on other worthy values, such as the freedom of conventions and the stability of contracts or security of transactions. To put it in other words, one must be aware of the collision between two "treasures": (i) the fight against the colossal imbalance that exists when the contract is made and (ii) the freedom and stability or safety of contracts. It seems obvious that if lesion and its remedies are embraced, the contract is affected. Fouillée's expression, "*Qui dit contractuel, dit juste*",[15] receives a fatal blow, because the very presence of lesion indicates exactly the contrary: *Qui dit contractuel, ne dit pas juste* (*i.e.*, who says contractual, does not say just). Also, lesion generates contractual instability or insecurity (the convention can be assassinated by nullity or it may be given another shape through the mechanism of reduction or supplement). As we shall see (*infra.* Part II), the various legal systems are aware of this delicate aspect.

My endeavor has the ambition of being a comparative study. As such, one must not limit his research to an equivalent institution,[16] that is, an institution that resembles lesion. Instead, the comparatist is to ask himself what is the function of the juridical creature he aims at, what is the problem it wants to take care of?[17] Lesion is concerned or ought to be concerned with the "*disease*" of consent and it is always concerned with the disequilibrium in conventions. Indeed, this is lesion's complex function (*i.e.*, usually, it fights the "*sickness*" of consent, and always struggles with the initial contractual imbalance). When emphasis is placed upon the function of an institution, as I have done, one talks about the functional method.[18]

3. Brief remarks on the method this study will be sensitive to – equivalence functionalism.

The methods that a comparative study can deploy are not few.[19] However, "*today, we understand that when we compare rules, we must take a functional approach …*".[20] Furthermore, "*the basic methodological principle of all comparative law is that of functionality*".[21] The only things that are comparable are the ones which fulfill the same function.[22] Functionalism[23] is problem-oriented[24], and this means that "*… in comparative law one must focus on the concrete problem*".[25] It should be kept in mind that the problem must be posed in purely functional terms, without reference to national concepts.[26] The comparatist is bound to purge himself of his native legal concepts and discover the functional equivalents within the compared legal systems. He will look beyond the legal devices, because it is possible that the function fulfilled in one system by a legal rule is accomplished somewhere else by an extralegal phenomenon.[27] The functionalist is mindful of the social, economic and political context.[28]

The essence of functionalism is this: there are similar problems that are solved by different mechanisms in such a manner that the results are the same.[29] These mechanisms are functionally equivalent; their function is to address the same issue and achieve a like solution, which, in the end, is reached.

Though there are authors who believe that the functional method is not beyond criticism,[30] it is, nevertheless, the approach to which this paper will remain faithful. It is undeniable that some of the most influential studies that compared civil law and common law institutions used the equivalence functionalism.[31] First, my paper is destined to compare institutions belonging to the civilian and common law traditions. Second, since institutions are the elements under comparison, and not entire legal systems, it is a paper that fits in the category of micro-comparisons.[32] Equivalence functionalism[33] seems to be a choice superior to any other.

4. The choice of legal systems in which to look for functionally equivalents. The structure of the current work.

The systems that I have chosen are France, Québec, Louisiana, and the common law states of the U.S. I believe that this choice illustrates what Zweigert[34] called "*une sage limitation*" (a wise limitation). I chose to limit my research to the enumerated legal

systems for two reasons. The first is represented by linguistics: I can understand the languages used in these jurisdictions. The second consists of my training: the listed legal environments are familiar to me.

Besides the present introductory part, this work will include no less than four other parts. Part II will be titled "*Lesion – A French, Québécois and Louisianian Spectre*"; this second section will be mainly a descriptive one; only its paragraph 10 shall contain a deep and critical analysis. Part III will be known as "*Uconscionability and Lesion Compared*". Part IV, named "*Lesion and other Functional Equivalents*", will be a search for doctrines[35] that, among other functions, also try to take care of the same issue as lesion does. The last part (*i.e.*, V) will encompass the "*Final Observations*".

Zweigert and Kötz advise us that the "*… the process of comparison proper starts only when the reports on the different legal systems have been completed. To present such reports before the comparison proper begins is an established method of research and a proven way of constructing works on comparative law. Separate reports should be offered for each legal system …*".[36] Reimann appears to agree with Zweigert and Kötz when he says that "*knowledge of foreign law is an indispensable prerequisite to explicit comparison …*".[37]

On the other hand, one author does not seem to approve of such a structure; he sees it as "*simplistic, ineffective, and inefficient*".[38] He urges the comparatist to "*make every section comparative*".[39]

As far as I am concerned, generally, I will make every section (*i.e.*, Part) comparative. It must be noted, nevertheless, that juxtaposition is necessary before comparison.[40] That is why within each Part, before advancing to the actual comparison, the status of every legal system will be indicated.

Part II. Lesion – A French, Québécois and Louisianian Spectre

5. Lesion – definition revisited, possible conceptions, and a locution on its domain.

One can observe above (*supra* no 2) the understanding of lesion provided by the dictionary coordinated by Cornu. In all truth, there are different, not to say better, ways to define the spectre. The word lesion describes the damage suffered by one party because of the imbalance that exists between prestations at the moment the contract was made.[41] This way at looking at the entity seems better, simply because it does not mention the word "partition"; there is no need to indicate it, since partition is a convention,[42] and when one says "contract" it also encompasses it.

The French doctrine believes that there are two possible conceptions of lesion: a subjective and an objective one;[43] according to the former, lesion is a vice of consent,[44] whereas the latter indicates that the being has nothing to do with consent.[45] The Louisiana legal literature also mentions the subjective and objective conceptions.[46] Some Québécois authors talk about three conceptions: (i) the objective one; (ii) the classic subjective view; and (iii) the contemporary subjective perspective;[47] perhaps, in regard to the latter legal system, these conceptions may be classified in two broad categories: the objective conception and the subjective perspective (this last one may encompass two sub-

categories: the classic subjective view, and the contemporary subjective one); briefly, even in Québec, the conceptions on lesion may be limited to two.

Lesion's definition indicates that it is favorable to synallagmatic, onerous, and commutative contracts;[48] these are the types of conventions for which the technique of lesion is fitted.[49] That is why, some legislative provisions that talk about lesion (*e.g.*, the Québec Civil Code art. 2332) are questionable; one is in the impossibility to notice it if the convention does not have the characteristics enumerated in the prior phrase. However, such mechanisms (*e.g.*, usury) can be seen as lesion's functional equivalents: they aim at rejecting a sort of imbalance that exists when the convention is fabricated.

6. Lesion – a French creature.

Within the French Civil Code,[50] lesion can be found especially at arts. 1118, 1305, 1313, 889 and 1674-1685. The first text indicates when lesion may be claimed. Art. 1305, in referring to non-emancipated minors, shows that this category of persons may claim lesion in all types of contracts. Art. 1313 illustrates the following idea: persons of full age are unable to invoke lesion, except in the cases permitted by legislation. Arts. 889 and 1674-1685 discuss lesion when two contracts are involved: partition, and sale of immovables.

There are at least three views in the French doctrine regarding the juridical nature of lesion.

Dean Carbonnier tells us that art. 1118 follows the texts that treat of error, fraud and duress.[51] As such, it is only natural to assume that, in the eyes of the legislator, lesion is a vice of consent.[52] The institution can be considered a distinct vice, or it is possible to analyze it as an element that generates a presumption that one of the other three vices is present (for instance, if one contractual partner suffers a damage, he committed an error on the value of the prestations, or he acted under a state of fear).[53] However, the author immediately adds that such an analysis is not completely mindful of the role played by lesion.[54] In the case of persons of full age, lesion is not to be seen as a defect of consent, but rather as an objective element.[55] On the other hand, if a contract is made by a minor or a person of full age under protection (*e.g.*, a person under curatorship), then lesion shows itself from a subjective standpoint.[56] Under such circumstances the person is weak, and it can be believed that he was subjected to exploitation. To summarize, Carbonnier teaches us that the French lesion is sometimes an objective vice, and other times it is a vice of consent.

Malaurie and Aynès preach that lesion is most definitely not a vice of consent.[57] When it appears, one contractual party made a bad deal, whereas the other made a good one.[58] This state of things is not seen as a reason for disturbing the security of conventions.[59] In sum, these two authors seem to take an objective approach to lesion.

Finally, Christian Larroumet announces that the French Civil Code embraced the subjective conception in regard to lesion.[60] In the situation of minors and protected persons of full age, the legislator presumes the weakness of their consent.[61] As much as the rest of persons of full age are concerned, lesion is accepted rarely; nonetheless, when it is allowed, this type of persons is under a necessity to make the contract;[62] as such, one might think that the person of full age was exploited by his contractual partner who took advantage of that

state of affairs.[63] Indeed, this scholar reckons that, as a rule, the French Civil Code wanted to build lesion as a vice of consent.

The French jurisprudence is inclined to adopt the objective conception, and, as such, rejects the idea that lesion is a vice of consent.[64] Larroumet believes that by doing so, the judges do not encircle the legislature's position.[65]

The scope of the French lesion, apparently, is not a broad one. "*La lésion ne vicie les conventions que dans certains contrats ou à l'égard de certaines personnes …*" (lesion does not vitiate conventions, except in regard to certain contracts or certain persons) (F.C.C. art. 1118). Thus, lesion is accepted only in regard to certain persons or in relation to some contracts. The minor can claim lesion every single time he makes an unfavorable act of administration[66] (such as a lease).[67] Equally, a person of full age placed under protection (*e.g.*, curatorship[68]) can claim lesion when he makes an act of administration;[69] on the other hand, it must be noted that some juridical acts in which such a person is engaged will be struck down on grounds of incapacity;[70] when that happens there does not seem to be any point in talking about lesion.

Persons of full age who enjoy contractual capacity are able to yell "lesion" only in rare instances (F.C.C. art. 1313). First, the convention must be synallagmatic, onerous and commutative.[71] However, not all agreements that have such characteristics are opened to lesion.[72] Generally, in regard to this kind of persons, the principles of autonomy of will and security of agreements will prevail over the exigencies promoted by the idea of commutative justice.[73] Nonetheless, in particular cases, the latter[74] was allowed to manifest itself. The French Civil Code tolerates lesion in two situations:[75] sale of an immovable (F.C.C. arts. 1674-1685) and partition (F.C.C. art. 889). In the former contract, only the seller can claim lesion, and a disproportion of more than 7/12 is necessary; in this case, the price received by the vendor must be inferior by more than 7/12. Historical reasons explain why the seller is the only one protected and why solely the sale of immovables is envisaged.[76] Roman law made way for lesion in such a sale, due to a constitution of Emperor Diocletian, though a disproportion of ½ was sufficient;[77] also, *L'Ancien Droit* was sensitive to a lesion of ½ suffered by the vendor.[78] The contract of partition is also subjected to lesion, if one of the parties receives a lot inferior to the one he should collect; the disproportion here has an amount of more than ¼ (F.C.C. art. 889).[79] One who asks himself why lesion must be tolerated in a partition could be satisfied by the following answer: equality is the soul of such a contract;[80] thus, the imbalance must be erased.

Outside the Civil Code, there are a few normative acts that are not repugnant to lesion: (i) art. 1 of a law that dates back in 1907;[81] (ii) the Code of Intellectual Property art. L131-5;[82] the authors[83] also enumerate arts. 10, 15 and 16 of Law no. 67-545,[84] but it seems that today the relevant text is art. L5132-6 2° of the Code of Transports.[85]

French lesion, especially when it involves contracts between persons of full age, supposes one requisite: the disproportion indicated by law[86] (*e.g.*, 7/12 or 1/4).

The legal system under analysis provides a few remedies when lesion is observed: relative nullity (or, as it is also called, rescission), damages, and reduction of obligations. Minors will obtain primarily the rescission of the contract (F.C.C. art. 1305). Persons of full age under protection (*e.g.*, curatorship) have the possibility to invoke relative nullity or reduction of their obligations (F.C.C. art. 465 1°). Finally, those who are of full age and not subjected to a measure of protection have, depending on the contract, a few variants: (i)

rescission in case of a sale of immovables (F.C.C. art. 1674), but the buyer can save the contract by offering a supplement in money (F.C.C. art. 1681);[87] (ii) in case of a contract of sale regarding fertilizers, seeds, plants or substances destined for farm animals, the buyer can obtain the reduction of his obligations and damages (art. 1 of the law of July 8, 1907); (iii) nullity or modification of the contract of maritime assistance (Code of Transports art. L5132-6); (iv) the revision of the price, when the contract is an assignment of the right to exploit an intellectual creation (Code of Intellectual Property art. L131-5). Under F.C.C. art. 889 it seems that the only remedy available to a party who was affected by lesion in a contract of partition is a supplement (*i.e.*, increase of his lot).[88]

7. Lesion - a Québécois being.

Articles 1399 (2), 1405-1408, 424,[89] 472,[90] and 2332[91] of the Québec Civil Code[92] are the main texts preoccupied with lesion.[93] The first of the enumerated clauses ranges lesion among vices of consent. The legal literature, nonetheless, observed that probably the Code proceeds in such a manner by reasons of commodity;[94] lesion is not a vice of consent in the traditional sense of the term,[95] but it became a reflection of commutative justice;[96] furthermore, we are told that lesion remains connected to the contractual will and it reflects the idea that the "*lesionary*" agreement was made by a person whose consent presented some problems.[97] On the other hand, there is another view, which is clearer and less tainted by confusion: lesion is a vice of consent separate from the other three.[98]

Lesion has a limited[99] domain of application, because, as a rule, it appears when a juridical act was made by a minor or by a person of full age under protection (art. 1405).[100] In regard to other persons who have achieved the age of majority, lesion is accepted only in situations expressly indicated by the law (art. 1405, first thesis). As one court put it, lesion can be invoked only in exceptional cases.[101] Briefly, like arts. 1001 and 1012 of the Civil Code of Lower Canada (1866), the Q.C.C. maintains the principle that lesion cannot be usually claimed;[102] at least, not by persons who are of full age. Be that as it may, one question is beyond avoidance: why is lesion an entity with a narrow scope? Pineau, Burman and Gaudet indicate that, for many, the explanation resides in contractual liberty and in the necessary security of transactions.[103] Nonetheless, Pineau *et al.* do not find this justification as being convincing.[104] First, freedom of contract and security of agreements are not boundless.[105] Second, they observe that in Germany (§138 (2) BGB (*i.e.*, the German Civil Code)) and Switzerland (Code of Obligations art. 21)[106] lesion is extended to persons of full age; even so, in these countries there is no instability of conventions.[107] Those authors conclude that the Québécois legislator should have accepted a general principle of lesion.[108] Instead, the lawmaker proceeded as in 1866: minors and protected persons of full age are solely envisaged; the regular persons of full age can complain of lesion in cases expressly indicated by law.[109]

Art. 1406 (1) Q.C.C. states that "*lesion results from the exploitation of one of the parties by the other, which creates a serious disproportion between the prestations of the parties; the fact that there is a serious disproportion creates a presumption of exploitation*" (Q.C.C art. 1406 (1)).[110] Some authors preach that the description can be taken into account only exceptionally,[111] because it is applicable only when persons of full

age are involved;[112] lesion was given a delineation at the insistence of the legal professions. The Bar of Québec was complaining that the Q.C.C. offered no definition for lesion.[113] It was the same Bar that, together with other professional associations, desired and obtained the rejection of a general principle of lesion.[114]

The second paragraph of art. 1406 underlines that "*in cases involving a minor or a protected person of full age, lesion may also result from an obligation that is considered to be excessive in view of the patrimonial situation of the person, the advantages he gains from the contract and the general circumstances*". Commenting upon art. 1406 (2), the authors emphasize that lesion, as indicated by this paragraph, rests on the same idea as the one underlined by the first paragraph: exploitation of one party by the other.[115] Both types of lesion have the same roots.[116] If that is the case, I wonder why do Pineau *et alii* indicate that the definition at paragraph 1 of art. 1406 aims essentially at persons of full age? The moment one looks at their words, contained in the following pages, he understands that the second paragraph of art. 1406 is nothing but a manifestation of the definition indicated by the first paragraph of the same article. Briefly, art. 1406 (1) applies also to minors and persons of full age under protection, but with some *souplesse*; that is suggested by the same authors who claim that the text is targeted only at persons of full age. As such, a certain lack of harmony in the analysis of Pineau *et alii* is hard to miss.

Art. 1406 puts into the light the two elements of the Québécois lesion: (i) exploitation of one party by the other[117] and (ii) the disproportion between performances. In regard to persons of full age it is not easy to find examples of lesion in the Q.C.C. The texts that purport to accept it are technically debatable; it is so for arts. 424 and 472 (which establish situations of renunciations at rights, and are completely incompatible with art. 1406 (1));[118] on the other hand, art. 2332 is more appropriate for the doctrine of usury, than for that of lesion. Nonetheless, outside the code, one encounters arts. 8-9 of the Law on Consumer's Protection.[119] The texts give life to lesion in favor of a person of full age who is a consumer. Of course, two pre-requisites must be met: (i) disproportion between obligations and (ii) exploitation of the consumer. In one case,[120] though there was disproportion in a contract of exchange, the court found that the consumer was not exploited by the professional; as such, the consumer's claim was rejected.

For minors and persons of full age under protection the same pre-requisites are necessary: (i) exploitation and (ii) disproportion.[121] Before discussing these two elements, it must be understood that things are quite delicate in their situation. Often, there is no need for lesion, since those categories of persons can obtain the destruction of the contract on grounds of incapacity. For instance, if the minor sells an immovable he can obtain the nullity by pointing out his incapacity,[122] without any necessity to discuss lesion (that is, to show that the price was too low). Similarly, a person of full age under curatorship can claim nullity by reasons of incapacity, regardless of lesion (Q.C.C. art. 283).[123] There are, of course, instances when these two types of natural persons may claim lesion. The being's demands are analyzed more gently in such cases. Minors and protected persons of full age (*e.g.*, persons of full age under tutorship or curatorship) are in a weak state generated by their condition itself (that is, by their minority, respectively their mental shape or other troubles);[124] they are always susceptible of

being exploited. Q.C.C. art. 157 states that a minor can enter alone into a contract to meet his ordinary and usual needs. Thus, a minor who buys a scooter in order to travel[125] is within the terms of art. 157. Let us assume that another youngster buys similar means of traveling for the very same purpose. He agrees to pay a just price for it. However, his patrimonial situation is a disastrous one, and, in fact, he cannot afford the scooter. In this hypothetical he may not claim nullity for reasons of incapacity, because he can make the agreement (*see* Q.C.C. art. 157). Nevertheless, he is able to invoke lesion, because, in regard to his patrimony, there is an imbalance. In this sense, the requirement represented by disproportion is tempered: usually, one is not allowed to observe a lack of equilibrium when the amounts of obligations match; things are different when a minor or a person of full age under protection is involved (under circumstances such as these, the idea of disproportion is indulgently analyzed).

Québec provides certain remedies when lesion is encountered: relative nullity, damages or the reduction of the obligation (Q.C.C. art. 1407); relative nullity and damages can form a couple.[126] The victim has the choice between these various options.[127] However, if the victim elects nullity, the contractual partner can very well avoid it,[128] by offering a reduction of his personal right[129] or an equitable pecuniary supplement (art. 1408). The rule contained in art. 1408 is novel[130] and it is meant to favor the stability of contracts.[131] Another attempt to encourage the survival of the contractual relationship is art. 1407 *in fine*: if lesion's victim prefers that the contract be maintained, he can apply for a reduction of his obligation equivalent to the damages he would be justified in claiming.[132]

8. Lesion – a Louisianian entity.

Arts. 1965, 814, 2589-2600, and 2663 of the Louisiana Civil Code deal with lesion.[133] Art. 1965 is of great importance, because it shows when lesion can be invoked, and its place in the Code also offers some indicia on lesion's nature; as such, this text is to be mentioned first when one discusses lesion. Art. 814 underlines that a contract of partition may be rescinded on grounds of lesion. Arts. 2589-2600 open the avenue for lesion in a contract of sale of immovables. Art. 2663 informs us that a contract of exchange that involves a corporeal immovable may also be targeted by lesion.

Professor Litvinoff underlined that the Louisiana courts have always preferred to treat lesion in an objective fashion.[134] Is this statement acceptable? At least one decision suggests a negative answer; a court has ranged lesion among vices of consent,[135] and that appears to be consistent with Louisiana Civil Code[136] art. 1965.[137] The moment one says that lesion is a vice of consent, any trace of the objective conception must be set aside (perhaps his inability to understand this is what makes Litvinoff claim that Louisianian courts embraced the objective view on lesion); according to this approach, lesion has nothing to do with a defect of consent.[138] Be that as it may, Litvinoff teaches us that, in Louisiana, in spite of its place in the code, lesion differs from the three traditional vices of consent, and is connected to public policy.[139] To me, that sounds like a plea in favor of the idea that lesion is something else than a vice of consent.

In Louisiana, lesion's scope is a restricted one.[140] The entity spreads to a few contracts and to a limited number of persons;[141] it seems that the 1984 revision has not

changed the law of lesion in a significant manner.[142] Nonetheless, the lack of appreciable change does not mean the absence of any modification. La. Civ. C. art. 1864 (1870) provided that minors can claim simple lesion in every species of contract.[143] However, this text and others that were referring to lesion in the case of minors were eliminated by the 1984 revision;[144] La. Civ. C. art. 1866 (1870) provided that minors do not need to claim lesion, since they are able to invoke their incapacity, and, as such, the texts on lesion seemed redundant.[145] Today, minors can simply avail themselves of their incapacity (La. Civ. C. arts. 1918-1919); the presence of lesion is not necessary in their case. The same seems to be true for interdicts, if we keep in mind the adage *Ubi lex non distinguit, nec nos distinguere debemus*, when we read La. Civ. C. art. 1919.

Louisiana accepts lesion in three situations, all of them involving persons of full age and not placed under protection: (i) sale of immovables; (ii) exchange, when an immovable is involved; and (iii) partition.

La. Civ. C. art. 2589 opens the avenue to lesion in a contract of sale of corporeal immovables. Only the seller of such an immovable[146] can claim lesion, because it was believed that need may force a person to sell, but never to buy;[147] thus, the buyer's complaints are not to be heard.[148] The disproportion between the value of the immovable and the price must have an amount of more than ½; that is, the price is inferior to more than ½ of the value of the immovable (La. Civ. C. art. 2589). The worth of the immovable is its fair market value[149] at the time the sale was made.[150]

The contract of exchange is also subjected to lesion (La. Civ. C. art. 2663).[151] Similar to a contract of sale, the disproportion between the value of the immovable and the thing obtained in return must be of more than ½. To put it differently, the contractual partner transfers an immovable and he receives property worth less than ½ of the value of the immovable.[152] Furthermore, the convention of exchange is governed by the rules of sales (La. Civ. C. art. 2664);[153] as such, the value of the immovable exchanged must be analyzed at the moment the contract was made.

An extra-judicial partition (*i.e.*, contract of partition[154]) may be rescinded on account of lesion, if there is a disproportion of ¼; in other words, the part received by a co-owner is less by more than ¼ of the fair market value of the portion he should have gotten (La. Civ. C. art. 814). The explanation for accepting lesion in this type of convention is this: partition is an "*acte égalitaire*";[155] thus, every contractual partner must receive what is due to him, and no less.[156] In the context of this contract, lesion is established by looking at the value of the thing at the moment the convention was made.[157]

According to the texts of the La. Civ. C., lesion's imperative requisite is this: the mathematical imbalance indicated by the law;[158] that is, ¼ in the case of an extra-judicial partition (La. Civ. C. art. 814), and ½, if the contract under consideration is a sale of immovables (La. Civ. C. art. 2589) or an exchange (La. Civ. C. art. 2663).

When lesion is shown there are a few remedies at hand: (i) rescission[159] is the one primarily mentioned by the texts (La. Civ. C. arts. 814, 2589 and 2663); (ii) in case of a sale, the buyer has the possibility to avoid the death of the contract by offering a supplement (La. Civ. C. art. 2591).[160] This supplement could be seen as another tool that materializes when lesion is detected; there is no good reason for not accepting it when an

exchange is involved; La. Civ. C. art. 2664 invites us to embrace it. La. Civ. C. art. 2591 could be applied *mutatis mutandis* to a contract of exchange: let us assume that A gives to B a tract of land that is worth $500,000, and the former receives a Mercedes that has a value of $230,000. What in the world would stand in the way of B's possibility to save the convention by paying $270,000 to A (*i.e.*, the difference between the value of the Mercedes and that of the immovable)?

9. French, Québécois and Louisianian lesions compared.

The nature of lesion can be characterized as controversial in these three legal systems; one could believe that in regard to this issue, the three legal systems present similarities, in the sense that controversy is felt in all of them. The French authors are divided on the subject. There seem to be two extremes and a midway. For some, lesion is a vice of consent,[161] whereas for others it is not such a vice.[162] Carbonnier takes the middle ground: the entity is a vice of consent when a minor or a person of full age under protection is involved,[163] and it is an objective element when it is recognized in favor of a person of legal age.[164] The French jurisprudence regards lesion as an objective entity, at least when persons of full age claim it.[165]

In Québec, there are scholars who underline that lesion is a vice of consent, distinct of the other three (error, fraud and duress);[166] however, the same authors add that both the subjective and objective conceptions were avoided.[167] The two statements might appear quite strange and contradictory to a French jurist, because the instant lesion is seen as a vice of consent, it must be admitted that the subjective approach prevails.[168] As far as the Québécois legislator was concerned, one might be tempted to think that its preference was expressed in the sense that lesion is a vice of consent; Q.C.C. art. 1399 (2) states that "*it* [consent] *may be vitiated by error, fear or lesion*".

Louisianian lesion is more akin to public policy, according to the legal literature;[169] it would seem that the being is not connected to vices of consent, despite of what the argument *pro subiecta materia* would suggest. On the other hand, there are some court decisions that clearly link lesion to consent.[170]

Regardless of this curious state of things, all the legal systems under analysis point out the limited field of lesion:[171] only certain persons can claim lesion, and but some contracts are affected by it. Persons of full age who are not under protection are allowed to invoke lesion in some juridical acts: (i) sale of immovables and partition (France and Louisiana; when the former contract is taken into consideration, it must be noted that there are differences between the amount of the disproportion; *see supra.* nos 6 and 8); (ii) exchange (Louisiana); (iii) some types of renunciations (Québec), though the solution is technically doubtful (*supra*. no 7); (iv) sale of agricultural fertilizers, seeds, plants, and substances destined to feed farm animals (France); (v) assignment of the rights to exploit an intellectual creation (France); (vi) contract of maritime assistance (France); (vii) contracts between professionals and consumers (Québec); (viii) loan of money (Québec), a solution which raises doubts (*supra.* no 7). In regard to minors and persons of legal age under protection, there is a curious interplay between lesion and capacity; it is so, at least

in France and Québec. To take only the situation of minors, sometimes they do not need lesion, because their incapacity is sufficient to destroy the contract.[172] In Louisiana, it seems that persons who do not enjoy full capacity may use its lack in order to set aside the juridical act; lesion is excluded.[173]

Lesion's requisites seem to vary within the legal systems that are placed under the magnifying glass; in reality, this is not of major consequence in regard to what the victim of lesion must prove. Let us take the example of persons of full age. In France the only requirement is the disproportion established by law (*e.g.*, more than 7/12). In Québec the pre-requisites are the exploitation and the disproportion (it seems that in this legal system the law does not indicate the amount of imbalance, as it happens in France and Louisiana; the mathematical disproportion must be "*important*"). In regard to Louisiana, one must proceed with caution: according to Litvinoff, lesion is an objective[174] aspect, and disproportion is its only element; some decisions[175] link it to consent, and disproportion must be accompanied by an error.

All these legal systems require from the persons who are complaining of lesion to prove one thing: the disproportion (indicated by the law, respectively the important imbalance). In France the accuracy of the statement is obvious: lesion's only requirement is the disproportion;[176] it follows that the burden of proof is limited to it. In Québec, one must show the important disproportion, and the law does the rest: it presumes the exploitation (Q.C.C. art. 1406).[177] As to Louisiana, "*the only issue of fact to be determined …*" is the imbalance.[178]

France, Québec, and Louisiana offer a few remedies in case of lesion. Rescission or relative nullity is one of them (*supra.* nos 6-8).[179] In Québec, sometimes, the former remedy forms a couple with damages (*supra.* no 7). Another remedy, common to all three jurisdictions, is the supplement (*see e.g.* F.C.C. art. 1681; Q.C.C. art. 1408; La. Civ. C. art. 2591). Reduction of the obligations is the cure allowed especially in France and Québec (*supra.* nos 6-7). In regard to France, reduction of obligations and damages may hold hands (*supra.* no 6). One is permitted to classify these remedies in two broad categories: (i) remedies that destroy the contract (rescission); (ii) cures that allow the contract to survive, in an altered form (supplement and reduction of the obligations). The latter category might very well receive the following name: alteration of the contract.

10. Lesion's foundation and concepts that might serve to explain it. Lesion and consent.

Some believe that lesion is a reflection of commutative justice.[180] Furthermore, there is a conviction that lesion's foundation is to be found in morality.[181]

Before indicating the tension between commutative justice and freedom of contracts, respectively the preference of the F.C.C., Q.C.C. and the La. Civ. C. for the latter, it is desirable to briefly discuss such concepts as commutative justice and morality.

Commutative justice (which appears synonymous to corrective or reparatory justice)[182] directly concerns the law of contracts.[183] This type of justice can be traced to Aristotle's *Nicomachean Ethics* and consists in establishing balance between two persons.[184] We are indeed in the presence of an arithmetic justice,[185] the aim being to assure, as much as possible, a mathematical equality.[186]

Morality, on the other hand, is that concept which characterizes the individual behavior or the behavior of society in terms of right or wrong;[187] the former can be called individual morality, whereas the latter is public morality.[188] Of course, lesion should be looked at through the eyes of individual morality, because it appears in contracts, that is, in a context where the wills of individuals tend to unite.

Commutative justice and morality can be seen as concepts that are interpenetrated (in the sense that the equality desired by commutative justice is also demanded by morality; equality is right);[189] as such, both of them are in the same place: at the basis of lesion.

However, commutative justice, and, in the end, lesion (which is based on this kind of justice) encounters a foe:[190] freedom of contracts,[191] or security, or stability of conventions. Freedom of contracts means, among others, that the parties are free to determine the content of their convention;[192] the contractual partners may establish what their obligations are.[193] Freedom of contracts, their security and stability impose the following idea: the convention, fruit of the united wills of the contractual partners, must not be tempered with, must not be touched or altered.

Thus, one may see the tension between lesion and freedom of contracts: the former (predicated on commutative justice) wishes equality and the alteration of the imbalanced contract; the latter desires that the convention remains as it was settled, regardless of everything else.

Which one of these two forces was preferred within the analyzed legal systems? Prior to answering the question, though the response was anticipated above, it must be said that "*the value of consent may be advanced under the banner of freedom of contract at the expense of substantive equality* ...".[194] To put it in other words, freedom of contract may be privileged in comparison to equality. However, "*other times equitable contract values will work to restrict unfettered freedom of contract*".[195] This means that a second avenue is opened: equitable contract, that is, equality in conventions[196] may prevail over contractual freedom.

The Romans believed in freedom of contract, but they also made room for *laesio enormis*[197] (a doctrine based on equity[198]). However, the mechanism was limited to sales of land. This indicates that in Rome freedom of contract prevailed over lesion and its basis (*i.e.*, equity or equality).

The Middle Ages brought a change of perspective, and favored equality. Fairness in the exchange was the governing idea of contract, and theology.[199] Saying that fairness was the ruling entity is the same with claiming that equality dominated; after all, the contract was fair if both partners gained from it equally; equality's presence is to be observed clearly.[200] No wonder then that the Canonists expanded the theory of lesion.[201] The mechanism was based on concepts that promoted equality and was apt to effectively achieve equality in contracts.

The 19th century was the time when freedom of contract has risen,[202] one might add, again. That was exactly the period when the F.C.C. and the La. Civ. C.[203] were enacted. As such, there is no surprise that the two Civil Codes were influenced by freedom of contract, and that, in their eyes, contractual freedom must prevail. The French doctrine, at least, points out that freedom of contract is the first principle that governs the law of conventions.[204] In regard to the Q.C.C., this normative act does not break its connection

with the past, that is, with the Civil Code of Lower Canada of 1866.[205] Since the Q.C.C. maintains its connection to the Civil Code of 1866, it is only reasonable to suspect that the former favors the same concept as the latter did: contractual freedom.[206] Briefly, the three Civil Codes were more attracted by contractual freedom rather than the opposite force (*i.e.*, lesion, based on commutative justice and morality, that is, on concepts that promote equality); it was so because of the epoch that influenced them. Still, there is another reason why contractual freedom prevailed, and not lesion. In regard to the F.C.C., if we read the discourse of the ones who participated at its drafting, we will understand the essential influence of Roman Law.[207] In the measure that we are concerned with the La. Civ. C., we will observe that it was called "... *perhaps, the most Romanist civil code ever enacted* ...".[208] We can easily notice that the two Civil Codes placed great emphasis on Roman Law, and, just like it, gave preference to contractual freedom, not to the doctrine of lesion.

It is necessary to say this: lesion is based on commutative justice and morality (*i.e.*, on concepts that promote equality). However, it has a foe called contractual freedom. This enemy desires that the contract remains untouched, whereas lesion, as ordered by the concepts underlying it, wishes that the contract is touched to assure equilibrium (or equality, even if it is not an absolute one). Contractual freedom, lesion's adversary, was given satisfaction by France, Québec, and Louisiana. Thus, lesion has a limited scope (*supra.* nos 6-9). Although lesion's field of application is restricted, there are a few fights in which it triumphs. After all, "*unlimited freedom of contract collapses into anti-competitive realms of superior bargaining powers*".[209] That is to say that a complete contractual freedom would favor the most powerful, and leave the weaker party at his mercy. However, the law, sometimes, is concerned with the weaker party. As such, the legal systems under scrutiny make way to lesion because of the inferiority of one of the contractual partners; it is so, for instance, in France and Québec, in the case of persons of full age under protection or in that of minors.[210] Furthermore, the same desire to protect what the legislator believes to be the inferior contractual partner might justify the existence of lesion in contracts made by consumers (*see e.g.* arts. 8-9 of the Québécois Law on Consumer's Protection).

In relation to sales of immovables, at least today, one might think that lesion protects sellers against speculators who do business in the domain of real estate.[211] Now that I have mentioned the sale of immovables, some aspects should be clarified in regard to the French lesion. In one case, that involved such a sale, the Court of Cassation said that "... *la lésion légalement constatée est par elle-même et à elle seule une cause de rescision, indépendamment des circonstances qui ont pu l'accompagner ou lui donner naissance*" (lesion, legally observed, is by itself a reason of rescission, independently of circumstances that might have accompanied it or gave birth to it).[212] This decision reflects the fact that the French judges embraced the objective conception in regard to lesion.[213] This means that, in the eyes of the French Supreme Court, lesion in the case of persons of full age is disconnected from consent; the objective conception signifies exactly that: lesion is not linked to consent (*see supra* no 5). One might very well disapprove of this decision and of the objective conception, because they create a discrepancy between what *the law of lesion is* sometimes (*i.e.*, lesion does not protect consent) and what *the law of lesion ought to be* (*i.e.*, lesion should always be linked to consent and protect it). First, the Roman *laesio*

enormis was clearly linked to the protection of consent. The Constitution of Diocletian that allowed lesion in a sale of immovables, in favor of the seller, was meant to protect the small owners;[214] these persons, due to taxes, were forced into selling their property to *potentes* (*i.e.*, great owners) for derisory prices.[215] Second, the drafters of the French Civil Code saw lesion as a vice of consent,[216] that is, as an institution linked to consent and meant to protect it. Exactly because lesion was considered as a vice of consent by those drafters, it was allowed only in favor of the seller of an immovable; a person might be constrained to sell due to his need for money, but one could hardly imagine that a person could be constrained into buying an immovable.[217] Thus, we may observe that lesion was meant to protect consent, all the time, exactly how it always ought to. Nonetheless, the French Court of Cassation did not see things this way and perverted lesion, despite the fact that it could have proceeded differently: the Supreme Court could have maintained the link between lesion and consent, just like some Louisianian courts did. The latter, in regard to a sale of immovable, underlined that "*the law presumes juris et de jure that he who sells an immovable for less than half its value is acting under an error of fact sufficient to invalidate the sale*".[218] This reasoning could have been adopted, *mutatis mutandis*, by the French Court of Cassation, and the bond between lesion and consent would not have been broken. Nonetheless, that bond was broken by the French Supreme Court: at times, lesion and consent seem to be a divorced couple.[219] In other words, as I already said, the Court of Cassation built a discrepancy between *how the law of lesion is* at times (in some situations, lesion does not protect consent) and *how the law of lesion ought to be* (lesion should always concern itself with consent). Needless to say that it is extremely difficult to explain in a rational and non-contradictory manner a type of lesion that has nothing to do with consent. Even great authors encounter difficulties, and their ideas seem contradictory. For instance, in regard to sales of immovables, one author says that "*bien que la doctrine classique ait souvent été tentée de voir dans la lésion un vice du consentement présumé ... ce n'est pas là le fondement des textes ...; c'est en réalité un tradition historique* ..."[220] (though the classic doctrine was often tempted to see, in regard to lesion, a presumed vice of consent, that is not the foundation of the texts; in reality, what is involved is a historical tradition). In other words, this first idea might be understood in the sense that lesion is not connected to consent, but with a historical tradition. Nonetheless, the same author, at the same page and section says that "... *le maintien des textes s'explique cependant par l'idée qu'ils forment malgré tout une limite à des déséquilibres contractuels trop criants profitant généralement à des spéculateurs immobiliers abusant de l'ignorance de vendeurs particuliers*"[221] (the existence of the texts is explained by the idea that they form a limit to great contractual imbalances that profit to speculators who abuse of the sellers' ignorance). This second idea contradicts the first one, because it connects lesion to sellers' consent; these sellers were ignorant, and lesion comes to protect their troubled consent.

Briefly, lesion, based on commutative justice and morality, does fight the initial contractual imbalance, and desires to touch the contract in order to assure equilibrium; furthermore, lesion, usually, takes care of consent, and when it does not, reason imposes that it ought to. Lesion, in the objective conception, is an unfortunate incident, and the law of lesion (how it actually is at times) creates contradiction within the spirit of the researcher (this is shown by the writings of Alain Bénabent).

Part III. Unconscionability and Lesion Compared

11. The "rule of thumb" – irrelevance of adequacy of values exchanged.

Consideration is the basis of enforcement of a promise.[222] The elementary principle underlined by important authors is that no inquiry into the adequacy of consideration will take place.[223] At least three aspects can constitute the explanation of the general rule. First, consideration is connected to enforceability; it is not a device for policing contracts in order to make sure that they are fair to both parties.[224] Second, contractual partners are free to do what they desire: they make their own contracts, agree upon their own exchange, and fix their own values.[225] Third, a certain flavor of policy may be detected: after announcing the well settled rule, a court adds that "*absolute equality is not to be hoped for, and is seldom attained in men's dealings one with the other; nor is consideration to be measured in terms of dollars and cents alone; convenience, avoidance of troublesome details and efforts are proper elements*".[226] In my view, the observation that consideration is not to be measured only in terms of money, indicates that the courts must restrain themselves from the following task: establishing the equality in an agreement; it is simply impracticable for them to do so, when one takes into account the kind of values that might be included in the concept of consideration.

The above mentioned principle has governed cases whose number amounts to legions.[227] On numerous occasions the courts indicated that they do not inquire into the adequacy of consideration,[228] or that this doctrine "*... does not require or imply an equal exchange between the contracting parties*".[229]

Of course, as it happens with most principles, some exceptions must be acknowledged. One of these derogations bears the name of unconscionability.[230]

12. Unconscionability presented.

We are told by Black's Law Dictionary that a contract or agreement is unconscionable when "*no promisor with any sense, and not under a delusion, would make* [it]*, and that no honest and fair promisee would accept* [it]".[231] First of all, it must be said that this definition may be traced back to an English case: *Earl of Chesterfield v. Janssen*. The decision was cited by the United Stated Supreme Court, in *Hume v. United States*.[232] Briefly, Black's Law Dictionary's understanding of unconscionability was borrowed from cases; even so, the definition seems incomplete. As it can be seen, it mentions nothing about disproportion, nor about the moment when the disparity must occur. However, this does not mean that one cannot find the information he needs about those two aspects. Any curios person can obtain this data by looking at § 208 of the Restatement (Second) of Contracts and its Comments.[233] Only then he or she will apprehend that a disparity is imperative, and it must appear when the contract is formed.

The nature of unconscionability revolves around Equity;[234] in other words, this is an equitable issue.[235]

Unconscionability's scope encompasses transactions regarding goods; the doctrine is to be noticed in § 2-302 of the Uniform Commercial Code.[236] More specifically, the creature discussed here relates to sales of personal property; the consequence is generated by § 2-302's place in the UCC. However, the courts admitted that § 2-302's unconscionability may go beyond the domain indicated by the UCC's text.[237] Furthermore, this being was expanded to all sorts of agreements by §208 of the Restatement (Second) of Contracts.[238] Still other uniform laws are familiar to the concept of unconscionability; among these the following may be enumerated: (i) the Uniform Consumer Credit Code § 5.108 (1974);[239] (ii) the Uniform Consumer Sales Practices Act § 4 (1970);[240] (iii) the Uniform Land Transactions Act § 1-311 (1975);[241] (iv) the Uniform Residential Landlord and Tenant Act § 1.303 (1972).[242]

Unconscionability's most important prerequisites, at least under § 2-302 of the UCC, seem to be these ones: (i) imbalance and (ii) exploitation of the contractual partner. At least one case appears to support such a view. In *Jones v. Star Credit Corp.*,[243] the court held that a contract of sale was unconscionable: a freezer unit that was worth $300 was sold for $900 (the final amount that was to be paid by the buyers went as high as $1,439.69, because other charges were included). Furthermore, the court added that "*… the value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs*".[244] The latter part of the previous citation is quite enlightening: the plaintiff was exploited.

One might be tempted to argue that the same preconditions must be observed under the Restatement (Second) of Contracts and all the uniform laws mentioned above. The former's provision on unconscionability was patterned after the UCC's;[245] as such, it would be only natural to think that the same conditions are required. The Uniform Residential Landlord and Tenant Act § 1.303 was adapted from the UCC;[246] thus, its requirements should be similar to those of the UCC's provision. As to the rest of the uniform laws, the presence of exploitation is acknowledged by the texts themselves;[247] however, it would seem that an additional number of elements must also be analyzed.

When unconscionability is observed the court may provide a few remedies such as (i) denial of enforcement of the contract, (ii) elimination of the offending clause, or (iii) limitation of the applicability of the contractual provision.[248]

13. Lesion and unconscionability face to face.

From the very beginning it must be grasped that both beings are embraced rather exceptionally. In France, Québec, and Louisiana lesion is usually defeated by the imperatives represented by conventional liberty and the security of transactions. To some degree,[249] freedom of contract[250] is the reason why unconscionability is a derogation.[251] Though the latter doctrine was sometimes expanded by the courts, and the drafters of the Restatement Second introduced it in that project, unconscionability still remains rare. It is so, because of its nature as an equitable remedy; this type of remedy is discretionary;[252] therefore, it is not reasonable to think that, in general, courts will use their discretion to defeat the rule according to which inequality of the exchange is irrelevant; after all, this principle is almost as old as the doctrine of consideration,[253] and the courts within the Common Law tradition are not famous for their willingness to set aside the products of history.

As to the nature of the two entities, one might think that they are quite different: unconscionability is connected to Equity, as opposed to common law. This distinction is ignored in civilian jurisdictions,[254] and even in a mixed one as Louisiana;[255] lesion cannot be chained to such an aspect.

The scope of the two spectres is similar, at least in regard to some contracts. For instance, both lesion and unconscionability may be used when a contract involves a consumer (*see e.g.* Uniform Consumer Credit Code § 5.108 – U.S.; arts. 8-9 of the Law on Consumer's Protection - Québec). On the other hand, the "*codal French and Louisianian lesions*"[256] could not have appeared in a situation as that which occurred in *Jones v. Star Credit Corp.* (*see supra.* no 12).

The structure of lesion and unconscionability is characterized by both similarity and difference. Their composition is the same if one has in mind the requirement of imbalance. Nonetheless, we must not forget that, in France and Louisiana, the amount of the mathematical imbalance is highlighted by legislation (*see e.g.* the case of the contract of sale). The bulk of the disproportion is not indicated by legislation, in regard to the Québécois lesion, nor as far as U.S.'s unconscionability is concerned. The exploitation requirement is a component of Québec's lesion, but it has nothing to do with France's lesion (at least not when persons of full age are in question). Unconscionability also seems to be opened to the condition called "exploitation"; however, the courts may take into account a group of additional[257] elements when they try to determine if unconscionability has shown itself.

The remedies can be seen as similar, if one meditates in broad terms. Lesion and unconscionability may kill the contract. Rescission and the court's possibility not to enforce the agreement generate such an effect. Let us assume that in a civilian jurisdiction, after the contract was made and before the parties perform their obligations, the court pronounces the rescission. In such a case the contract is dead. In a common law jurisdiction an unconscionable contract that the court refuses to enforce has the same faith. On the other hand, a civilian court can alter the contract on account of lesion (*supra.* no 9). A common law counterpart may reach the same result: *Jones v. Star Credit Corp.* illustrates it quite nicely.[258]

The one who has in mind their nature, might say that lesion and unconscionability are somehow different mechanisms. Nonetheless, they are functional equivalents. Both aim at the same problem (*i.e.*, protection of consent[259] and the originary contractual imbalance), and, generally, solve it in a similar manner. Furthermore, one author observed that "*Anglo-American common law can be seen as firmly planted upon Aristotle's notion of corrective justice*" (I have indicated above that corrective justice is also named commutative justice; *see supra* no 10).[260] Thus, unconscionability, part of the American Common Law, rests on commutative justice, exactly like lesion.

Part IV. Lesion and other Functional Equivalents

14. Enumeration of lesion's functional equivalents.

Lesion's functional equivalents that I have identified are the following:[261] (i) *actio aestimatoria* (*quantis minoris*); (ii) the vices of consent (error, fraud, and duress); (iii) capacity;

(iv) objective cause; (v) abusive clauses; (vi) usury; (vii) leonine clauses; (viii) the false recital of consideration; (ix) the penal clause; and (x) *lex commissoria* regarding real securities.

In the following paragraphs, each of the above mentioned techniques will be briefly explained; their elucidation shall be accompanied by examples illustrating that they are functionally equivalent to lesion.

15. *Actio aestimatoria* or *quantis minoris*.

This kind of action belongs to the purchaser of a thing affected by hidden vices or defects,[262] and who desires the reduction of the price.[263] The defect must exist when the contract of sale is formed.[264]*Actio aestimatoria* works in the following manner: the buyer acquires a thing that is affected by a hidden vice. Despite the defect, the good still conserves some utility for the purchaser.[265] The trouble is that the contractual partner paid a price that was too high, and that he would not have offered to the seller if he had known[266] the vice (*see* F.C.C. art. 1641, Q.C.C. art. 1726, and La. Civ. C. art. 2520 (3)). In other words, there is an imbalance: the purchaser gives too much, and the seller transfers too little (*i.e.*, a thing not completely useful). Also, there is a problem with consent: the buyer's will was affected, because he was not aware of the state of the purchased thing. Under these circumstances, the acquirer may obtain the reduction of his obligation.

One can easily notice that lesion and *actio aestimatoria* are functional equivalents, at least to some extent. Both aim at the same problem: troubled consent and an originary imbalance (that is, a disproportion between obligations that existed when the contract was made; as pointed out, the hidden vice is present when the sale is perfected). Furthermore, to some degree, both achieve the same result: the reduction of the obligation (or the alteration of the contract).

16. The vices of consent (error, fraud, and duress).

Error may be understood as an inexact representation of reality.[267] Not every type of false representation has importance.[268] For example, the error on the value of the contractual object is usually of no consequence.[269] However, things are different if the error regarding the value is generated by an inaccurate representation of the substantial qualities of the contractual object.[270] Let us assume that a person buys a luxurious residence, which does not have a panorama.[271] He pays a colossal price for what he considers his new home. Furthermore, let us imagine that the panorama was a substantial quality of the immovable for the *errans*,[272] and that the seller should have known of this. Under these facts, the buyer might claim error and obtain the relative nullity of the contract; the purchaser may be unsatisfied by the superior price he paid as a result of his wrong belief regarding the qualities of the thing. One may very well notice how lesion and error are, sometimes, functional equivalents; in both cases, there are a problem of consent and a primordial disproportion between obligations (*errans* may have paid too much for something that, in reality, was worth less from the very moment the contract was formed). Though the purchaser may not use lesion in order to destroy the contract and set aside the disparity, he has another tool that achieves a very similar result: error.

Fraud may be seen as an error provoked by deceit.[273] This type of error, even if it concerns the value of the object,[274] can bring with it the relative nullity or the revision of the contract.[275] Let us suppose that a person desires to buy a car. He seeks a professional seller, who, in the end, appears to be ruthless. The vendor takes one of his many cars and hides all its extraordinary imperfections by giving it a complete facelift. Furthermore, he tells the buyer that the car is in perfect shape, and he shows him a fake certificate that proves his words. The seller assures his partner that the car is worth $10,000, although its true value is $4,000. The purchaser pays the former sum; later he discovers the deceit. Assuming that the buyer wants to keep the car, he may very well request damages in value of $6,000, on grounds of fraud.[276] By doing so, he sets aside the contractual imbalance; he equilibrates the convention.[277] Needless to say that lesion and fraud can be considered functional equivalents: in both cases, the problem is represented by a troubled consent and the primordial imbalance; these institutions have the aptitude to reach a similar result, that is, contractual equilibrium.

Duress was defined as a threat that generates a feeling of fear in the spirit of the contractual partner.[278] This threat may consist in an intimidation with a physical or moral harm;[279] it is also possible to be targeted at the contractual partner's loved ones.[280] The elements taken into consideration in order to establish the fear are age, intellectual development, and, generally, the condition of the party.[281] Imagining an example is no difficult task: the seller threatens the buyer's wife that he will divulge her sexual fetish, if the purchaser does not agree to acquire the former's house for $2 million dollars. Although the value of the immovable is $1 million dollars and the purchaser would have been willing to pay that price, he accepts to give its double. Assuming that, after some time, the buyer leaves his wife, and his state of fear is gone, he may demand damages represented by the difference between the price and the true value of the thing. I believe that it is quite understandable how lesion and duress are functional equivalents, on some occasions: they submit to attack the same problem (*i.e.*, the "*diseased*" consent and the primordial imbalance between the obligations); also, the same result is achieved (in case of lesion it is possible to obtain the reduction of the obligations; the above hypothetical generates a similar solution: by receiving damages in amount of $1 million dollars, the situation presents itself as if the purchase price was "*cut*" in half).

17. Capacity to make juridical acts.

The legal literature teaches us that capacity represents the rule.[282] However, exceptions do exist. Certain categories are touched by an incapacity to make juridical acts; it is so for minors and persons of full age under protection.[283] The incapacity to make juridical acts brings with it relative nullity[284], as a rule. Let us assume that a person of full age mentally diseased makes a contract of sale.[285] He or she "agrees" to transfer an immovable that is worth $50,000 for a price of $20,000. Under these circumstances, it is possible for the sale to be annulled on grounds of the seller's incapacity. Of course, the troubled consent and the originary imbalance cannot escape us; also, the disproportion is cured with the help of relative nullity. As such, one can apprehend that lesion and capacity to make juridical acts are functional equivalents, at some moments: both concentrate on the same problem (*i.e.*, a problematic consent and a primordial imbalance) and reach similar results (*i.e.*, the death of the contract).

18. Objective cause.[286]

I am concerned here with the objective reason which determined every party to make the contract.[287] This cause is unchangeable in the same type of juridical act,[288] regardless of the person. For instance, in a sale, regardless of the person who has the quality of vendor, the objective reason for making the contract is always the same: the receipt of the purchase price.[289] The absence of objective cause, according to modern theory, is punished by relative nullity.[290] The fact that lesion and objective cause are, at times, functional equivalents is proven by the following idea: the absence of the latter is seen as a lesion in amount of 100%.[291] Let us imagine than in a sale the vendor's objective cause (*i.e.*, the price) is missing, and no desire to make a liberality (*i.e.*, a gift or donation) can be noticed; the absence of the price may hide a troubled consent (*e.g.*, the seller was the buyer's employee and the former was afraid to refuse the contract because he believed he might lose his job). The problematic consent and the originary imbalance seem obvious: the seller's mind is not free and he has the obligation to transfer the thing, whereas the other party has no duty. Under those circumstances, the transferor of the thing may request the relative nullity of the convention. Here, too, one notices the functional equivalence between objective cause and lesion: the problem is the same (*i.e.*, affected consent and imbalance), and the result is also similar (*i.e.*, assassination of the contract).

19. Abusive clauses.

A clause is abusive when it creates a significant imbalance between the rights and obligations of the parties; the disadvantage exists in the detriment of the consumer or non-professional;[292] in Québec, abusive clauses seem to be accepted in contracts made with consumers, but also in adhesion conventions;[293] the Québécois abusive clauses appear to be the ones that can be qualified as excessive and unreasonable.[294] To put it simply, an abusive clause destroys the contractual equilibrium, both in France[295], and Québec.[296] As it seems, the abusive clause and the imbalance it generates are originary; they show themselves at the moment of the formation of the contract.[297]

The French Court of Cassation decided that one is in the presence of an abusive clause in the following situation: a contract established that a student who was enrolled in a school (*VBOS Ecole Pigie*r) will have to pay the complete amount of the education taxes, and it did not allow her to be partially excused if she decides not to complete her studies.[298]

Of course, an abusive clause may hide a problem of consent. Referring to Q.C.C. art. 1437 (*i.e.*, the text that discusses abusive clauses), a court indicated that "*la notion d'exploitation est à la base de la règle de ce texte*"[299] (exploitation is underlying the rule of the text). Thus, one can believe that, for instance, the consumer was exploited by the professional; in other words, one may assume that the consumer's consent was "*diseased*" when he accepted the clause that disadvantaged him.

It goes without saying that lesion and abusive clauses can be regarded as functional equivalents: they solve the same issue, which is a troubled consent and the originary imbalance; both may reach the same result (*i.e.*, the destruction of some element that lacks equilibrium).[300] I am compelled to add here that lesion and abusive clauses, though they

are very close mechanisms, should not be regarded as one and the same thing. Lesion, at least in France and Louisiana, supposes a mathematical imbalance indicated by the law itself (the example of a sale between persons of full age is quite enlightening); even in Québec, lesion between persons of full age requires a mathematical imbalance, though the law does not show its amount.[301] The disadvantage that exists in case of the abusive clauses is quite a delicate issue: it is possible that mathematics has no part in it.[302] Briefly, lesion requires always a sort of disproportion between prestations (which is mathematical, if the contractual partners are persons of full age); the mechanism of abusive clauses is broader: there might be a mathematical imbalance between prestations that indicates that a clause is abusive,[303] or mathematics might be irrelevant.[304] Furthermore, the fact that lesion and abusive clauses are different was highlighted by important authors.[305]

20. Usury.

This mechanism signifies the stipulation of excessive interests in a contract of loan.[306] In the context of a loan of money, some authors[307] and even legislators[308] believe that lesion and usury are exactly the same thing. As I have mentioned above, this view is questionable. Loan of money is a unilateral[309] and real[310] contract. This kind of convention involves only rights for one party, and solely obligations for the other:[311] the lender has the right to receive the sum of money, and no duties. The borrower has the duty to restitute that sum. As such, there can be no lesion; it is impossible to notice an imbalance between prestations, simply because there is only one prestation (that of the borrower). However, usury infects often times this type of contract; as such, some even speak of "*usurary*" loans.[312]

Nonetheless, lesion and usury are functional equivalents: both have the same target (protection of consent and an originary imbalance), and reach the same result (for instance, the reduction of the excessive advantage).[313] I have claimed that usury, like lesion, may hide a trouble of consent. Imagining an example is not impossible. We may very well believe that the borrower of a sum of money accepted a colossal interest, because he was under a pressing need to obtain that sum. As such, the lender took advantage of the borrower, and the latter's consent was not completely free.

21. Leonine clauses.

These contractual provisions appear especially in a convention of partnership;[314] they offer the entire profit to one of the associates, or they indicate that one of the parties will not receive any portion of the profit.[315] Briefly, one associate or partner takes the lion's part.[316] If one understands that an essential aspect of partnership is for every associate to participate in the distribution of benefits,[317] it is not hard to imagine why leonine clauses are intolerable. They contradict the very nature of this contract and generate imbalance. Let us imagine that two persons create a partnership; one of these two persons is ignorant, and it is unclear to him what it means to be involved in a partnership; they establish the resources that they will have to combine, in order for the entity to be successful. Furthermore, they indicate that one will obtain the entire profit

generated by the partnership. The problem of consent and the lack of equilibrium are striking: one partner is ignorant, and exploited by the other, and the latter gets everything, whereas the former receives nothing. Such a clause, at least in France, is considered non-written (F.C.C. art. 1841-1).

As it can be seen, lesion and leonine clauses are functional equivalents: they fight the same problem (*i.e.*, troubled consent and an imbalance that exists from the very moment the contract is formed), and can reach a similar result (that is, the destruction of the disproportionate element).

22. False recital of consideration.

As noted above (*supra.* no 11), promises are binding or enforceable if they are made for a consideration.[318] The latter is "*... the glue that binds the parties to a contract together*".[319] The adequacy of consideration, usually, is not a concern of the courts.[320] Nonetheless, nominal consideration or a false recital is an aspect that courts do not overlook. This kind of consideration "*... is so insignificant as to bear no relationship to the value of what is being exchanged (e.g., $10 for a piece of real estate)*".[321]

Let us suppose that A promises to convey to B a tract of land that is worth $500,000 in exchange of a consideration of $10. A, when he makes the promise, is B's employee, and he fears that refusal of the contract will cause him to remain without his job. Later, A encounters some financial difficulties. C offers A to pay him $480,000 for the real property that the latter promised to transfer to B. A agrees. After some time, B brings suit against A for breach of their contract. Under these facts, the convention would be unenforceable.[322]

It is noticeable that false recital of consideration and lesion may appear as functional equivalents: they fight against a problem of consent and against an originary imbalance; they also lead to a similar result (*e.g.*, the agreement is left for dead). One may notice how nominal consideration is apt to involve a trouble of consent, and, in reality, something more lurks behind that doctrine.

Of course, it is hard to deny that nominal consideration's primary function is to establish if there is or not a consideration (*see infra* no 25). Nonetheless, one might look at consent and the primordial imbalance that are present in the context of nominal consideration and understand that this doctrine also has the ability to protect consent and fight that lack of equilibrium (this would be nominal consideration's secondary function).

23. The penal clause.

Now, let us take a look at the mechanism known as penal clause. This contractual provision is meant to establish the amount of damages owed by the debtor if he does not perform his obligation.[323] The court has the possibility to reduce the established damages, under the conditions indicated by Q.C.C. art. 1623 (2),[324] or by F.C.C. art. 1152.[325]

One can imagine that two parties make a contract and they draw a penal clause according to which the failure to perform will generate the duty of the obligor to pay damages in a great amount;[326] we may further assume that the penal clause was accepted by a party,

because of his financial situation (*i.e.*, he needed the money brought to him by the contract). Under those facts, we can observe two aspects: (i) the problem of consent (the party's mind was not completely free when the penal clause was drafted, because of the pressing financial situation), and (ii) the penal clause is abusive or excessive (because it creates a serious imbalance from the moment the contract is made). The court has the power to reduce the amount of the damages. The penal clause, or its mechanism as created by Q.C.C. art. 1623 or by F.C.C. art. 1152, appears to be functionally equivalent to lesion. Both may attack the same problem (the "*sickness*" of consent and the originary contractual imbalance), and reach the same result (a cured consent and the equilibrium in the convention). However, the fact that they are functional equivalents does not mean that they are the same thing. Lesion is designed to protect consent (or ought to be so all the time) and it is also meant to fight imbalance. The main function of the penal clause is to assess damages; they are different mechanisms, but sometimes they can be functional equivalents.

24. *Lex commissoria* in the realm of real securities.

Q.C.C. art. 1801 forbids the commissory pact (or *lex commissoria*)[327] in the field of real securities;[328] F.C.C., on the other hand, allows it (*see e.g.* art. 2459, which makes way for this pact in relation to conventional mortgages). This clause does operate a *dation en paiement*[329] because the creditor who does not obtain his credit right gets instead the thing that is the object of the security.[330]

Let us assume that A lends a sum of money to B. The latter secures the restitution of the sum with a mortgage on one of his buildings. The parties establish that if B does not perform his obligation to restitute the money, A will become owner of the construction. B accepts the commissory pact, because he is in great need for the borrowed money; A knows this, and he understands that B is "willing" to "consent" to anything. The clause that allows A to become owner of B's house is considered non-written in Québec, but is valid in France. One can imagine how this clause could create a serious imbalance from the very beginning, and how a problematic consent is involved. Perhaps B's building is worth much more than the sum that he must restitute, and his pressing need for money subjected him to exploitation. Thus, there is an imbalance between advantages: B's advantage (the sum he borrowed), and A's advantage (the possibility to get a construction) are disproportionate. Furthermore, there is a problem of consent: B's mind was troubled by the urgent need for money. The mechanism of *lex commissoria* destroys the imbalance by setting aside such a commissory pact (Québec), or by indicating that the creditor must transfer to the debtor the difference between the value of the immovable and the amount of the credit right (France; *see* F.C.C. art. 2460[331]); in France, one can observe a reduction of the creditor's advantage. Furthermore, the mechanism of *lex commissoria* might give some protection to a "*diseased*" consent.

One may see why lesion and the mechanism of *lex commissoria* are functional equivalents: both may rise against the same problem (*i.e.*, "*diseased*" consent and primordial contractual imbalance), and reach a similar result (*i.e.*, a healthy consent and assurance of equilibrium).

Part V. Final Observations

25. My work has reached its end. The paper's body encompasses an institution known from the dawn of history, at least as far as the contract of sale is concerned; this being goes by the name of lesion. The creature was observed in three legal systems: France, Québec and Louisiana. The starting point was represented by attempts to imagine the thesis of this paper. Also, I have forced myself to define lesion. Furthermore, I have indicated the tension between contractual freedom and the spectre. In every one of these jurisdictions, I have tried to put into the light lesion's nature, its scope and pre-requisites; the remedies it offers were also taken into account. Of course, French, Québécois and Louisianian lesions were compared: in some aspects they are the same (*e.g.*, remedies, if one is to speak generally); on the other hand, they also seem to vary (it is so, to some extent,[332] for their realm of application; in Louisiana, unlike in France and Québec, lesion does not concern minors and persons of full age under protection; a functional equivalent appears to be enough for the former legal system). It may be easily noticed that the concepts that serve as lesion's foundation were brought to light.

The United States Common Law has an analogous to lesion: the doctrine of unconscionability. After the latter was discussed, the two were faced off. The comparison between them revolved around their nature, scope, elements, and remedies. The most curious aspect is that both lesion and unconscionability are generally defeated by contractual liberty or freedom; this is an indicium that Civil Law and Common Law Traditions, respectively mixed jurisdictions as Louisiana hold in high regard the so-called "*freedom of conventions*" and its desires (*i.e.*, contract is not be disturbed).

I have announced from the very beginning that the method of this study is the so called equivalence functionalism. Thus, a Part (*i.e.*, IV) was preoccupied with institutions that on some occasions are lesion's functional equivalents. Though these creatures may have the same function as lesion, it most definitely does not mean that they are concerned only with the same problem as the latter; also, one should not understand that their main function is the one that lesion has. False recital of consideration or nominal consideration may be cited. This entity's primary focus is to make sure that there is a consideration; "*… a false recital of consideration or merely nominal consideration … will not constitute consideration*".[333] That is its primary function or the problem it attacks: the presence or absence of consideration. Be that as it may, it also focuses on the issue of imbalance, and may involve a "*malady*" of consent: a party promises something without receiving much in exchange, and the acceptance of such a "transaction" occurs due to some fear.

Some of the identified functional equivalents[334] do play a most interesting role: they refute contractual imbalance and generate equilibrium in conventions that are "allergic" to lesion.[335]

[1] The current work is the author's dissertation paper. The paper was submitted to the LSU Paul M. Hebert Law Center in order to meet some of the requirements of an LL.M. program in Comparative Law. When published in this Law Review, the paper suffered some modifications, mainly in regard to its form (*e.g.*, the Chapters were replaced by Parts).

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[2] Furthermore, these legal techniques hide something more: the desire to protect consent.

[3] Of course, the first force prevails sometimes; it so happens when the existence of freedom is questionable.

[4] At a close look, it could be claimed that unconscionability is meant to protect consent, since in its context one of the contractual partner is exploited (*see infra* no 12).

[5] Though there is some controversy in regard to the Québécois lesion's juridical nature, at least some authors indicate that this lesion is a vice of consent, and the Civil Code of Québec calls it a vice of consent (*see* art. 1399 (2)). Thus, one might think that this lesion does protect consent.

[6] In Louisiana there is also controversy in regard to lesion's nature. Be that as it may, if one looks at some of the decisions of the Louisiana courts, that person might very well say that the Louisianian lesion protects consent. For instance, one court indicated that "*the law presumes juris et de jure that he who sells an immovable for less than half its value is acting under an error of fact sufficient to invalidate the sale*". *See Fernandez v. Wilkinson*, 103 So. 537, 539 (La. 1925). These words do indicate that lesion hides a problem of consent, and it is meant to protect that consent.

[7] French lesion, in relation to minors and persons of full age under protection, could be regarded as being concerned with the consent of the young or of the protected person. One might very well believe that the minor and the protected persons, by their very condition, are inexperienced or ignorant and subject to exploitation.

[8] *See* 3 CHRISTIAN LARROUMET, DROIT CIVIL. LES OBLIGATIONS. LE CONTRAT 378 no 415 (4th ed., Economica 1998).

[9] Cour de Cassation [Cass.], 1e civ., Oct. 19, 1960, Bull. civ. I, No. 8 (Fr.).

[10] I will provide an example to show what I mean by the fact that lesion may be absent in regard to some contracts. Take for instance France and the contract of exchange. French Civil Code art. 1706 states that "*la rescision pour cause de lésion n'a pas lieu dans le contrat d'échange*" (rescission for lesion does not occur in a contract of exchange).

[11] KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 36-37 (Tony Weir trans., 3rd ed., Oxford University Press reprinted 2011).

[12] ZWEIGERT & KÖTZ, *supra.* note 10 at 40.

[13] GÉRARD CORNU ET AL., VOCABULAIRE JURIDIQUE 543 (8th ed., PUF 2007). Of course, lesion has another meaning, besides the one already shown. *See Id.* at 543-44. This paper, however, worries itself only with the description that was already mentioned. Furthermore, when it depicts the first meaning of lesion, the work coordinated by Cornu also brings into the light the French conception. I have ignored that portion, simply because this part of my study is not the appropriate place to look into it.

[14] PAUL OSSIPOW, DE LA LÉSION. ÉTUDE DE DROIT POSITIF ET DE DROIT COMPARÉ 12 (Librairie de Droit, Librairie du Recueil Sirey 1940).

[15] ALFRED FOUILLÉE, LA SCIENCE SOCIALE CONTEMPORAINE 410 (Librairie Hachette 1880). The expression has the following meaning: who says contractual, says just.

[16] Olivier Moréteau, *Premiers pas dans la comparaison des droits*, *in* JURILINGUIS TIQUE: ENTRE LANGUES ET DROITS 419 (Jean-Claude Gémar & Nicholas Kasirer eds., Bruylant, Les Éditions Thémis 2005).

[17] *Id.* at 419-20.

[18] *Id.* at 420.

[19] For a presentation of Comparative Law's methods, *see e.g.* Béatrice Jaluzot, *Méthodologie du droit comparé. Bilan et prospective*, 57 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 29, 38-43 (2005) (Fr.). On juxtaposition-plus and its criticism, *see* Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harv. Int'l. L. J. 411, 427, 429-34 (1985).

[20] Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 Am. J. Comp. L. 671, 679 (2002).

[21] KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (Tony Weir trans., 3rd ed., Oxford University Press reprinted 2011).The same idea was expressed by Zweigert in French, when he said that "*la méthode comparative est donc nécessairement une méthode fonctionelle* …" [the comparative method is necessarily a functional method]. *See* Konrad Zweigert, *Des solutions identiques par des voies différentes (Quelques observations en matière de droit comparé)*, 18 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 5, 7 (1966) (Fr.).

[22] ZWEIGERT & KÖTZ, *supra.* note 10 at 34. Similarly, another author teaches us that the criterion of comparability may be searched within the function fulfilled by the rules which are studied. *See* Olivier Moréteau, *Premiers pas dans la comparaison des droits*, *in* JURILINGUIS TIQUE: ENTRE LANGUES ET DROITS 419 (Jean-Claude Gémar & Nicholas Kasirer eds., Bruylant, Les Éditions Thémis 2005).

[23] From the very beginning one must understand that there are "... *at least seven different concepts of functionalism across disciplines* …". *See* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 344 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008). Of course, Zweigert and Kötz appear to be proponents of equivalence functionalism, as suggested by their own words: "*the comparatist who wants to find in a foreign system the rules which are functionally equivalent to those which interest him in his native law requires both imagination and discipline*". *See* ZWEIGERT & KÖTZ, *supra.* note 10 at 36-37.

Zweigert and Kötz also tell us that "... *the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results*". *See* ZWEIGERT & KÖTZ, *supra.* note 10 at 34. We are led to believe that functionalism means the possibility to observe the same problems which, by different mechanisms, receive the same results. Nevertheless, this aspect must be properly understood. Zweigert and Kötz themselves preach that "… *if we leave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of successions, and concentrate on those parts of private law which are relatively 'unpolitical' we find that as a general rule developed nations …*'". *See* ZWEIGERT & KÖTZ, *supra.* note 10 at 40. Thus, one can easily think that similar problems that admit the same results are an idea that one meets with in the context of 'unpolitical' topics and developed nations. It appears difficult to admit that, for instance, Botswana and France would have the same problems. Furthermore, if we meditate at topics that are not 'unpolitical', but extremely tainted by moral imperatives, it is doubtful that equally developed nations would reach the same solutions. For example, Germany and Netherlands are developed, but gay marriage is not accepted in the former, though it is so in the latter.

[24] Jaluzot, *supra.* note 18 at 39.

[25] ZWEIGERT & KÖTZ, *supra.* note 10 at 35. The problem is the aspect that must be envisaged. *See* RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 12 (11th ed., Dalloz 2002).

[26] ZWEIGERT & KÖTZ, *supra.* note 10 at 34; Hein Kötz, *Comparative Law in Germany Today*, 51 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 753, 755 (1999).

[27] ZWEIGERT & KÖTZ, *supra.* note 10 at 38.

[28] Zweigert, *supra.* note 10 at 15.

[29] ZWEIGERT & KÖTZ, *supra.* note 10 at 34. This assertion of Zweigert and Kötz, as I have already pointed out, must be read in close connection to their view regarding the developed nations and 'unpolitical' institutions (*i.e.*, entities free from heavy moral imperatives).

[30] *See e.g.* Frankenberg, *supra.* note 18 at 411 ff. For a brief presentation of the reproaches that were formulated against functionalism, *see* Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 389-90, §2.(b) (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

[31] Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 358 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

[32] Micro-comparison aims at comparing specific legal institutions. *See* ZWEIGERT & KÖTZ, *supra.* note 10 at 5. On the other hand, macro-comparison looks at entire legal systems. *See* Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 408 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

[33] One scholar underlines that lesion's foundation is a moral precept: *Neminem laede*. *See* OSSIPOW, *supra.* note 13 at 12. Is the author correct? If he is, can equivalence functionalism be used, since that method does not sit well with topics that are highly penetrated by moral imperatives? I believe that equivalence functionalism can be the method deployed in this study, even if lesion is founded on morality. Zweigert and Kötz seem to find a barrier in the path of equivalence functionalism when we are in the presence of "*… topics … heavily impressed by moral … values, mainly to be found in family law and in the law of succession …*". *See* ZWEIGERT & KÖTZ, *supra.* note 10 at 40. Lesion is not a topic heavily penetrated by moral values, since it is not placed or found in family law, nor in the law of succession; the institution belongs to the law of contract. Of course that lesion has some roots in morality, but this does not mean that it is a topic heavily tainted by moral values. Perhaps an illustration will better highlight what I mean. One might say that a creature highly characterized by swimming skills can mainly be found in an aquatic environment (*e.g.*, oceans, rivers etc.) A horse, though it has some swimming talent, it is not heavily characterized by swimming skills, since this animal is not to be found in an ocean or river and so on. It is the same with lesion, which cannot be seen as heavily characterized by moral values, because it is not to be found on the realms represented by family and succession laws.

[34] Konrad Zweigert, *Méthodologie du Droit Comparé*, *in* 1 MÉLANGES OFFERTS A JACQUES MAURY 584 (Dalloz & Sirey 1960).

[35] An example of such a doctrine is the objective cause (*infra* Part IV). I am compelled to highlight that when the comparatist uses the functional method he is obliged to show a complete inventory of rules that have the same function. *See* Olivier Moréteau, *Premiers pas dans la comparaison des droits*, *in* JURILINGUISTIQUE: ENTRE LANGUES ET DROITS 421 (Jean-Claude Gémar & Nicholas Kasirer eds., Bruylant, Les Éditions Thémis 2005). That is why it is necessary to identify other beings from the civil law and the common law with the same function as lesion. Unconscionability is, of course, one of these beings, as Part III will clarify.

[36] ZWEIGERT & KÖTZ, *supra.*note 10 at 43.

[37] Mathias Reimann, *supra.* note 19 at 675.

[38] John C. Reitz, *How to Do Comparative Law*, 47 Am. J. Comp. L. 617, 634 (1998).

[39] *Id.* at 634.

[40] Olivier Moréteau, *Premiers pas dans la comparaison des droits*, *in* JURILINGUIS TIQUE: ENTRE LANGUES ET DROITS 418 (Jean-Claude Gémar & Nicholas Kasirer eds., Bruylant, Les Éditions Thémis 2005).

[41] FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 310 no 302 (9th ed., Dalloz 2005).

[42] 4 JEAN CARBONNIER, DROIT CIVIL. LES OBLIGATIONS 158 no 78 (22nd ed., PUF 2000).

[43] 3 CHRISTIAN LARROUMET, DROIT CIVIL. LES OBLIGATIONS. LE CONTRAT 377-78 nos 414-15 (4th ed., Economica 1998).

[44] *Id.* at 377 no 414. A vice of consent may be understood as a perturbation that, when the juridical act is formed, affects the lucidity or the freedom of consent without completely abolishing it, and which brings with it relative nullity. *See* GÉRARD CORNU ET AL., *supra.* note 12 at 962.

[45] 3 LARROUMET, *supra.* note 7 at 378 no 415.

[46] Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 111 (1989-1990). This author makes a questionable statement: *"for supporters of an objective approach, lesion, although still listed among the vices of consent ..."*. *Id.* It is hard to claim that the ones who describe lesion from the objective perspective accept that the being is listed among the vices of consent. Larroumet clearly emphasizes that lesion stands apart from these vices, if it is seen as an objective element. *See* 3 LARROUMET, *supra.* note 7 at 378 no 415.

[47] JEAN-LOUIS BAUDOUIN & PIERRE-GABRIEL JOBIN, LES OBLIGATIONS 240-42, nos 264-66 (5th ed., Les Éditions Yvon Blais Inc. 1998). These authors claim, in the context of the objective conception, that a sort of presumed economic error is involved. *Id.* at 240 no 264. In my opinion, if any kind of error appears (presumed or otherwise) it is highly difficult to discuss about an objective approach. Error implies a psychological defect, and it means that a subjective aspect shows itself.

[48] A contract is synallagmatic when each party has the double quality of creditor and debtor (sale is such a synallagmatic contract, *see Commentaires du Ministre de la Justice*, *in* 2 BAUDOUIN & RENAUD, CODE CIVIL DU QUÉBEC ANNOTÉ 1654 (15th ed., Wilson & Lafleur 2012)). It is onerous when each contractual partner desires an advantage in exchange of his prestation (*see e.g.* the legal definition indicated by the Québec Civil Code art. 1381 (1)). Finally, the convention is commutative when the extent of each obligation and advantage is known from the very beginning (*see* the Québec Civil Code art. 1382 (1)).

[49] *See e.g.* TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 310 no 302.

[50] Hereinafter, *brevitatis causa*, F.C.C.

[51] 4 CARBONNIER, *supra.* note 41 at 104 no 44.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] 4 CARBONNIER, *supra.* note 41 at 104-105 no 44.

[57] 4 PHILIPPE MALAURIE & LAURENT AYNÈS, COURS DE DROIT CIVIL. LES OBLIGATIONS 236 no 421 (4th ed., Cujas 1993).

[58] *Id.* at 236 no 421.

[59] *Id.*

[60] 3 LARROUMET, *supra.* note 7 at 379 no 417. Furthermore, some believe that the French Civil Code's preparatory works indicate that lesion was meant to be a vice of consent. *See* 2 HENRI CAPITANT, FRANÇOIS TERRÉ & YVES LEQUETTE, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE. OBLIGATIONS. CONTRATS SPÉCIAUX. SÛRETÉS 676 (12th ed., Dalloz 2008). The latter authors add this: in the eyes of the Court of Cassation, such preparatory works did not prevail over the formula of the texts. *See* 2 CAPITANT, TERRÉ & LEQUETTE, *supra.* note 59 at 676. The Code does not indicate the necessity of a subjective element, and the judges adopted the objective conception. 2 CAPITANT, TERRÉ & LEQUETTE, *supra.* note 59 at 676.

[61] 3 LARROUMET, *supra.* note 7 at 380 no 417.

[62] *Id.*

[63] *Id.*

[64] *See* Cour de Cassation [Cass.] Req., Dec. 28, 1932, D.C. Jur. (Fr.) at 89 (in the context of F.C.C. art. 1674, the court declared that lesion is, by itself, a reason for rescission; as such, the French Supreme Court rejected the theory of the defendant, according to which, in the eyes of the law, lesion is a vice of consent). *See also* Cour de Cassation [Cass.], 1e civ., Oct.19, 1960, Bull. civ. I, No. 8 (Fr.) (referring to a partition, the court established that lesion is by itself a motive for rescission, independently of any vice of consent).

[65] 3 LARROUMET, *supra.* note 7 at 380 no 418.

[66] 3 LARROUMET, *supra.* note 7 at 369 no 408. An act of administration may be briefly defined as an ordinary act regarding the exploitation of a thing; an example of such a juridical act is the lease. *See* GÉRARD CORNU ET AL., *supra.* note 12 at 30.

[67] One must not be deceived by F.C.C. art. 1305, which indicates that the minor can use lesion in regard to all sorts of conventions. Often, lesion is not the appropriate remedy; incapacity seems better fitted. *See* ALEX WEILL & FRANÇOIS TERRÉ, DROIT CIVIL. LES PERSONNES. LA FAMILLE. LES INCAPACITÉS 865 no 875 (5th ed., Dalloz 1983); TERRÉ, SIMLER &LEQUETTE, *supra.* note 40 at 314 no 309.

Maybe there is no exaggeration in saying that, in the case of a minor, lesion and incapacity have their own separate roles; they are distinct mechanisms. Some juridical acts can be criticized on grounds of the

former, but not the latter and vice-versa. *See e.g.* Cour de Cassation [Cass.], 1e civ., Nov. 4, 1970, D. 1971, 186 (Fr.) (a minor who had a driving license leased a car; the court decided that such a contract could be attacked for lesion, but not incapacity; however, no lesion was observed in the case). Even if lesion and capacity stand apart, they can be seen as functional equivalents; sometimes the latter can battle, for instance, contractual imbalance (*infra* no 17), though there is no place for the former.

[68] Curatorship is a regime of protection that can affect a person of full age who has the need of being advised and controlled in regard to the most serious juridical acts, either because of the alteration of his personal characteristics, either because of his prodigality or similar reasons. *See* GÉRARD CORNU ET AL., *supra.* note 12 at 259.

[69] 3 LARROUMET, *supra.* note 7 at 370 no 408.

[70] *See e.g.* F.C.C. art. 465 3°. The nullity envisaged by the text appears exactly because there is a lack of capacity. *See* JURRIS CLASSEUR. CODE CIVIL. Volume «Art. 415 à 432 à art. 565 à 577», no 75.

[71] 4 CARBONNIER, *supra.* note 41 at 157 no 78.

[72] *Id.*

[73] 3 LARROUMET, *supra.* note 7 at 370 no 409. It is only reasonable to assume that a person of full age not under protection is careful with his interests and intelligent enough to protect them. *See* 4 CARBONNIER, *supra.* note 41 at 156 no 78.

[74] Commutative justice requires that a contract should not be maintained, if a party suffers a damage because of a lack of balance between the prestations. *See* 3LARROUMET, *supra.* note 7 at 366 no 405. Nonetheless, a strict observance of this idea is dangerous; it creates the risk of completely destroying the security of juridical relationships. *Id.* at 367 no 405. Commutative justice and security of contracts are in disaccord. *Id.* at 370 no 409.

[75] 4 CARBONNIER, *supra.* note 41 at 158 no 78.

[76] 4 CARBONNIER, *supra.* note 41 at 158 no 78.

[77] 1 RENÉ DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL. SOURCES DES OBLIGATIONS 609 no 391 (Librairie Arthur Rousseau 1923).

[78] GABRIEL BAUDRY-LACANTINERIE & LÉO SAIGNAT, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DE LA VENTE ET DE L'ÉCHANGE 707 no 673 (3rd ed., Librairie de la Société du Recueil J.-B. Sirey et du Journal du Palais 1908).

[79] 4 CARBONNIER, *supra.* note 41 at 158 no 78.

[80] 3 LARROUMET, *supra.* note 7 at 371 no 409.

[81] The law allows the buyer of agricultural fertilizers, seeds, plants, and substances destined to feed farm animals to claim lesion if he paid more than ¼ their value. For the text, *see* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070998&dateTexte=20130401#LEGIARTI000006474007 (last visited May 13, 2013).

[82] The assignor of the rights to exploit the intellectual creation can use lesion, if there is a disproportion of more than 7/12. For the content of art. L131-5, the following link may be consulted: http://www.legifrance.gouv.fr/affichCode.do;jsessionid=171D4EF35DCEFD4B2DA73BC1D20BAF1F.tpdjo15v_2?idSectionTA=LEGISCTA000006161639&cidTexte=LEGITEXT000006069414&dateTexte=20130401 (last visited May 13, 2013).

[83] *See e.g.* 4 CARBONNIER, *supra.* note 41 at 158 no 78.

[84] The normative act allowed lesion in a contract of maritime assistance, if the price paid by the saved ship was inequitable. However, arts. 10, 15 and 16 were repealed by art. 7 of Ordinance no 2010-1307. *See* http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=171D4EF35DCEFD4B2DA73BC1D20BAF1F.tpdjo15v_2?cidTexte=JORFTEXT000022990793&dateTexte=20101103 (last visited May 13, 2013).

[85] Art. L5132-6 2° condones lesion in a contract of maritime assistance if the price paid is too high or too low in comparison to the services that were rendered. For the text, *see*

http://www.legifrance.gouv.fr/affichCode.do;jsessionid=171D4EF35DCEFD4B2DA73BC1D20BAF1F.tpdjo15v_2?idSectionTA=LEGISCTA000024151203&cidTexte=LEGITEXT000023086525&dateTexte=20130401 (last visited May 13, 2013).

[86] 4 CARBONNIER, *supra.* note 41 at 158-59 no 78.

[87] *Id.* at 159 no 78; 5 CHARLES AUBRY & CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS 181 no 358 (Imprimerie et Librairie Générale de Jurisprudence 1907). *See e.g.* Cour de Cassation [Cass.], 3e civ., Dec. 14, 2011, D. 2012 A.J.No 3(Fr.) (the court said that rescission for lesion does not affect by itself the buyer's ownership and cited art. 1681); Cour de Cassation [Cass.], 1e Civ., June 7, 1966, *in* 2 CAPITANT, TERRÉ & LEQUETTE, *supra.* note 59 at 679 (the court talked about the supplement that the buyer must pay in order to avoid the restitution of the immovable, when lesion is observed; also, the Supreme Court indicated that the supplement must correspond to the value of the thing when the supplementation is paid, not to the worth of the immovable at the moment the sale was made).

[88] According to the former F.C.C. art. 887 the main remedy was nullity. *See* 4 CARBONNIER, *supra.* note 41 at 159 no 78; 3 LARROUMET, *supra.* note 7 at 371 no 409. Law no. 2006-728 operated the change: it modified F.C.C. art. 887, which now talks about error, fraud and duress; it also gave another shape to F.C.C. art. 889, which speaks of a supplement, without referring to rescission.

[89] Renunciation by one of the spouses is another issue that tends to be delicate. This type of manifestation of will seems to be a unilateral act. In relation to art. 424, a court talked about renunciation at rights contained in the familial patrimony. *See C. (F.) c. M. (J.),* (C.S., 1999-07-09), *in* 1 JEAN-LOUIS BAUDOUIN & YVON RENAUD, CODE CIVIL DU QUÉBEC ANNOTÉ 526 (15th ed., Wilson & Lafleur 2012). Of course, renunciation at a right is a unilateral act. *See* ALAIN BÉNABENT, DROIT CIVIL. LES OBLIGATIONS 590 no 885 (9th ed., Montchrestien 2003).

As such, that act and lesion seem incompatible, despite the clear words of art. 424. How can one party be exploited by the other, since, by definition, a unilateral act means that there is only one person?

[90] Art. 472 can be subjected to the same criticism indicated above, in regard to art. 424.

[91] Art. 2332 of the Québec Civil Code, dedicated to loan of money, mentions lesion *expressis verbis*. However, it is more than debatable that this doctrine is appropriate in such a context. As one court noticed, in the case of a loan of money, which is a unilateral contract, one is to talk about usury. This is a notion distinct of lesion. *See Crédit Trans-Canada ltée c. McClemens*, (Q.C., 1995-01-26), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 3342. Nevertheless, other decisions, in referring to the same legislative text, have no trouble in using the term "*lésionnaire*". *See e.g. Saviolakis c. Immeubles Marai inc.*, (C.S., 2000-04-14) and *Bégin c. Marcouiller*, (C.Q., 2007-06-12), *in Id.*

[92] Hereinafter, *brevitatis causa*, Q.C.C.

[93] *Commentaires du Ministre de la Justice*, *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1711. It must be noted that one author is of the opinion that lesion extends to other situations than the ones pointed out by the Minister of Justice. That scholar recites the penal clause (art. 1623 (2)), the *dation en paiement* clause (art. 1801), clauses that establish damages in a residential lease (art. 1901) etc. *See* 1VINCENT KARIM, COMMENTAIRES SUR LES OBLIGATIONS 110 (Les Éditions Yvon Blais 1997). To me, it is rather doubtful that these examples are actually forms of lesion; rather, one can grasp them as different doctrines that are lesion's functional equivalents. As such, I will not discuss the issues at this point; their place is in Part IV; for the penal and *dation en paiement* clauses, *see infra* Part IV. Q.C.C. art. 1901 talks about abusive clauses in relation to a residential lease. The text seems an application of Q.C.C. art. 1437 (*i.e.*, the doctrine of abusive clauses). *See Commentaires du Ministre de la Justice*, *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 2759. Just like the before mentioned institutions, abusive clauses are analyzed below (*see infra* Part IV).

[94] BAUDOUIN & JOBIN, *supra.* note 46 at 242 no 267.

[95] *Id.* at 239 no 263.

[96] *Id.*
[97] *Id.*
[98] JEAN PINEAU, DANIELLE BURMAN & SERGE GAUDET, THÉORIE DES OBLIGATIONS 218 no 105 (4th ed., Les Éditions Thémis 2001).
[99] One might be shocked by my statement that lesion has a limited field in Québec (the fact that lesion's scope is limited seems difficult to deny; *see* Q.C.C. art. 1405 and *Commentaires du Ministre de la Justice*, *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1711; the cited Commentaries are placed under art. 1405). After all, it does apply to whole categories of persons, and, sometimes, even to those who are of full age. Nevertheless, one must keep in mind that the Québécois lesion encounters restraints, especially if compared to, say, the Romanian lesion. The latter appears regardless if the contract was made by persons under protection or by an individual who has reached the age of majority. For details regarding the Romanian lesion, *see e.g.* Adrian Tamba, *Leziunea în contextul Noul Cod Civil. Câteva consideraţii*(*Lesion in the Context of the New (Romanian) Civil Code. A Few Considerations)*, Studia Universitatis Babeş-Bolyai Iurisprudentia no. 3/2011, http://studia.law.ubbcluj.ro/articol.php?articolId=460 (last visited May 13, 2013).
[100] Art. 1405 is considered the fundamental text in relation to lesion. *See* BAUDOUIN & JOBIN, *supra.* note 46 at 237 no 261.
[101] *Racicot v. Berttrand*, (C.S. Can., 1978-10-31), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1711.
[102] 1 VINCENT KARIM, COMMENTAIRES SUR LES OBLIGATIONS 109 (Les Éditions Yvon Blais 1997).
[103] PINEAU, BURMAN & GAUDET, *supra.* note 97 at 217 no 104.
[104] *Id.*
[105] *Id.*
[106] Art. 21 (1) of the Swiss Code of Obligations states that "*en cas de disproportion évidente entre la prestation promise par l'une des parties et la contre-prestation de l'autre, la partie lésée peut, dans le délai d'un an, déclarer qu'elle résilie le contrat et répéter ce qu'elle a payé, si la lésion a été déterminée par l'exploitation de sa gêne, de sa légèreté ou de son inexpérience*" [in case of obvious disproportion between the prestation promised by one of the parties and the counter-prestation of the other, the injured party may, within one year, declare that she dissolves the contract and receive back what she paid, if lesion was determined by the exploitation of her situation, legerity, or inexperience].
[107] PINEAU, BURMAN & GAUDET, *supra.* note 97 at 217 no 104.
[108] *Id*.
[109] *Id.* at 217-18 no 104.
[110] Despite this definition, one cannot ignore that lesion's domain is limited, as indicated by Q.C.C. art. 1405. *See Commentaires du Ministre de la Justice*, *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1711. Indeed, to completely grasp lesion's scope, one must look simultaneously at arts. 1405 and 1406.
[111] PINEAU, BURMAN & GAUDET, *supra.* note 97 at 217 no 104.
[112] *Id.* at 219 no 105.
[113] *Id.* at 217 no 104.
[114] *Id.* at 217 no 104, 216 no 104.
[115] *Id.* at 220 no 105.
[116] *Id.* at 221 no 105.
[117] The presence of disproportion generates a presumption of exploitation. This presumption is a relative one, as it can be rebutted. *See* BAUDOUIN & JOBIN, *supra.* note 46 at 248 no 274; PINEAU, BURMAN & GAUDET, *supra.* note 97 at 219 no 105. Furthermore, the legal presumption was created in order to lessen the burden of proof requested from the victim of lesion. *See* BAUDOUIN & JOBIN, *supra.*note 35 at 247 no 274.
[118] A few authors observe that the renunciations indicated by arts. 424 and 472 are indeed unilateral acts. *See* PINEAU, BURMAN & GAUDET, *supra.* note 97 at 226 no 107. However, they claim that we are in the

presence of lesion if the renouncing party was in mistake upon the value of that which he was entitled to, or the party was pressured into renouncing. *Id.* If the party renounces in order to escape the pressure to which he was subjected, his conduct may be disproportionate in comparison to the advantage he gained, and which is a too expensive peace. *Id.* at 227. Though the observations seem fair, the issue remains: how can lesion be accepted in cases of unilateral acts, since art. 1406 indicates that it was constructed for contracts? Under hypotheses as those imagined by the cited scholars, other mechanisms must be used (*e.g.*, civil liability), because lesion does not seem equipped to handle such problems.

[119] Art. 8 states that "*le consommateur peut demander la nullité du contrat ou la réduction des obligations qui en découlent lorsque la disproportion entre les prestations respectives des parties est tellement considérable qu'elle équivaut à de l'exploitation du consommateur …*" [the consumer may demand the nullity of the contract or the reduction of the contractual obligations, if the disproportion between the prestations of the parties is so considerable that it amounts to the exploitation of the consumer]. According to art. 9 "*lorsqu'un tribunal doit apprécier le consentement donné par un consommateur à un contrat, il tient compte de la condition des parties, des circonstances dans lesquelles le contrat a été conclu et des avantages qui résultent du contrat pour le consommateur*" [if a court must analyze the consent given by a consumer in regard to a contract, the court will take into account the condition of the parties, the circumstances in which the contract was made, and the advantages which result from the contract for the consumer].

For the content of the two provisions the following Internet link may be consulted: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P_40_1/P40_1.html (last visited May 13, 2013).

[120] *Neagu c. Motor Sport Rive Sud Inc.*, [1978] C.S. 909, *in* MAURICE TANCELIN & DANIEL GARDNER, JURISPRUDENCE COMMENTÉE SUR LES OBLIGATIONS 67-68 (5th ed., Wilson & Lafleur 1992). The case was decided under art. 118 of the Law on Consumer's Protection; that text was replaced by arts. 8-9 mentioned above. The latter are identical in substance with art. 118, so the case is relevant under the current legislation.

[121] Discussing Q.C.C. art. 1406 (2) the doctrine indicates that the idea of exploitation is to be observed. *See* PINEAU, BURMAN & GAUDET, *supra.* note 97 at 220 no 105. The necessity of a disproportion may be seen if one looks at a decision where the court talked about the disequilibrium between the minor's contractual obligations and the advantages he obtains. *See Marcel Grenier Automobile Enrg. c. Tahuvette*, (C.S., 1968-03-29), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1713.

[122] PINEAU, BURMAN & GAUDET, *supra.* note 97 at 249 no 118.

[123] *Id.* at 266 no 124. Art. 283 talks about damage, but the term is understood in the sense of lesion. *See R.J. c. Clément*, (C.A., 2011-04-14), *in* 1 BAUDOUIN & RENAUD, *supra.* note 88 at 346.

[124] PINEAU, BURMAN & GAUDET, *supra.* note 97 at 220 no 105.

[125] *Séguin c. Paradis*, (C.Q., 2010-12-06), *in* 1 BAUDOUIN & RENAUD, *supra.* note 88 at 246.

[126] MAURICE TANCELIN, DES OBLIGATIONS EN DROIT MIXTE DU QUÉBEC 173 no 235 (7th ed., Wilson & Lafleur, 2009).

[127] *Minten Grove Corporation c. Ménard*, (C.S., 2006-03-17), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1714.

[128] *Commentaires du Ministre de la Justice*, *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1718.

[129] One author accurately notices the connection between Q.C.C. arts. 1407-1408, in regard to the issue of reduction. *See* TANCELIN, *supra.* note 125 at 173 no 235. Art. 1407's reduction can very well be placed into action by the judge at the defendant's initiative under art. 1408. Perhaps an example will be more clarifying. Let us assume that a minor agrees to buy for $2500 a scooter that is worth $2200, for the purpose of travelling. The minor's patrimony does not allow him to pay such a price, but the assets are enough for him to pay $2000. The minor could request the reduction of his obligation with $500 (*i.e.*, the amount of damages he would be justified in claiming). Since the $2500 sum is an obligation for the minor and a credit right for his contractual partner, the $500 reduction means that the former's obligation and

the latter's personal right are reduced in that amount. Thus, under art. 1407, the minor's obligation will consist of $2000 and the same will be the quantum of the contractual partner's credit right. Now, let us imagine that the minor demands the nullity, but under art. 1408, the contractual partner offers a reduction of his personal right by $500. If the court accepts the proposal, since the $2500 is for the contractual partner a personal right and for the minor an obligation, the former will receive $2000 and the minor is bound to pay that sum. Briefly, both articles, 1407 and 1408, generate a diminution of the victim's obligation and of the contractual partner's personal right.

[130] TANCELIN, *supra.* note 125 at 173 no 235; *Commentaires du Ministre de la Justice*, *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1718.

[131] 1 VINCENT KARIM, COMMENTAIRES SUR LES OBLIGATIONS 122 (Les Éditions Yvon Blais 1997); BAUDOUIN & JOBIN, *supra.* note 46 at 259 no 301.

[132] 1 VINCENT KARIM, COMMENTAIRES SUR LES OBLIGATIONS 120 (Les Éditions Yvon Blais 1997).

[133] Freedom of contract represents a most valuable jewelry for Louisiana. After all, it does have the rank of a principle. *See* Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 108 (1989-1990) (the author talks about the "*principle of freedom of contract*"). Since contractual freedom is a principle one can easily see that it will usually defeat other beings that rise against it; one of these loosing creatures is lesion.

[134] Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 112 (1989-1990).

[135] *Harmon v. Harmon*, 508 So.2d 616, 620 (La. App. 2nd Cir. 1987).

[136] Hereinafter, *brevitatis causa*, La. Civ. C.

[137] The argument *pro subiecta materia* indicates that lesion is a vice of consent, in the understanding of the La. Civ. C.

[138] 3 LARROUMET, *supra.* note 7 at 378 no 415.

[139] Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 112 (1989-1990). The author tells us the following: "*... in sum ... in spite of its place in the code, lesion differs from the three traditional categories of vices of consent and, insofar as the law of Louisiana is concerned, is more akin to an instrument of public policy ...*". *Id.* We may very well understand that, in such a vision, lesion has little to do with consent; it is linked to public policy.

[140] *Id.* at 109.

[141] *Id.*

[142] *Id.* at 115.

[143] The Louisiana courts had the chance to place themselves on the field of art. 1864, or, at least, to acknowledge its existence. *See e.g. Farrar v. Swedish Health Spa*, 337 So.2d 911, 914 (La. App. 3d Cir. 1976) (a seventeen year old entered into a contract with a company; the minor paid $324,13 for a two year membership); *Wilkinson v. Wilkinson*, 323 S.2d 120, 125 (La. 1975) (marriage contract involving a minor and a person of full age).

[144] Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 114 (1989-1990).

[145] *Id.*

[146] The immovable usually involved is land. *See e.g. Bisco v. Middleton*, 383 So.2d 1047 (La. App. 1st Cir. 1980). Also, *see* Comment, *Lesion Beyond Moiety in the Law of Sale*, 14 Tul. L. Rev. 249, 253 (1939-1940).

[147] Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 110 (1989-1990). Here is the place to emphasize that such a reason does not sit well with the objective conception on lesion. According to that approach, it is enough to notice the lack of equivalence between prestations. *See* TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 321 no 314. Anything else, such as the needs of one of the contractual partners, brings with it a subjective flavor.

[148] *Peterson v. Herndon*, 221 So.2d 615, 617 (La. App. 2nd Cir. 1969).

[149] Fair market value has been defined as "*the amount a willing purchaser would pay a willing seller for a particular piece of property*". *See Valley Land Co. v. Fielder*, 242 So.2d 358, 361 (La. App. 2nd Cir. 1970). Somehow similar it has been said that "*market value means the fair value of the property between one who wants to purchase and one who wants to sell under usual and ordinary circumstances*". *See Henderson v. Dyer*, 68 So.2d 623, 625 (La. App. 1st Cir. 1953).

[150] *See e.g. Mullins v. Page*, 457 So.2d 64, 71 (La. App. 2nd Cir. 1984); *Goulas v. Goulas*, 426 So.2d 735, 736 (La. App. 3d Cir. 1983); *Fontenot v. Fontenot*, 427 So.2d 27, 30 (La. App. 3d Cir. 1983); *Dejean v. La. Dept. of Highways*, 350 So.2d 938, 940 (La. App. 2nd Cir. 1977); *Crow v. Monsell*, 200 So.2d 700, 703 (La. App. 2nd Cir. 1967).

[151] One might doubt the usefulness of art. 2663. It is so because art. 2664 states that the rules of sale govern the contract of exchange. That is why lesion could have been allowed on account of art. 2664: the rules applicable to sale (*e.g.*, lesion, which is indicated by art. 2589) could take the contract of exchange in their arms.

[152] Prior to the 2010 revision, it was claimed that lesion would not be applicable where each party has exchanged an immovable. *See* Comment, *Lesion Beyond Moiety in the Law of Sale*, 14 Tul. L. Rev. 252 (1939-1940). Nevertheless, it was admitted that lesion could appear if an immovable and a sum of money were given in exchange of an immovable. *See Landry v. Istre*, 510 So.2d 1310, 1314 (La. App. 3d Cir. 1987) (however, the solution was the rejection of lesion, because the ½ disproportion was not met; I will underline, once again, that the court accepted the idea that lesion can be used when money and an immovable are given in exchange of an immovable, if its requisites can be observed).

Today, it can be said that a person that exchanges an immovable for another immovable can claim lesion, if the thing he receives is worth less than ½ of the value of the immovable he gives. La. Civ. C. art. 2663 talks about "property"; it does not distinguish between the kind of things received, and neither should the interpreter.

[153] It has been noted that a true exchange is the equivalent of a sale. *See Simon v. Arnold*, 727 So.2d 699, 702 (La. App. 3d Cir. 1999). Thus, it is not surprising that the former is under the influence of the latter.

[154] 16 KATHERINE S. SPAHT & RICHARD D. MORENO, LOUISIANA CIVIL LAW TREATISE. MATRIMONIAL REGIMES 683 § 7.25 (3rd ed., Thomson/West 2007).

[155] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 314 no 309. French doctrine may very well be used to explain the reasons that support lesion in a partition. After all, French lesion was received by the Louisiana Civil Code. *See* Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 109 (1989-1990). Of course, the being under discussion did suffer some alterations in Louisiana (*see infra* no 8).

[156] *See e.g. Picard v. Picard*, 708 So.2d 1292, 1295 (La. App. 3d Cir. 1998), where the court mentions the word "*equality*" in the context of a partition between husband and wife. The term suggests that the court believes that partition is an "*acte égalitaire*", just as Terré *et alii* indicate.

On the other hand, the 2nd Circuit reports that "... *when lesion does exist in a community property settlement, it must be the result of an error or other vice of consent*". *See Picard v. Picard*, *supra.* note 136 at 1294-95. The sentence makes known the following aspect: lesion is tied to consent, which seems a rejection of the objective conception.

[157] *Pitre v. Pitre*, 162 So.2d 430, 431 (La. App. 3d Cir. 1964).

[158] *See e.g. Caillouet v. Zwei Bruderland, L.L.C.*, 746 So.2d 752, 759 (La. App. 3d Cir. 1999); *Thomas v. Sewell*, 117 So.2d 912, 914 (La. 1960). In both cases it was said that "*the only issue of fact to be determined … is whether the vendor sold the immovable for less than one-half of the value that it had at the time of the sale*". Apparently, the disproportion is everything that matters; the subjective aspect, though not denied (*see Thomas v. Sewell*, *supra.* note 157 at 914), is unimportant. Indeed, if the

imbalance is the only issue to be determined, could it be said that the subjective component is so irrelevant that is absolutely of no concern? Even if we accept that the psychological aspect is of minor consequence, it does not mean that it is absent; it is there in the form of a presumption. *See Blaize v. Cazezu*, 26 So.2d 689, 690 (La. 1946). The expression "*imperative requisite*" is used in order to highlight that, practically, the disproportion is the issue that should worry us.

[159] The purpose of rescission is *restitutio in integrum*. *See O'Brien v. LeGette*, 211 So.2d 427, 429 (La. App. 1st Cir. 1968), reversed on other grounds, 223 So.2d 165 (La. 1969). There is one angle that must not be overlooked: the seller of the immovable cannot claim lesion against a third buyer who acquired the thing from the original vendee. *See e.g. Brewster Development Company Inc. v. Fielder*, 271 So.2d 299, 302 (La. App. 2d Cir. 1972).

[160] Comment, *Lesion Beyond Moiety in the Law of Sale* 14 Tul. L. Rev. 260 (1939-1940); SAUL LITVINOFF, SALE AND LEASE IN THE LOUISIANA JURISPRUDENCE. A COURSEBOOK 554 (Center of Civil Law Studies 1997). *See e.g. Batton v. Batton*, 11 So.2d 707, 709 (La. App. 2d Cir. 1942).

[161] 3 LARROUMET, *supra.* note 7 at 379 no 417.

[162] 4 MALAURIE & AYNÈS, *supra.* note 54 at 236 no 421.

[163] 4 CARBONNIER, *supra.* note 41 at 105 no 44.

[164] *Id.* at 104 no 44.

[165] *See e.g.* Cour de Cassation [Cass], Req. Dec. 28, 1932, D.C. Jur. (Fr.) at 89.

[166] PINEAU, BURMAN & GAUDET, *supra.* note 97 at 218 no 105.

[167] *Id.*

[168] *See* 3 LARROUMET, *supra.* note 7 at 377 no 414 (in the subjective conception, lesion appears as a vice of consent).

[169] Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 112 (1989-1990).

[170] *See e.g. Thomas v. Sewell*, *supra.* note 157 at 914; *Fernandez v. Wilkinson*, 103 So. 537, 539 (La. 1925) (the court underlined that "*the law presumes juris et de jure that he who sells an immovable for less than half its value is acting under an error of fact sufficient to invalidate the sale*"). As I pointed out above (*supra.* no 5), when an error is in the picture, a subjective approach (*i.e.*, an issue of consent) seems difficult to ignore.

[171] 3 LARROUMET, *supra.* note 7 at 367 nos 405-406; PINEAU, BURMAN & GAUDET, *supra.* note 97 at 217-18 no 104; Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 109 (1989-1990).

[172] *See e.g.* 3 LARROUMET, *supra.* note 7 at 369 no 408; PINEAU, BURMAN & GAUDET, *supra.* note 97 at 249 no 118.

[173] For minors, *see* Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 114 (1989-1990).

[174] In all truth, Litvinoff's view on the objective conception is quite strange. He seems to believe that the ones who support such a perspective regard lesion as a vice of consent. *See* Saul Litivinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 La. L. Rev. 1, 111 (1989-1990). Such a belief is deeply doubtful (*see supra.* no 5).

[175] *Thomas v. Sewell*, *supra.* note 157 at 914; *Caillouet v. Zwei Bruderland, L.L.C.*, *supra.* note 157 at 759.

[176] 4 CARBONNIER, *supra.* note 41 at 158-59 no 78.

[177] *See Québec inc. c. Laniel*, (C.S., 2008-12-03), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1712 (an important disproportion between the prestations generates a presumption of exploitation). It is true, of course, that the presumption can be rebutted. *See* PINEAU, BURMAN & GAUDET, *supra.* note 97 at 218 no 105.

[178] *See Caillouet v. Zwei Bruderland, L.L.C.*, *supra.* note 157 at 759 ; *Thomas v. Sewell*, *supra.* note 157 at 914 (La. 1960).

[179] The two terms, rescissions and relative nullity, are synonyms. *See* 3 LARROUMET, *supra.* note 7 at 369 no 407 n. 1.

[180] BAUDOUIN & JOBIN, *supra.* note 46 at 239 no 263.

[181] *See e.g.* BAUDOUIN & JOBIN, *supra.* note 46 at 243 no 267 (the authors talk about Q.C.C. art. 1406 (1)); OSSIPOW, *supra.* note 13 at 12.

[182] 1 MURIEL FABRE-MAGNAN, DROIT DES OBLIGATIONS, CONTRAT ET ENGAGEMENT UNILATÉRAL 11 no 7 (1st ed., P.U.F. 2008).

[183] Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 845 (1998-1999).

[184] 1 MURIEL FABRE-MAGNAN, DROIT DES OBLIGATIONS, CONTRAT ET ENGAGEMENT UNILATÉRAL 11 no 7 (1st ed., P.U.F. 2008).

[185] *Id.*

[186] FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT 13 no 15 (8th ed., Dalloz 2009).

[187] GÉRARD CORNU ET AL., VOCABULAIRE JURIDIQUE 664 (9th ed., P.U.F. 2011).

[188] *Id.*

[189] As shown above, commutative justice aims at equality. Morality demands exactly the same thing, *i.e.*, equality. It was noticed that "*for a contract to be … moral it must grant a party … «the same amount [of value]» …*" . *See* Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 847 (1998-1999).

Furhermore, it was said that "... *le contrat immoral, c'est souvent le contrat inégal* ..." (the imoral contract is often the unequal contract). *See* 2 JEAN CARBONNIER, DROIT CIVIL. LES BIENS. LES OBLIGATIONS 1947 no 932 (1st ed., «Quadrige», P.U.F. 2004). We may observe that immorality is inequality; *per a contrario*, morality would mean equality.

[190] It was noticed that commutative justice and freedom, or security of contracts are enemies. *See* 3LARROUMET, *supra.* note 7 at 370 no 409.

[191] The writings of one author would suggest that autonomy of will bears this name: contractual freedom. *See* 2 JEAN CARBONNIER, DROIT CIVIL. LES BIENS. LES OBLIGATIONS 1945 no 931 (1st ed. «Quadrige», P.U.F. 2004).

[192] FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 31 no 24 (10th ed., Dalloz 2009).

[193] *Id.*

[194] Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 871 (1998-1999). The emphasis should be placed on "*freedom of contract*", since consent may be embraced by something else (such as lesion, that is, contractual freedom's enemy). Briefly, though the author links consent and freedom of contract, we should read his words with great care, because consent may belong to freedom of contract's adversary (*i.e.*, lesion), and not to the former (*i.e.*, conventional liberty).

[195] *Id.*

[196] Equity is linked to equality. *See* GÉRARD CORNU ET AL., VOCABULAIRE JURIDIQUE 408 (9th ed., P.U.F. 2011) (equity means justice based on equality; thus, once again, what we notice is the presence of equality).

[197] Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 850 (1998-1999).

[198] The fact that *laesio enormis* was based on equity (that is, equality) is highlighted by a rescript attributed to Diocletian. C.4.44.2 mentions *expressis verbis* the word "*equitable*". For the text of the rescript, *see* Raymond Westbrook, *The Origin of Laesio Enormis*, at http://www2.ulg.ac.be/vinitor/rida/2008/03.Westbrook.pdf (last accessed July 18, 2013).

[199] For details, *see* Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 849 (1998-1999).

[200] Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 849 (1998-1999). *See*, especially, the doctrine cited by the author.

[201] FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 319 no 306 (10th ed., Dalloz 2009).

[202] Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 842 (1998-1999).

[203] The La. Civ. C. of 1870 is "... *substantially the Code of 1825*". *See* A.N. Yiannopoulos, *The Civil Codes of Louisiana* 1 Civil Law Commentaries 1, 14 (2008). Thus, the La. Civ. C. of 1870 is a Code of the 19th century. Even if we were to assume that the 1870 Civil Code was one completely new we would still have to place it in the 19th century.

[204] 1 MURIEL FABRE-MAGNAN, DROIT DES OBLIGATIONS, CONTRAT ET ENGAGEMENT UNILATÉRAL 55 no 28 (1st ed., P.U.F. 2008).

[205] 1 JEAN-LOUIS BAUDOUIN & YVON RENAUD, CODE CIVIL DU QUÉBEC ANNOTÉ XII (15th ed., Wilson & Lafleur 2012).

[206] The doctrine of Québec, in talking about the 1866 Civil Code, says that the legislator embraced the reality of the epoch, and it assured the freedom of the human being. *See* 1 JEAN-LOUIS BAUDOUIN & YVON RENAUD, CODE CIVIL DU QUÉBEC ANNOTÉ X (15th ed., Wilson & Lafleur 2012). As underlined before, the reality of the epoch (*i.e.*, the 19th century) was that of contractual freedom; thus, embracing that reality is accepting contractual freedom. Furthermore, the words "*assured the freedom of the human being*" lead to the belief that the part of this freedom, represented by contractual liberty, was also taken into account.

[207] FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 35 no 31 (10th ed., Dalloz 2009).

[208] A.N. Yiannopoulos, *The Civil Codes of Louisiana* 1 Civil Law Commentaries 1, 17 (2008).

[209] Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 908 (1998-1999).

[210] FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 327 no 313 (10th ed., Dalloz 2009). *See e.g.* F.C.C. arts. 488 and 1305; *also* Q.C.C. art. 1405.

[211] A French author believes that F.C.C. arts. 1674-1685 are maintained because it is possible for real estate speculators to make profit by taking advantage of the ignorance of particular sellers. *See* ALAIN BÉNABENT, DROIT CIVIL. LES CONTRATS SPÉCIAUX CIVILS ET COMMERCIAUX 35 no 60 (9th ed., Montchrestien 2011). However, it is highly disputable if, in the context of French lesion, one should mention the idea of "*exploitation*". At least in regard to persons of full age and not under protection, French lesion is objective, it has nothing to do with the contractual partner's state of mind. *See* FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 328 no 314 (10th ed., Dalloz 2009).

In any case, I will discuss below the contradiction that one observes in Alain Bénabent's work on contracts.

[212] Cour de Cassation [Cass.] Req., Dec. 28, 1932, *in* 2 HENRI CAPITANT, FRANÇOIS TERRÉ & YVES LEQUETTE, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE 471 no 247 (11th ed., Dalloz 2000).

[213] 2 HENRI CAPITANT, FRANÇOIS TERRÉ & YVES LEQUETTE, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE 472 no 247 (11th ed., Dalloz 2000); 1 MURIEL FABRE-MAGNAN, DROIT DES OBLIGATIONS, CONTRAT ET ENGAGEMENT UNILATÉRAL 404 no 164 (1st ed., P.U.F. 2008).

[214] FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 319 no 306 (10th ed., Dalloz 2009).

[215] FRANÇOIS TERRÉ, PHILIPPE SIMLER, YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 319 no 306 (10th ed., Dalloz 2009).

[216] 2 HENRI CAPITANT, FRANÇOIS TERRÉ & YVES LEQUETTE, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE 472 no 247 (11th ed., Dalloz 2000); 2 JEAN CARBONNIER, DROIT CIVIL. LES BIENS. LES OBLIGATIONS 1996 no 959 (1st ed., «Quadrige», P.U.F. 2004).

[217] 1 MURIEL FABRE-MAGNAN, DROIT DES OBLIGATIONS, CONTRAT ET ENGAGEMENT UNILATÉRAL 406 no 164 (1st ed., P.U.F. 2008).

[218] *Fernandez v. Wilkinson*, 103 So. 537, 539 (La. 1925).

[219] The words of two authors are quite enlightening. They tell us that "... *il est aujourd'hui admis que ... la lesion ne repose pas sur un vice du consentement présumé*" (it is accepted today that lesion does not stand on a presumed vice of consent). *See* PHILIPPE MALINVAUD & DOMINIQUE FENOUILLET, DROIT DES OBLIGATIONS 240 no 313 (11th ed. Litec, 2010). At least for France, this can be seen in the

following manner: lesion does not have any connection with consent, and it cannot even be presumed that such a link would be present.

[220] ALAIN BÉNABENT, DROIT CIVIL. LES CONTRATS SPÉCIAUX CIVILS ET COMMERCIAUX 35 no 60 (9th ed., Montchrestien 2011).

[221] ALAIN BÉNABENT, DROIT CIVIL. LES CONTRATS SPÉCIAUX CIVILS ET COMMERCIAUX 35 no 60 (9th ed., Montchrestien 2011).

[222] E. Allan Farnsworth, *Comparative Contract Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 908 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

[223] 3 RICHARD A. LORD, WILLISTON ON CONTRACTS 456 § 7:21 (West 2008).

[224] E. Allan Farnsworth, *Comparative Contract Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 909 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2008).

[225] 2 JOSEPH M. PERILLO &HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS 65-66 § 5.14 (West 1995).

[226] *Marcrum v. Embry*, 282 So.2d 49, 54 (Ala. 1973).

[227] 3 RICHARD A. LORD, WILLISTON ON CONTRACTS 469 § 7:21 (West 2008).

[228] *See e.g. Preis v. Eversharp Inc.*, 154 F. Supp. 98, 101 (E.D. N.Y. 1957); *Carroll v. Lee*, 712 P.2d 923, 926-27 (Ariz. 1986); *Browning v. Johnson*, 422 P.2d 314, 316 (Wash. 1967); *Buckingham v. Wray II*, 366 N.W.2d 753, 756 (Neb. 1985).

[229] *Osborne v. Locke Steel Chain Co.*, 218 A.2d 526, 532 (Conn. 1966); *Parker v. Slosberg*, 808 A.2d 351, 358, n. 12 (Conn. App. 2002) (this case cites *Osborne*); *Datto Inc., v. Braband*, 856 F. Supp.2d 354, 366 (D. Conn. 2012) (*Datto* also refers to *Osborne*).

[230] *See* 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS 74 § 5.15 (West 1995).

[231] BLACK'S LAW DICTIONARY 79 (9th ed., 2009).

[232] *Hume v. United States*, 10 S. Ct. 134, 136 (1889) ("*... no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains*").

[233] § 208 of the Restatement (Second) of Contracts highlights that "*if a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result*". Comment c) to § 208 discusses about the imbalance that is present.

[234] For details on Equity and its relation to the Common Law, *see e.g.* RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 236-39 nos 231-34, 251-58 nos 248-57 (11th ed., Dalloz 2002); JOHN W. HEAD, GREAT LEGAL TRADITIONS. CIVIL LAW, COMMON LAW, AND CHINESE LAW IN HISTORICAL AND OPERATIONAL PERSPECTIVE 354-64 (Carolina Academic Press 2011).

[235] E. ALLAN FARNSWORTH, CONTRACTS 326 § 4.28 (2nd ed., Little, Brown & Co. 1990). In reaching his conclusion as to the nature of unconscionability, Farnsworth seems to rely on a court decision: *County Asphalt Inc. v. Lewis Welding & Engr. Corp.*, 444 F. 2d 372, 379 (2d Cir. 1971) (the federal judicial organism said the following: "*... the discretionary power to grant equitable relief according to the 'conscience' of the chancellor was so unmistakably a matter for the equity ...*"). The court's statement does appear to place unconscionability on Equity's field.

[236] For a detailed discussion on § 2-302 of the UCC, *see e.g.* Arthur Allen Leff, *Unconscionability and the Code – The Emperor's New Clause* 115 Univ. Pa. L. Rev. 485 ff. (1967). This section was characterized as being probably the most important statutory codification of the doctrine of unconscionability. *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal* 18 J.L. & Econ. 293, 294-95 n. 6 (1975). § 2-302 puts into the light the following: "*(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*; *(2) when it is claimed or appears*

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

[237] *See e.g. Zapatha v. Dairy Mart Inc.*, 408 N.E.2d 1370, 1375 (Mass. 1980) (franchise agreement and § 2-302 of the UCC: "*we view the legislative statements of policy concerning good faith and unconscionability as fairly applicable to all aspects of the franchise agreement, not by subjecting the franchise relationship to the provisions of the sales article but rather by applying the stated principles by analogy*"); *Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971) (the court said that if the case had involved a sale of goods, there would have been unconscionability, under UCC § 2-302; the issue was a gas station lease, but the court still relied on the doctrine of unconscionable contract); *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843, 857 (N.J. 1976) (a real estate brokerage contract was the focus of the discussion; the court said that "*whenever there is substantial inequality of bargaining power, position or advantage between the broker and the other party involved, any form of agreement designed to create liability on the part of the owner for commission upon the signing of a contract to sell to a prospective buyer, brought forward by the broker, even though consummation of the sale is frustrated by the inability or the unwillingness of the buyer to pay the purchase money and close the title, we regard as so contrary to the common understanding of men, and also so contrary to common fairness, as to require a court to condemn it as unconscionable*").

[238] E. ALLAN FARNSWORTH, CONTRACTS 325 § 4.28 (2nd ed., Little, Brown & Co. 1990).

[239] § 5.108 provides the following: "*(1) with respect to a transaction that is, gives rise to, or leads the debtor to believe will give rise to, a consumer credit transaction, if the court as a matter of law finds: (a) the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement; or (b) any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable term or part, or so limit the application of any unconscionable term or part as to avoid any unconscionable result; (2) with respect to a consumer credit transaction, if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, the court may grant an injunction and award the consumer any actual damages he has sustained; (3) if it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable, or that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt, the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the agreement or transaction or term or part thereof, or of the conduct, to aid the court in making the determination; (4) in applying subsection (1), consideration shall be given to each of the following factors, among others, as applicable: (a) belief by the seller, lessor, or lender at the time a transaction is entered into that there is no reasonable probability of payment in full of the obligation by the consumer or debtor; (b) in the case of a consumer credit sale or consumer lease, knowledge by the seller or lessor at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased; (c) in the case of a consumer credit sale or consumer lease, gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like consumers; (d) the fact that the creditor contracted for or received separate charges for insurance with respect to a consumer credit sale or consumer loan with the effect of making the sale or loan, considered as a whole, unconscionable; and (e) the fact that the seller, lessor, or lender has knowingly taken advantage of the inability of the consumer or debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, inability to understand*

the language of the agreement, or similar factors; (5) in applying subsection (2), consideration shall be given to each of the following factors, among others, as applicable: (a) using or threatening to use force, violence, or criminal prosecution against the consumer or members of his family; (b) communicating with the consumer or a member of his family at frequent intervals or at unusual hours or under other circumstances so that it is a reasonable inference that the primary purpose of the communication was to harass the consumer; (c) using fraudulent, deceptive, or misleading representations such as a communication which simulates legal process or which gives the appearance of being authorized, issued, or approved by a government, governmental agency, or attorney at law when it is not, or threatening or attempting to enforce a right with knowledge or reason to know that the right does not exist; (d) causing or threatening to cause injury to the consumer's reputation or economic status by disclosing information affecting the consumer's reputation for credit-worthiness with knowledge or reason to know that the information is false; communicating with the consumer's employer before obtaining a final judgment against the consumer, except as permitted by statute or to verify the consumer's employment; disclosing to a person, with knowledge or reason to know that the person does not have a legitimate business need for the information, or in any way prohibited by statute, information affecting the consumer's credit or other reputation; or disclosing information concerning the existence of a debt known to be disputed by the consumer without disclosing that fact; and (e) engaging in conduct with knowledge that like conduct has been restrained or enjoined by a court in a civil action by the Administrator against any person pursuant to the provisions on injunctions against fraudulent or unconscionable agreements or conduct (Section 6.111); (6) if in an action in which unconscionability is claimed the court finds unconscionability pursuant to subsection (1) or (2), the court shall award reasonable fees to the attorney for the consumer or debtor; if the court does not find unconscionability and the consumer or debtor claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable fees to the attorney for the party against whom the claim is made; in determining attorney's fees, the amount of the recovery on behalf of the consumer is not controlling; (7) the remedies of this section are in addition to remedies otherwise available for the same conduct under law other than this Act, but double recovery of actual damages may not be had; (8) for the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable".

[240] § 4 underlines this: "*(a) an unconscionable act or practice by a supplier in connection with a consumer transaction violates this Act whether it occurs before, during, or after the transaction*; *(b) the unconscionability of an act or practice is a question of law for the court; if it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination*; *(c) in determining whether an act or practice is unconscionable, the court shall consider circumstances such as the following of which the supplier knew or had reason to know: (1) that he took advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors; (2) that when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transaction by like consumers; (3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction; (4) that when the consumer transaction was entered into there was no reasonable probability of payment of the obligation in full by the consumer; (5) that the transaction he induced the consumer to enter into was excessively one-sided in favor of the supplier; or (6) that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment*".

[241] § 1-311 indicates that "*(a) the court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract,*

enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result; *(b) whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, shall be afforded a reasonable opportunity to present evidence as to: (1) the commercial setting of the negotiations; (2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, or inability to understand the language of the agreement, or similar factors; (3) the effect and purpose of the contract or clause; and (4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the real estate and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions, but a disparity between the contract price and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions does not, of itself, render the contract unconscionable*".

[242] § 1.303 shows that "*(a) if the court, as a matter of law, finds (1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result*; *or (2) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result*; *(b) if unconscionability is put into issue by a party or by the court upon its own motion the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination*".

[243] *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264 (Sup. Ct. 1969).

[244] *Id.* at 267.

[245] E. ALLAN FARNSWORTH, CONTRACTS 325 § 4.28 (2nd ed., Little, Brown & Co. 1990).

[246] *See* Comment to § 1.303 (Westlaw current through 2012 Annual Meeting of the National Conference of Commissioners on Uniform State Laws).

[247] *See* Uniform Consumer Credit Code § 5.108(4)(e); Uniform Consumer Sales Practices Act § 4(c)(1); Uniform Land Transactions Act § 1-311(b)(2).

[248] James Gordley, *Equality in Exchange* 69 Cal. L. Rev. 1587, 1649 (1981).

[249] Of course, as indicated above (*supra.* no 11), some other clarifications may be found.

[250] In the Common Law tradition, just like in the Civilian one, freedom of contract has a great importance. On two occasions the United States Supreme Court underlined that contractual freedom has a constitutional value. *See Allgeyer v. Louisiana*, 17 S.Ct. 427, 431 (1897) and *Lochner v. New York*, 25 S.Ct. 539, 539 (1905).

[251] *See e.g. Mandel v. Liebman*, 100 N.E.2d 149, 152 (N.Y. Ct. App. 1951) ("*it is commonplace, of course, that adult persons, suffering from no disabilities, have complete freedom of contract and that the courts will not inquire into the adequacy of the consideration*"). To be assured, freedom of contracts remains one of the tenets of contract law. *See* Robert A. Hilmann, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 Cornell L. Rev. 1 (1981-1982).

[252] RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 254 no 253 (11th ed., Dalloz 2002).

[253] 3 RICHARD A. LORD, WILLISTON ON CONTRACTS 465-68 § 7:21 (West 2008). *See U.S. v. Crobarger*, 343 F. Supp. 2d 1048, 1057 (D. Utah 2004) (the court cited "*the eminent Willinston*", and it said the following: "*...the fact that the relative value or worth of the exchange is unequal is irrelevant ...*; *the rule is almost as old as the doctrine of consideration itself*").

[254] RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 251 no 248 (11th ed., Dalloz 2002).

[255] For Louisiana, *see* Vernon Valentine Palmer & Matthew Sheynes, *Louisiana*, *in* MIXED JURISDICTIONS WORLDWIDE. THE THIRD LEGAL FAMILY 300 (Vernon Valentine Palmer ed., Cambridge University Press 2001) (the authors tell us that "*a separate court of equity does not and has never existed in Louisiana*"). Of course, as far as I am aware, Louisiana jurists are not in the habit of distinguishing between legal and equitable remedies.

[256] By "*codal lesions*" I mean the provisions of the Civil Codes relating to lesion.

[257] *See e.g.* Uniform Land Transactions Act § 1-311 (b)(1), (3).

[258] In *Jones*, the plaintiffs paid $619.88, and a balance of $819.81 was still due. *See Jones v. Star Credit Corp.*, *supra.* note 242 at 265. The court indicated that "*… the application of the payment provision should be limited to amounts already paid by the plaintiffs and the contract be reformed …*". *Id.* at 268. It is rather clear that unconscionability generated the alteration of the contract.

[259] As I have already indicated, in the context of unconscionability, one finds this idea: a party was taken advantage of. Thus, this party was exploited, which suggests that his or her consent was problematic.

[260] Larry DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law* 60 U. Pitt. L. Rev. 839, 844 (1998-1999).

[261] Some functional equivalents have been briefly announced above.

[262] "*Vice*" and "d*efec*t" are synonym terms. *See* PHILLIPE LE TOURNEAU, DROIT DE LA RESPONSABILITÉ ET DES CONTRATS. RÉGIMES D'INDEMNISATION 1570 no 6079 (9th ed., Dalloz Action 2012). The vice of the thing makes it inappropriate for it being used according to its normal destination. *See Id.* at 1571 no 6080. For instance, a court decided that it is affected by a hidden vice an agitated horse whose destination consisted in being used for promenade or labor. *See St-Denis c. Pontbriand*, (C.A., 2002-09-26), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 2526. The defect is considered hidden when it could not have been discovered by an expert of normal competence. *See Blanchard c. Foster*, (C.Q., 2002-09-13), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 2526.

[263] GÉRARD CORNU ET AL., *supra.* note 12 at 22.

[264] *Duchesne c. Boissoneault*, (C.Q., 1999-07-22), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 2516.

[265] LE TOURNEAU, *supra.* note 261 at 1584 no 6121.

[266] Of course, one might argue that, in the case of a hidden vice, the purchaser could also claim error on the substance of the object. However, it seems that today the French Court of Cassation rejects this possibility. *See* Cour de Cassation [Cass.], 3e civ., June 7, 2000, *in* 2 CAPITANT, TERRÉ & LEQUETTE, *supra.* note 59 at 721 (the supreme court held that the hidden vice was the only foundation for the buyer's action, and that she could not invoke the error). It must be said, nevertheless, that even if the buyer cannot invoke error, this does not mean that an error is not involved. Error may be present, but it is not permitted to speak of it. This would indicate that some issue of consent hides behind *actio aestimatoria*.

[267] TERRÉ, SIMLER& LEQUETTE, *supra.* note 40 at 215 no 208.

[268] For details, *see Id.* at 216 no 209.

[269] *Id.* at 228 no 220.

[270] *Id.*

[271] *See Lépine c. Khalid*, (C.A., 2004-09-08), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1691.

[272] For the possible conceptions regarding error on the substance of the object, *see* TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 219-20 no 215.

[273] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 234 no 228.

[274] *Id.* at 241 no 237.

[275] *Boghossian c. Plantek Design inc.*, (C.S., 2008-11-13), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1690.

[276] For the remedies at hand in case of fraud, *see* TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 244-45 nos 239-40.
[277] *Id.* at 245 no 240.
[278] *Id.* at 246 no 241.
[279] *Gelber c. Kwinter (Estate of)*, (C.S., 2007-04-05), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1706.
[280] *S.B. c. J.F.*, (C.Q., 2007-04-18), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1708.
[281] *Gravel c. Traders General Insurance Co.*, (C.S., 1961-11-16), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1707.
[282] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 110 no 95.
[283] For details, *see Id.* at 111 no 97.
[284] *Id.* at 112 no 98.
[285] *See e.g. Thibodeau c. Thibodeau*, [1961] R.C.S. 285, *in* MAURICE TANCELIN & DANIEL GARDNER, JURISPRUDENCE COMMENTÉE SUR LES OBLIGATIONS 6-7 (5h ed., Wilson & LaFleur 1992). The case involved two brothers and two sales. Oscar Thibodeau was mentally ill, and thus incapable of making the contracts. The sales were annulled by the Supreme Court.
[286] For the various meanings of the word "*cause*" in the Civil Law Tradition, *see* GÉRARD CORNU ET AL., *supra.* note 12 at 137-38.
[287] *See* PINEAU, BURMAN & GAUDET, *supra.* note 97 at 290 no 144.
[288] GÉRARD CORNU ET AL., *supra.* note 12 at 137.
[289] *Id.*
[290] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 368 no 357.
[291] *Id. See* the doctrine that the authors cite at n. 3.
[292] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 331-32 no 324. *See also* the French Code of Consumer art. L 132-1 (1).
[293] *See* Q.C.C. art. 1437 and the Commentaries of the Minister of Justice, *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1768.
[294] *See e.g. Latreille c. Industrielle Alliance (L'), compagnie d'assurance sur la vie*, (C.A., 2009-07-29), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1768.
[295] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 332 no 324.
[296] *See e.g. Service aux marchands détaillants ltée (Household Finance) c. Option Consommateurs*, (C.A., 2006-10-16), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1769. The court says that analyzing the value of the prestations allows to determine whether a clause is abusive or not. This would indicate that a clause that creates disproportion (*e.g.*, the value of a prestation is inferior to that of the other prestation) might be qualified as an abusive provision. Of course, the value is a criterion for establishing if there is an abusive clause in the contract. In some situations, good faith is the element to be taken into account. *See Location Rompré ltée c. Guillemette*, (C.Q., 2005-04-01), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1769.
[297] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 334 no 325. In my view, this conclusion is generated by these word of Terré, Simler and Lequette: "*comment savoir, en effet, lors de la rédaction du contrat, si la clause qui y est insérée entraîne ou non un déséquilibre significatif ... ?*" (how should it be known, from the moment the contract is made, if the clause inserted in it generates or not a significant imbalance?). It appears that everything takes place at the initial moment, that is, when the convention is born.
[298] Cour de Cassation [Cass.], 1e civ., Dec. 13, 2012 (Fr.); *see* the following link: http://www.juricaf.org/arret/FRANCE-COURDECASSATION-20121213-1127766 (last visited, May 14, 2013). The student was enrolled for the 2008-2009 academic year. When the contract was made (July, 2008) she paid a part of the education taxes. In September 2008 she decided to quit school. At that moment, the education professional demanded the rest of the taxes.
[299] *Latreille c. Industrielle-Alliance (L'), compagnie d'assurance sur la vie*, (C.S., 2007-12-18), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1768.

[300] The abusive clause is "*réputée non écrite*" (considered not written). *See* TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 340 no 329. In other words, the imbalance generated by this sort of clause disappears, just as it happens when relative nullity is observed in a contract affected by lesion.

[301] Art. 1406 (1) of the Q.C.C. would suggest such a conclusion, because it uses the expression "*disproportion importante entre les prestations des parties*" (important disproportion between the prestations of the parties). This means that the value or the amount of prestations is always an issue that lesion is concerned with, and the two performances need to be compared; mathematics cannot be ignored.

[302] For instance, good faith may be the criterion for determining the abusive character of a clause. *See Location Rompré ltée c. Guillemette*, (C.Q., 2005-04-01), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1769.

[303] *Service aux marchands détaillants ltée (Household Finance) c. Option Consommateurs*, (C.A., 2006-10-16), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1769.

[304] *Location Rompré ltée c. Guillemette*, (C.Q., 2005-04-01), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 1769 (good faith is what the court talked about).

[305] *See* PHILIPPE MALINVAUD & DOMINIQUE FENOUILLET, DROIT DES OBLIGATIONS 253 no 326 (11th ed. Litec, 2010).

[306] GÉRARD CORNU ET AL., *supra.* note 12 at 948.

[307] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 316 no 310.

[308] *See* Q.C.C. art. 2332.

[309] *See* TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 76 no 64.

[310] *See e.g. Hamel c. Assurance-vie Desjardins (L')*, (C.A., 1986-12-10) and *Banque Laurentienne du Canada c. 9058-1398 Québec inc.*, (C.S., 2007-05-01), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 3326. The cases are cited under Q.C.C. art. 2314; this text envisages, among others, the loan of money.

[311] It is of great importance to understand the mechanism of loan. This contract, qualified as real, is intimately connected to things (*i.e.*, *res*). The convention is valid only when the lender "delivers" the thing; until that moment there is no contract. The instant the lender transmits the thing (*e.g.*, a sum of money) there is a contract; of course, from then on, the lender has only rights (*i.e.*, to receive the sum), whereas the borrower has solely obligations (*i.e.*, restitution of the money).

[312] *See e.g.* GÉRARD CORNU ET AL., *supra.* note 12 at 948.

[313] I will emphasize once again that lesion and usury are technically different; the advantages involved in their context work in distinct manners. To demonstrate this assertion I will use two examples; one relates to lesion, and the other to usury.

Let us suppose that A agrees to sell to B an immovable that is worth $50,000 for a price of $20,000. We see here that there is a disproportion between advantages. B's benefit (delivery of immovable) is colossal in comparison to A's (to receive $20,000). Of course, every advantage involved here is an illustration of a contractual prestation. In other words, the same element is a prestation for one party, and an advantage for the other. Delivery of the thing is a prestation for A (seller) and an advantage for B (buyer). The payment of the sum of money is a prestation for B (purchaser) and an advantage for A (vendor).

Now, let us suppose that C lends $50,000 dollars to D with an interest of 300% per year. The loan is formed when the sum was handed to D. From that instant C is only obligee, and D is solely an obligor. Of course, every party has an advantage: C will receive the sum with interest; D's benefit is the fact that he can enjoy $50,000 in order to satisfy whatever need he might have. However, this time, not every advantage is an illustration of a conventional prestation. D's advantage is not an illustration of a prestation imposed on C by the contract; when D got his advantage, there was no contract which imposed a duty on C. C's transfer of the money gave birth to a contract, without being a prestation created by the convention. The example with the sale involved transfers that were generated by a contract in existence.

[314] It should be noted that leonine clauses are not limited to contracts of partnership. For a broad definition, *see* GÉRARD CORNU ET AL., *supra.* note 12 at 543.

[315] TERRÉ, SIMLER & LEQUETTE, *supra.* note 40 at 316 no 310. A leonine clause may as well spare one of the associates of every loss, or impose the entire burden on the shoulders of a single party. *Id.*

[316] The word "*leonine*" has its source in the following fable: "*...the lion ... hunted in partnership with ... smaller beasts, and appropriated the whole product of the chase to himself*". *See Consolidated Bank v. State*, 5 La. Ann. 44, 46 (1850).

[317] *Cimon c. Arès*, (C.A., 2005-01-14), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 3212.

[318] JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 150 § 4.1 (6th ed., West, 2009).

[319] *Matter of Deed of Trust of Owen*, 303 S.E. 2d 351, 353 (N.C. App. 1983).

[320] JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 154 § 4.4 (6th ed., West, 2009).

[321] BLACK'S LAW DICTIONARY 348 (9th ed., 2009).

[322] For the presentation of the view according to which the solution is unenforceability, *see* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 159 § 4.7 (6th ed., West 2009).

[323] *See e.g. Québec inc. (Comspec) c. Harvey,* (C.S., 2006-08-10), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 2330).

[324] Q.C.C. art. 1623 (2) contains the following: "*… the amount of the stipulated penalty may be reduced if the creditor has benefited from partial performance of the obligation or if the clause is abusive*". The debtor is the one who is bound to prove the abusive character of the penal clause. *See Pascan Aviation inc. c. Di Marzio*, (C.S., 2009-01-06), *in* 2 BAUDOUIN & RENAUD, *supra.* note 47 at 2338.

[325] In its pertinent part, art. 1152 indicates that the judge may reduce the stipulated penalty if it is manifestly excessive. *See e.g.* Cour de Cassation [Cass.], 3e civ., April 16, 2013 (Fr.) at http://www.juricaf.org/arret/FRANCE-COURDECASSATION-20130416-1215190 (last visited May 24, 2013). The French Supreme Court suggested that a penalty in amount of 35,000 euros could have been reduced on grounds of art. 1152.

[326] Perhaps a more specific example will be helpful. Let us suppose that A and B make a sale. A has the obligation to pay $5,000 and B has the duty to deliver a car. Let us suppose that the seller is in a great need for money. The moment the contract is made, the parties insert a penal clause according to which B's failure to perform will generate the duty to pay $10,000 in damages. B's need to obtain the price makes him accept a colossal penal clause.

This illustration brings into the light the primordial imbalance between advantages: A's advantage (*i.e.*, delivery of the car in his favor and possibility to obtain $10,000) greatly outweighs B's advantage (*i.e.*, reception of $5,000). Furthermore, the example highlights the problem of consent that affects B (his need for money subjects him to exploitation, as he accepts an excessive penal clause).

[327] The commissory pact (or *pacte commissoire*) in regard to real securities may be defined as a contractual clause that attaches to the non-performance of the secured debt the effect of making the creditor owner of the thing. The authors offer an example of a codal text that talks about this type of pact: F.C.C. art. 2459. *See* GÉRARD CORNU ET AL., *supra.* note 12 at 651-52.

[328] Real securities are the ones that bear on things and which offer to the creditor, for the security of his credit right, the value of the thing subjected to them. *See* GÉRARD CORNU ET AL., *supra.* note 12 at 900.

[329] *La dation en paiement* was defined as a manner of extinguishing an obligation by performing a different prestation than the one initially due. *See* Jean-François Hamelin, *Dation en paiement*, *in* Répertoire civil Dalloz 1, 2 no 1 (2012).

[330] As one author observed, "*… la doctrine et la jurisprudence dominantes considèrent que le pacte commissoire réalise moins une vente qu'une dation en paiement*" [the dominant doctrine and jurisprudence believe that the commissory pact involves a *dation en paiement* rather than a sale]. *See* Sophie Hébert, *Le pacte commissoire après l'ordonnance du 23 mars 2006*, 29 Dalloz (Chronique) 2052, 2057 (2007). Briefly, *lex commissoria* operates a *dation en paiement*, simply because the creditor obtains a different element (*i.e.*, the thing) than the one initially due to him (*i.e.*, a credit right).

[331] F.C.C. art. 2460 states that "... *l'immeuble doit être estimé par expert désigné à l'amiable ou judiciairement; si sa valeur excède le montant de la dette garantie, le créancier doit au débiteur une somme égale à la différence ...*" [the value of the immovable must be determined by an expert agreed upon by the parties or established by the court; if the value of the immovable exceeds the amount of the secured debt, the creditor owes to the debtor the difference].

[332] I have used the expression "*to some extent*" because the field of application is a delicate issue. All three jurisdictions are similar and different, in regard to lesion's realm: they are similar, because lesion is limited; they are distinct when we think about the situation of minors and persons of full age under protection.

[333] 3 RICHARD A. LORD, WILLISTON ON CONTRACTS 486 § 7:21 (West 2008).

[334] Perhaps it would not be exaggerated to assume that equivalence functionalism was created so that one can find different means that are equivalent in different juridical systems; after all, the functional method is analyzed in the context of comparative law; *see* ZWEIGERT & KÖTZ, *supra.* note 10 at 34, where "*functionality*" is chained to "*comparative law*". Nonetheless, does this mean that functional equivalents cannot exist within the same juridical system? One might say that, in reality, nothing stands in the way of finding functional equivalents in the same system. Let us take the example of France. This system knows the mechanism of vices of consent and that of lesion. The two doctrines are functional equivalents, though they operate in the same system.

Of course, functional equivalents must be searched especially in different legal system. This time, let us look at France and Québec; the sale of immovables will be the working material. Québec allows vices of consent in such a sale. France allows lesion in the same contract. When there is a disproportion in a sale and the courts desire to assure balance, Québec might use a vice of consent (*e.g.*, fraud), and France could apply lesion.

In Part IV I have talked about lesion and its other civilian functional equivalents (*e.g.*, capacity, vices of consent, objective cause). One might say that lesion and these other doctrines are functionally equivalent both in different systems, and within the same legal system; maybe the example indicated in this footnote in regard to lesion and the vices of consent is clarifying.

[335] *See e.g.* Cour de Cassation [Cass.], 1e civ., March 3, 1998 (Fr.), http://www.juricaf.org/arret/FRANCE-COURDECASSATION-19980303-9515799 (last visited May 15, 2013). The French Court of Cassation decided the reduction of attorney fees, because it found them to be excessive in comparison to the provided services. In the doctrine's eyes, such a solution is linked to objective cause. *See* 3 LARROUMET, *supra.* note 7 at 376 no 412.