

The impact of the French doctrine of significant imbalance on international business transactions

David Restrepo Amariles (HEC Paris), Eva Mouial Bassilana (Université Côte d'Azur) and Matteo Winkler (HEC Paris) have posted on SSRN an article titled *The Impact of the French Doctrine of Significant Imbalance on International Business Transactions*. The paper is forthcoming on the Journal of Business Law.

The abstract reads as follows.

This article examines the concept of “significant imbalance” (SI) under French law and its impact on international business transactions. “Significant imbalance” is a legal standard meant to assess whether a contractual clause is unfair (abusive). Although initially restricted to consumer law, it has been extended to general contract law with the implementation of a reform entered into force on 1 October 2016. Previously, the Commercial Court of Paris in the ruling Ministry of Economy v Expedia, Inc (2015) had qualified SI as an “overriding mandatory provision” (“loi de police”) under Regulation 593/2008 on the applicable law to contractual obligations (Rome I). As a consequence, SI became operative in respect of international contracts despite an express choice of a foreign governing law made by the parties to the transaction. This article argues that, as a result of Expedia and the 2016 reform, French courts can interfere with international business transactions by striking down contractual terms that they deem unfair according to the SI standard. The analysis focuses on two key issues. On the one hand, notwithstanding recent judicial precedents, SI still fails to provide a reliable test for predicting which clauses or contracts are at risk of being deemed unfair. On the other hand, the legal arsenal supporting the French legislator’s disapproval of SI allocates great power to French courts and the French Government to pursue tort lawsuits against foreign companies allegedly oppressing their commercial partners with SI clauses. Empirical evidence shows that these actions are highly successful compared with those commenced by private actors. The article concludes that all these aspects, together with SI’s

turbulent case law throughout the years, will give rise to uncertainty in international business transactions and may eventually disadvantage France in the global competition in such a field.