Revocability, Unconscionability and Impracticability in American, Danish and International Law

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Think of the tools in a tool-box: there is a hammer, pliers, a saw, a screw-driver ... The functions of words are as diverse as the functions of these objects.[1]

[I]t is only by identifying difference that one can identify both difference and its equally important counterpoint, similarity.[2]

1. Introduction

As a 1-L student at Columbia University in 1939, Rudolf Schlesinger, who had first studied law in Germany, faced the challenge of absorbing American law and its bewildering language.[3]

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1. Ludvig Wittgenstein, *Philosophical Investigations*, l.ll; see also Dinda Gorlée, 'Wittgenstein, Translation, and Semiotics' (1989), http://wab.uib.no/wab_contrib-gdl.pdf, at 95.
2. Vivian Curran, 'Comparative Law and Language Revisited,' University of Pittsburgh Legal Studies Research Paper No. 2017-25 (2017), available at https://ssrn.com/abstract=3054746, forthcoming in *Oxford Handbook of Comparative Law* (Reimann & Zimmermann eds).
3. Curran, id. at 22, citing Rudolf B. Schlesinger, *Memories* (Ugo Mattei and Andrea Prodi eds. 2000).

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I can relate to that. Having graduated from the New York University School of Law in 1971, I later migrated to Denmark, and in my first year at the University of Copenhagen I confronted the (for me) no less bewildering Danish system and legal lingo.

I am not suggesting that my own exploits compare with those of the ultimately illustrious Schlesinger, but rather that, in switching continents and legal systems, we each got off to an understandably bumpy start. Just as Schlesinger had to adapt to the (for him) strange American rule that a promise is not binding unless supported by something called 'consideration,'[4] I had to wrap my New York lawyer's head around the 'opposite' Danish rule, that promises are binding without any such glue.[5]

Traditionally, comparative legal studies have focused on whether legal systems throughout the world are (1) fundamentally similar, such that apparent differences are superficial in nature, justifying universalist conclusions; or (2) fundamentally different, such that apparent similarities are misleading, and universalist conclusions unwarranted.[6]

For Schlesinger and his generation of 'post-war' comparatists, the *similarities* were clearly the most important thing. Indeed, during his tenure at Cornell (1948-1975), Schlesinger championed the 'common core' approach to comparative law. To this end, he and his colleagues (nine men who spent ten years focused on the 'mechanics' of offer and acceptance)[7] searched not only for a common core, but also for a universal language of law, a juristic Esperanto.[8] These universalist themes live on today in several soft law codification projects,[9] including ('on the shoulders of Schlesinger') the Trento Common Core of European Private Law (1993),[10] as

4. See generally E.A. Farnsworth, *Contracts* (4th ed. 2004) § 2.2 with n. 1, citing *In re Owen*, 303 S.E.2d 351 (1983): 'Consideration is the *glue* that binds the parties to a contract together.' Emphasis added here.
5. See Mads Bryde Andersen, *Grundlæggende aftaleret* (Basic Contract Law) (4th ed. 2013) at 82 (in Danish law a promise is binding 'by itself'; no consideration (*modydelse*) is required). Compare Farnsworth and *Owen*, preceding note.
6. See Curran, supra n. 2, at 18.
7. Bertram F. Willcox, 'Rudolf B. Schlesinger World Lawyer,' 60 *Cornell Law Review* 919, 925 (1975), also at http://scholarship.law.cornell.edu/clr/vol60/iss6/.
8. Curran supra n. 2, at 29.
9. Accord Curran, id. at 25-26.
10. Schlesinger himself described his project as seeking »to redirect the emphasis of Comparative Law toward similarity rather than difference«. See Vivian Curran, 'On the Shoulders of Schlesinger: The Trento Common Core of European Private

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well as the Principles of European Contract Law (1995),[11] the latter hoping to advance the Lando Commission's impossible dream of a hard-core European Code.[12]

In other comparative contexts, however, the 'postmodern' tendency has been to debunk (or at least tone down) such 'universals' – this reflecting the view that *differences* between legal systems and constructs often trump the similarities.[13] This is not to say that there are no (near) equivalents, nor that unification is doomed to remain illusory, but rather that even within the most successful supra-national codifications, subtle differences in the *language* and *content* of underlying domestic conceptions deserve our continuing attention.

During my tenure as an academic at the University of Copenhagen (1981-2015), I focused – not on comparative studies as such – but rather on Danish domestic Obligations, Contracts and Sales. Still, having studied two legal systems from top to toe,[14] each in its original language, I often saw one system's rule or construct in light of the other system's pendant. I also often compared domestic sales law with the 1980 Convention on Contracts for the International Sale of Goods (CISG),[15] the rule set that became an *integral part of* American law (in 1988) and Danish law (in 1990).[16]

In some of these contexts, I found that even hard-to-translate rules and constructs ultimately lead to similar substantive solutions. In other instances, where a given rule or construct in one system might at first appear to 'translate' readily into something similar in the other, the results upon closer analysis proved very different.

Law Project,' *European Review of Private Law* (2003), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297431.

11. See *Principles of European Contract Law* (Ole Lando & Hugh Beale, eds.2000).
12. See id. at xxiii (one objective of the Principles is to serve as basis for future European Code of Contracts). For a critique of the European Civil Code project, as unveiled at the Hague in 1997, see Joseph Lookofsky, 'The Harmonization of Private and Commercial Law,' 39 *Scandinavian Studies in Law* 111 (2000), available at http://www.scandinavianlaw.se/pdf/39-7.pdf.
13. Accord: Curran, supra n. 2, at 29.
14. Leading to a J.D. at NYU (1971), followed by cand.jur. (1981) and dr.jur. (1989) degrees in Copenhagen.
15. See http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.
16. I.e. the part of American and Danish law that applies to international sales. See Joseph Lookofsky, *Understanding the CISG* (5th Worldwide ed. 2017) § 1.1.

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Given this mixed bag of comparative experience, I remain reluctant to declare allegiance to either the common-core or the difference-dominant school, though I do think my research output during the past decade or so reflects increasing sympathy for the postmodern position.

To illustrate my experience in this regard, both as a student and later as professor of law, I will now examine some issues that fall within the following categories: (1) the contracting process (*aftaleindgåelsen*),[17] (2) defenses to contract enforcement (*ugyldighed*),[18] and (3) remedies for breach (*misligholdelsesbeføjelser*).[19]

More specifically, I will explain and compare how American and Danish *domestic* contract law deal with the issues of (1) revocability, (2) unconscionability and (3) impracticability. I will also consider these issues as they relate to the *harmonized part* of American and Danish commercial contract law: the CISG Convention.

In each instance: Is there a common domestic core, and does it shine through in the CISG? If not, does the homogenized CISG version conceal domestic differences that could not be legislated away?

2. Revocability

As a first-year law student in Copenhagen in 1975, I remember reading (and re-reading) the starkly formulated proposition, codified in §1 of the Danish Contracts Act (1917), that '*promises ... are legally binding*.'[20] Period! Put another way, once the promisor (promise-maker) communicates his promise to the promisee (recipient), the promisor is bound,[21] irrespective of whether or not that promisor has received anything in return.

17. See Farnsworth, surpa n. 4, Ch. 3; Andersen, supra n. 5, Ch. 3.
18. See Farnsworth, id., Ch. 4 (Policing the Agreement); Andersen, id., Ch. 6.
19. See Farnsworth, id., Ch. 8 (Performance and Nonperformance); Mads Bryde Andersen & Joseph Lookofsky, *Lærebog i obligationsret* (Vol. I, 4th ed. 2015) Ch. 5.
20. § 1 of the Danish Contracts Act (*Aftaleloven*), available in English at https://www.trans-lex.org/604900/_/danish-contracts-act/, as then presented in my Copenhagen textbook: Munch-Petersen, *Den borgerlige ret* (21st ed. 1973) at 191 (*løfter og kontrakter er retlig bindende*). See also supra n. 5.
21. For the time stated in the offer or for a reasonable period of time.

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The underlying conception at work here is what Danish domestic doctrine calls the 'promise-principle' (*løfteprincippet*),[22] this in contrast to the 'agreement-principle' (*overenskomstprincippet*), upon which the Common law of contract is built.[23]

As a significant corollary to the Danish principle, an *offer* (*tilbud*), once communicated, is *irrevocable*, i.e. the offeror cannot 'call back' that offer (at least not during the time stated therein or, alternatively, for a reasonable period). In American law, however, the 'opposite' applies: an offer, even if communicated, is *revocable*: in other words, prior to acceptance, the offeror can simply 'call it back.'

Common lawyers sometimes distinguish between the *withdrawal* of an offer (before it becomes effective by communication) and *revocation* of an offer (after it becomes effective by communication).[24] In withdrawal contexts, Danish lawyers use the term *tilbagekalde* (literally: to 'call back'); no separate terminology applies to 'revocation' (in the Common law sense) since the Danish rule is that an offer, once it takes effect, cannot be revoked.[25]

Significantly, the Danish (irrevocability) rule is a *default* rule, so if a given offeror (*tilbudsgiver*) declares his intention to retain the power to *revoke* his offer (prior to its acceptance), that intention will prevail. The American (revocability) principle, by contrast, is *not* a mere default rule, and so American law professors like to tease their first-year students with hypotheticals like this:

'But what if the offeror *promises not to revoke* his offer?'

To which the knowing student might rightly reply:

'That makes *no difference*.'

22. Andersen, supra n. 5, at 82. Accord (re. the corresponding 'offer principle') Mads Bryde Andersen & Eric Runesson, 'An Overview of Nordic Contract Law,' in *The Nordic Contracts Act* (2015) at 34.
23. Id.
24. See, e.g., Farnsworth, supra n. 4, § 3.17 with n. 1. The CISG makes the same distinction in Articles 15(2) and 16.
25. See text supra with notes 21-22. Revocation is possible only if the offeror has expressly retained the power to revoke (see text infra).

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Well ... no difference *unless* the offeree *pays for* irrevocability, since in that event the offeror's promise not to revoke is 'supported by consideration' (and therefore binding). Furthermore, even absent consideration, the offeree's reasonable *reliance* can render even a 'naked' offer binding under American domestic law.[26]

Beyond these caveats (exceptions to revocability), the knowing American student might also add that, as regards *sales of goods*, State statutes have largely *displaced* the traditional Common law rule. The model for these statutes is § 2-205 of the American Uniform Commercial Code (UCC), which provides:

> An offer by a merchant to buy or sell *goods* in a signed *writing* which by its terms gives *assurance* that it will be held open is *not revocable*, for lack of consideration, during the time stated or if no time is stated for a reasonable time ...[27]

Therefore, when it comes to the single most important contract type, we might boil the key difference between American and Danish law on the revocability issue down to this:

> Under American law, an offer to buy or sell goods is *not binding unless* the offeror clearly *wants* it to bind, whereas under Danish law, an offer is *binding unless* the offeror *does not want* it to bind.

Hardly a big difference, but a difference nonetheless. In fact, since the difference between American and Danish domestic law on this point reflects corresponding differences between other (e.g. Common and Civilian) jurisdictions,[28] the adoption of a *harmonized* rule for inclusion in Part II of the 1980 Vienna Convention on Contracts for the International Sale of

26. § 90(1) of the American *Restatement (Second) Contracts* provides: 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise ...'.
27. Provided such period of irrevocability does not exceed three months. See UCC § 2-205. According to case law, a substitute for a signed writing (e.g. an email) will do. In New York, for example, an unsigned but 'reasonably authenticated' writing assuring that an offer will remain open is not revocable for want of consideration.
28. Re. the essentially similar approach shared by Civilian systems, see Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon and Stefan Vogenauer, *Contract Law: Ius Commune Casebooks for the Common Law of Europe* (2010), Part 6.2.B (Revocability of an Offer).

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Goods (CISG) required some degree of *compromise* between domestic doctrines.

The compromise on revocability ultimately adopted in CISG Article 16 is this:

1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
2) However, an offer cannot be revoked:
   a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
   b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Clearly, the Common law won a point in paragraph (1), in that the CISG 'starting point' is *revocability*.[29] Then again, since the gaping 'exceptions' to revocability in paragraph (2) fully compensate Civilian and Scandinavian systems which favor the promise principle, the fact that (1) comes before (2) should hardly matter. Nor did this thin distinction deter France and Italy from joining the United States in the first group of States to ratify CISG in 1987. Later, other Civil law jurisdictions, including Germany and the Netherlands, would follow suit.

Surprisingly, however, those jurists who in the 1980s advised Danish (and other Scandinavian) lawmakers about CISG ratification maintained that CISG Part II – and especially Article 16(1) – steers too close to the Common (revocability) rule, and (conversely) too far from the 'promise-principle' laid down in the Danish Contracts Act. It was as if the very 'honor' of the promise principle was at stake! Mainly for this reason, Denmark – along with Finland, Norway and Sweden – at the time of their CISG ratifications made Article 92 'declarations,' thereby refusing to ratify CISG Part II.[30]

Interestingly, the same skeptics also argued that Denmark's adoption of CISG Part II – which regulates contract formation, but not contract 'validity' – might create 'uncertainty' as to when (or whether) a binding and

29. Accord: Lennart Lynge Andersen & Palle Bo Madsen, *Aftaler og mellemmænd* (Agreements & Agents) (7th ed. 2017) at 37 (CISG pays homage to the 'agreement principle' as opposed to the 'promise principle').
30. Regarding these declarations, see generally Lookofsky, supra n. 16, § 8.4.

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valid international sales contract was made.[31] Presumably, this objection was related to the fact the Danish Contracts Act – unlike CISG Part II – deals both with contract formation (the 'mechanics' of agreement) and with contract validity ('defenses' to enforcement).

Because the international community was not ready in 1980 to harmonize the rules that render contracts unenforceable, (e.g.) by reason of unconscionability or unreasonableness,[32] sales contract validity would have to remain dependent upon (the applicable) domestic law, but that hardly gave Denmark reason to reject the contract formation rules in CISG Part II.

The failure to acknowledge and support the *homogenized common core* of Article 16 – i.e. the default starting point in paragraph (1), as well as the significant exceptions to revocability in paragraph (2) – was an unfortunate mistake which put Scandinavia outside the Part II loop which united all other CISG Contracting States. Regrettably, it took twenty-five long years before Denmark – and the other Scandinavian States – finally saw the light and took steps to put things right.[33]

3. Unconscionability

I started studying Danish law in the fall of 1975. Earlier that same year, § 36 of the Danish Contracts Act (1917) became a 'General Clause,' which translates as follows:[34]

1) A contract may be modified or set aside, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it ...

31. See Joseph Lookofsky, 'Alive and Well in Scandinavia: CISG Part II,' 18 *Journal of Law and Commerce* (1999) 289, 290, also at https://www.cisg.law.pace.edu/cisg/biblio/lookofsky1.html.
32. Regarding unconscionability and unreasonableness see the discussion in the next section (III).
33. See Joseph Lookofsky,' The Rise and Fall of CISG Article 92,' in *Festschrift für Ulrich Magnus* (Mankowski & Wurmnest eds. 2014), 243-254.
34. As reflected in this translation here, the original (1975) phrase 'can be set aside' (*kan tilsidesættes*) was replaced in 1995 with the broader phrase 'can be amended or set aside' (*kan ændres eller tilsidesættes*).

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2) In making a decision under paragraph (1), regard shall be had to the circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances.

At the suggestion of my Contracts instructor, I noted this new rule in the margin of my textbook (alongside the prior version of § 36). Indeed, since hardly a week had passed since I learned the main rule that that 'promises and contracts are binding,' I was tempted to scribble a few more words in margin, maybe something like this:

In Denmark, since 1975, *reasonable* promises and contracts are binding.

That, however, would have overshot the mark, not least because the new § 36 was *mainly* intended for application in *consumer* contract contexts. On the other hand, the text of the General Clause is indeed general: it clearly covers *all* kinds of contracts, and it was therefore understandable that its advent sent a few nervous shivers down the backs of foreign merchants whose contracts might be subject to Danish law.[35]

These Danish General Clause recollections take me even further back, to 1967, when, as a first-year student at NYU Law, I learned about § 2-302 of the Uniform Commercial Code (UCC) – a rule which, in pertinent part, provides:

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.[36]

35. Regarding the rules which govern the applicable contract law in Denmark, see generally Joseph Lookofsky and Ketilbjørn Hertz, *EU-PIL: European Union Private International Law in Contract and Tort* (2nd ed. 2015), Ch. 3.
36. Paragraph (2) of § 2-302 provides: '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.'

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A few years later, this sales law rule was 'restated' (virtually verbatim) as § 208 of the *Restatement (Second) of Contracts*,[37] thereby elevating the concept of unconscionability to a *general* American rule, applicable to all contract types.[38]

'Unconscionable' does not translate easily to Danish. Admittedly, § 36 of the Contracts Act, with its focus on reasonableness, looks a lot like UCC § 2-302(1) and *Restatement* § 208,[39] but what 'unconscionable' really means is '*extremely* unreasonable' (*yderst urimelig*),[40] especially in 'commercial' (*non*-consumer) contexts, where American courts hold the 'unconscionability' defense on a *very* tight leash.[41]

In both the UCC and the *Restatement*, unconscionability provides what American lawyers refer to as a 'defense' to contract enforcement, i.e. within the same category as fraud and duress. If, by reason of unconscionability, a court elects not to enforce the clause in question, that contract *no longer binds*, and we could say the same thing about a contract which a Danish court 'sets aside' by reason of the General Clause in § 36. Without a promise binding on the promisor, the promisee (*løftemodtager*) has no right to demand performance, so there can be no breach, no remedy.[42]

37. Section 208 provides: '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.'
38. See Farnsworth, supra n. 4, § 4.28.
39. See Bo von Eyben, *Juridisk Ordbog* (defining unconscionability under UCC § 2-302 as '*rimelighedscensur af kontraktsvilkår, svarende til aftalelovens § 36*'). See also Andersen & Runesson, supra n. 22, at 38 (contract term may be adjusted or set aside under Article 36 'if the term is unconscionable').
40. Various versions of Black's Law Dictionary define unconscionable as 'showing no regard for conscience; affronting the sense of justice, decency, or reasonableness' or 'completely one sided and unfair due to the significant leverage and bargaining power that one party has over the other.' Black's defines 'unconscionability' as 'extreme unfairness' or 'unfairness that is shocking to the senses of the average person.' See https://dictionary.thelaw.com/unconscionable/.
41. See generally Charles Knapp, 'Unconscionability in American Contract Law: A Twenty-First Century Survey,' UC Hastings Research Paper No. 71, available at SSRN: https://ssrn.com/abstract=2346498.
42. See Joseph Lookofsky, *Consequential Damages in Comparative Context – From Breach of Promise to Monetary Remedy in the American, Scandinavian and International Law of Contracts and Sales* (1989) at 31.

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Granted, Danish courts have also been reluctant to carve out commercial exceptions to *pacta sunt servanda*.[43] But it seems to me that courts in Denmark (the world's most 'equal' country)[44] have been *somewhat* more willing to adjust commercial contract terms on grounds of perceived unfairness or imbalance (what American law calls 'substantive unconscionability),[45] in this respect perhaps reflecting greater acceptance of 'communicative justice,'[46] a *somewhat* more 'paternalistic' approach.

> '[I]t is hard [for an American traditionalist] to explain the law's sometime refusal to enforce a promise ... just because it seems harsh or unfair. In such cases the doctrine [of unconscionability] seems paternalistic and, as such, inconsistent with the promise principle, which is expressive of and implements the right of adult individuals to set their own goals and make such arrangements as seem best to them.'[47]

Quite apart from nuances as regards judicial application, there is another reason why unconscionability is a more 'narrow' doctrine than unreasonableness in Danish law. Whereas § 36 of the Contracts Act applies, *inter alia*, to contracts that have 'become unreasonable' due to subsequent events, the American rule applies *only* when the clause or contract in question was unconscionable '*at the time the contract was made*.'

I shall return to this particular point in the context of 'impracticability' (IV below). Before I move on to that, however, I note that the CISG Convention contains *no rule* (whatsoever) that deals with unconscionability or unreasonableness. This, as confirmed in CISG Article 4, is an intentional omission:

43. See generally Andersen & Madsen, supra n. 29, p. 207 ff.
44. See http://www.demos.org/blog/10/20/15/united-states-vs-denmark-17-charts.
45. See Andersen & Madsen, supra n. 29, at 204-05 (noting that unreasonable contract *content* can itself justify adjustment) and 207 ff. (no basis to claim that § 36 cannot – or ought not – be applied in commercial agreements). Regarding the distinction between procedural and substantive unconscionability in American law, see, e.g., Knapp, supra n. 41, Part III.B.
46. As regards this concept, see Hein Kötz & Axel Flessner, *European Contract Law* (1997) at 125.
47. Charles Fried, '*Contract as Promise* Thirty Years On,' 45 *Suffolk University Law Review* 961 (2012). Compare re. § 36 of the Scandinavian Contracts Acts, Andersen & Runesson, supra n. 22, at 38 (early critics saw the provision as unduly paternalistic protection of weaker parties).

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The Convention *governs only* the *formation* of the contract of sale and the *rights and obligations* of the seller and buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is *not concerned* with

a) The *validity* of the contract or any of its provisions ...[48]

So, whereas issues relating (e.g.) to the revocability of offers are clearly governed by CISG Part II, and issues relating (e.g.) to delayed or nonconforming delivery are clearly governed by CISG Part III, issues relating to unconscionable or unreasonable contract terms (which are not CISG-governed) can only be resolved by *domestic* law. Indeed:

'The drafters' *purpose* in creating the 'validity' exception ... was to *preserve* the applicability of national rules deemed important enough by individual states that the rules were not, under the state's domestic law, subject to contrary agreement of the parties.'[49]

The scope of the validity exception is, nonetheless, a matter of considerable dispute. Indeed, when it comes to a CISG liability 'exemption' due to an 'impediment' to performance, some scholars – emphasizing the 'except clause' in CISG Article 4(a)[50] and/or the 'uniformity principle' in Article 7(1) – argue that Article 79 *precludes* the application of 'competing' domestic validity rules. More about this in the following.

4. Impracticability

Assuming, for the sake of argument, that the parties have concluded a 'reasonable' agreement, those parties are *bound to perform*. After all, 'a deal's a deal.'[51]

By way of exception, however, one of the promisors concerned may later claim (s)he is entitled to an *excuse for nonperformance* – this by virtue

48. CISG Article 4, emphasis added here.
49. Harry Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1),' 17 *Journal of Law and Commerce* (1998) 187-217, 209 (emphasis added here). Accord: Clayton Gillette & Steven Walt, *Sales Law Domestic and International* (3rd ed.) at 199: 'By leaving matters of validity to domestic law ... UNCITRAL got what it bargained for, purchasing consensus at the cost of uncertainty.'
50. I.e. the words 'except as otherwise expressly provided in this Convention ...'
51. See Farnsworth, supra n. 4, at 599 with note 1.

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of a supervening force majeure-type event, rendering performance impossible or (at least) an extraordinary 'impediment to performance' (*opfyldelseshindring*), what American lawyers refer to as 'impracticability.'[52]

In the Danish glossary of 'foreign words,'[53] '*impraktikabel*' (as a Dane would spell that transplant) is misleadingly defined as 'impossible to do' (*ugørlig*). *Black's Law Dictionary* provides a functional and more accurate definition of *impracticability*: 'A fact or circumstance that *excuses* a party from performing an act, especially a contractual duty, because (though possible) it would cause *extreme and unreasonable difficulty*.'

Excuses like these were the focus of my senior-year (5-L) thesis in Copenhagen in 1980,[54] where I concluded that the relevant American and Danish statutes, although very differently worded,[55] convey an *essentially similar* message based on similar underlying criteria.[56] Thus, in my first attempt at 'academic' analysis, I focused on *similarities*, this in reaction to a prominent English scholar who, the year before, had argued that *differences* dominated, at least in *his* Common (contra-Civil) law perspective.[57]

52. Farnsworth, id., § 9.6.
53. Brüel & Nielsen, *Fremmedordbog* (11th ed).
54. Joseph Lookofsky, 'CISG: The Basis of Liability,' *Justitia* (Copenhagen 1981).
55. § 24 of the Danish Sale of Goods Act (*Købeloven*) translates as follows: 'A seller who incurs a generic obligation [*genusforpligtelse*] is liable in damages for delay or non-delivery, unless the contract otherwise provides or the possibility of performance must be considered precluded by circumstances not of such a nature that the seller should have taken them into account at the time of the conclusion of the contract, such as the accidental destruction of all goods of the kind or lot concerned, war, prohibition of import, or the like.'

    § 2-615 of the American Uniform Commercial Code provides (in relevant part): 'Delay in delivery or non-delivery in whole or in part by a seller is not a breach of his duty under a contract of sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.'
56. Both rules depend on variants of the 'impossibility' and 'foreseeability' tests central to traditional theories of liability for delay and non-delivery. In § 2-615, 'impracticable' covers both 'objective impossibility' and impracticability in the narrower sense of what Danish law refers to as 'economic force majeure.' In both systems, a key inquiry is the foreseeable nature of the contingencies concerned.
57. In 1979 Barry Nicholas described the CISG 'exemptions' rule as reflecting 'superficial harmony which merely mutes a deeper discord,' the discord between the Civil (fault) and Common (no-fault) approaches to liability for breach of contract. See

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I will not re-debate that, but will instead, in the present impracticability context, focus on the sub-issue of 'economic force majeure' as a liability 'exemption' under CISG Article 79(1).[58] The controversial question is not whether sharply increased cost can qualify as an 'impediment' (these days, almost everyone agrees it *can*),[59] but whether *hardship*[60] – and/or *domestic* rules which permit contract *adjustment* by reason of *supervening unreasonableness* – can affect the CISG equation, either by *expansive application* of Article 79 (to include international soft law on hardship) or by allowing *domestic* rules of hardship (or unreasonableness) to 'compete' with (supplement) that CISG rule.

In my student thesis, I did not address the hardship conundrum. In a subsequent (1983) version, however, I noted the possibility of an 'equitable adjustment' of the price pursuant to § 36 (Denmark's General Clause) – a possibility which I described as one of the Convention's 'loose ends.'[61]

Barry Nicholas, '*Force majeure* and Frustration', 27 *American Journal of Comparative Law*, pp. 231 ff. (1979).

58. Article 79(1) provides: 'A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'
59. See Harry Flechtner, 'CISG Article 79: Getting Scafomed,' in *The CISG Convention and Domestic Contract Law – Harmony Cross-Inspiration or Discord?* (2014) at 193 (prevailing view). Accord John Honnold, *Uniform Law for International Sales* (4th ed., edited and updated by Harry Flechtner, 2009) at 627 (language of Article 79(1) seems to leave room for exemptions based on economic dislocations). See also Lookofsky, supra n. 16, §6.19.
60. As defined in the *UNIDROIT Principles of International Commercial Contracts* (2004), Art. 6.2.2: 'There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.' In case of hardship the disadvantaged party is, according to Art. 6.2.3 of the *Principles*, entitled to request renegotiations. Upon failure to reach agreement, either party may resort to the court. If the court finds hardship it may, if reasonable, terminate the contract [or] adapt the contract with a view to restoring its equilibrium.
61. See 27 *Scandinavian Studies in Law* (1983) 109-138, at 123 with n. 125, also available at https://www.cisg.law.pace.edu/cisg/biblio/lookofsky4.html.

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Later, after an Italian court addressed 'hardship' in CISG context (in 1993),[62] and the hardship concept gained prominence in the UNIDROIT Principles (1994),[63] I wrote more about this,[64] and in the wake of a highly controversial Belgian decision in 2009,[65] I wrote still more.[66]

To sum up my own position (there are at least three others):[67] liability exemption for force majeure and contract adjustment for hardship are two very different things.[68] By a similar token, § 36 of the Contracts Act – a domestic rule of validity 'protected' by CISG Article 4(a) – should, in appropriate circumstances, be allowed to compete with Article 79,[69] thus opening the possibility of an equitable price adjustment.[70]

62. See CLOUT Case No. 54 (Tribunale Civile di Monza, Italy, 14 Jan. 1993), noted in the *Digest of CISG Case Law* (2016), Article 79, p. 396: 'Treatment of Particular Impediments: Change in the Cost of Performance or the Value of the Goods,' http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf. See also the English translation of this Italian case at http://cisgw3.law.pace.edu/cases/930114i3.html.
63. See also supra n. 60.
64. See Joseph Lookofsky, 'Walking the Tightrope between CISG Article 7 and Domestic Law', 25 *Journal of Law & Commerce* (2006), available at http://www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html.
65. See Harry Flechtner, 'The Exemption Provisions of the Sales Convention, Including Comments on Hardship and the 19 june 2009 Decision of the Belgian Cassation Court,' LIX *Belgrade Law Review* (2011) 84, 87-101, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1785545.
66. See Lookofsky 'Not Running Wild with the CISG,' 29 *Journal of Law & Commerce* 141 (2011), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376353.
67. See Franco Ferrari/Clayton P. Gillette/Marco Torsello/Steven D. Walt, 'The Inappropriate Use of the PICC to Interpret Hardship Claims under the CISG,' 3 *Internationales Handelsrecht* (2017) at 97-98 (summarizing these various positions, including my own).
68. Re. hardship and hardship remedies see supra note 60. See also text infra with note 74.
69. Assuming, of course, that the applicable rules of private international law (choice-of-law) rules point to Danish domestic law. See Lookofsky & Hertz, note 35 supra.
70. See also Joseph Lookofsky, 'Predicting Exemptions and Hardship in CISG Context,' *Liber Amicorum Peter Møgelvang-Hansen* (2016) at 335.

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Many of those who take a different position point to the 'except clause' in Article 4(a)[71] and to the desideratum of 'uniform' CISG application,[72] but I think that involves too much of a stretch:

'A[n] example of an unduly rigid view of the [CISG] uniformity principle leading to unjustified conclusions involves the interpretation of the rule in Article 4 that questions of contractual 'validity' are beyond the scope of the Convention, and are governed by applicable national law. To counteract this threat [to uniform CISG application ... Peter Schlechtriem] argued that the reach of the validity exception should be limited by confining the term 'validity' to issues that are almost universally treated as a matter of validity in the various national legal systems. The drafters' purpose in creating the 'validity' exception, however, was to preserve the applicability of national rules deemed important enough by individual states that the rules were not, under the state's domestic law, subject to contrary agreement of the parties. ... Nothing in the uniformity principle of Article 7(1) justifies such an attempt to undermine the purposes behind the validity exception.'[73]

To take this a step further, let's assume, for the sake of argument, that the domestic unconscionability rule in UCC § 2-302 was as 'expansive' as the General Clause in § 36 of the Danish Contracts Act, so that the UCC rule (like the Danish rule) also authorized contract adjustment by reason of *supervening events*. Would American CISG scholars then argue that (my hypothetical version of) UCC § 2-302 was *not* a rule of validity, and that the United States, by ratifying the CISG, traded that 'supervening' part of § 2-302 away in exchange for 'uniform' application of CISG Article 79?[74]

I dare not answer that question, but I do argue that the General Clause in the Danish Contracts Act remains a viable validity rule in the international context – a rule not displaced by CISG Article 79, not 'traded away' when Denmark ratified the CISG.

Lastly, and mindful of the *Festschrift* in which the present paper appears, I find it appropriate to translate an excerpt from *The Law of Obliga-*

71. I.e. 'except as otherwise expressly provided in this Convention' (see text supra with n. 48).
72. Pursuant to CISG Article 7(1). Regarding these different positions see Ferrari et.al, supra n. 67.
73. Flechtner, supra n. 49, at 208.
74. But see Honnold/Flechtner, supra n. 59, at 68 (arguing that 'domestic 'hardship' doctrines are pre-empted by the Convention); Flechtner, 'Getting Scafomed,' supra n. 59; Torsten Iversen, 'CISG Article 79 and Hardship,' in *The CISG Convention and Domestic Contract Law – Harmony Cross-Inspiration or Discord?* (2014) at 223 (ultimately siding with Professor Flechtner).

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tions treatise, co-authored (in four editions since 2000) by Mads Andersen (*fødselaren*) and me:

'It is important to note that hardship triggers other legal effects than force majeure. The legal effect of force majeure is that the obligor is exempt from liability in damages, just as the same qualifying circumstances can also affect the obligor's obligation to perform. The legal effect of hardship, on the other hand, is that the agreement (possibly after an unsuccessful attempt at renegotiation) is adapted to the new circumstances. This accords with Danish law, but here the basis for modifying the agreement lies in domestic contract law rules. Such a correction will depend on a number of concrete factors, including the incentive the parties had to anticipate the unforeseen circumstance. If the agreement has simply become more burdensome for one party, without a fundamental displacement of the initial relationship between respective benefits, there will be no basis for adapting the agreement.'[75]

5. Conclusion

'Revocability' is obviously the opposite of 'irrevocability,' but if we are only talking about a starting point amended by significant exceptions, it hardly much matters where we start (and end).

If, to take a different example, we translate 'unconscionable' as 'unreasonable' (for lack of a better corresponding term), that would gloss over important substantive differences at the domestic level, perhaps also leading the way to inappropriate conclusions in an international 'impracticability' context.

So, what makes the greatest impression, the common core or the differences? Maybe it depends on the direction in which we're headed ... or on where we're coming from.

'Like language, comparative law faces the stark pitfalls of miscommunication and misunderstanding, but, also like language, it possesses the unique and breathtaking potentials of learning to see, to communicate, and to shed light in that elusive, inevitable, shifting, and ever-reconfiguring gap between the same and the other.'[76]

75. Andersen & Lookofsky, supra n. 19, 197-198 (translated here by the present author).
76. Curran, supra n. 2, at 54.

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