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UNFAIR TERMS IN CONSUMER CONTRACTS: ENGLISH AND ITALIAN LAW ON UNFAIR TERMS IN THE LIGHT OF DIRECTIVE 93/13

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ABSTRACT

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UNFAIR TERMS IN CONSUMER CONTRACTS: ENGLISH AND ITALIAN LAW ON UNFAIR TERMS IN THE LIGHT OF DIRECTIVE 93/13

by Paola Elisa Nebbia

The purpose of this thesis is to examine the implementation of EC Directive 93/13 on Unfair Terms in Consumer Contracts in two countries, England and Italy. The thesis has two primary objectives. The first is to examine to what extent Directive 93/13 has influenced and continues to influence fundamental notions and principles of contract law in the two countries under consideration. The second objective is to answer the question whether European intervention in the field of contract terms has actually enhanced protection for the weak party to a contract in comparison to the one traditionally afforded by English and by Italian law.

From the methodological point of view, this thesis seeks to demonstrate the importance of comparative analysis as a key to understanding the effects of European law on domestic legal systems.

Finally, the work has a broader, more theoretical concern in that it seeks to explain the nature of the law not as a simple set of rules and cases, but as a set of methods, habits and ways of thinking deposited and crystallised over generations – in other words, as a tradition. The comparative analysis of the implementation of Directive 93/13 in England and Italy shall reveal that all measures seeking to reform the law, even those of European origin, are not immune from the influence of tradition in the way they are drafted, implemented and ultimately applied.

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Abbreviations

AC	Appeal Cases
All ER	All England Law Reports
Art.	Article
Banca, Borsa, tit. cred.	Banca Borsa e titoli di credito
Cass.	Corte di Cassazione
Corr. Giur.	Corriere Giuridico
Corte Cost.	Corte Costituzionale
C.c.	Codice Civile
CMLR	Common Market Law Reports
CL	Current Law
CLR	Commonwealth Law Reports
Cons. L.J.	Consumer Law Journal
Danno e Resp.	Danno e responsabilita'
DGFT	Director General of Fair Trading
Dir. Econ. Assicuraz.	Diritto e Economia delle Assicurazioni
D. lgs	Decreto legislative
DTI	Department of Trade and Industry
ECJ	European Court of Justice
ECR	European Court Reports
ELMR	European Market Law Reports
Ff.	following
Foro Pad.	Foro Padano
Foro It.	Foro Italiano
Giur. It.	Giurisprudenza Italiana
Giust. Civ.	Giustizia Civile
Giust. Cost.	Giustizia Costituzionale
HL	House of Lords
HMSO	Her Majesty's Stationery Office
I.L.Pr.	International Legal Practitioner
KB	King's Bench Law Reports
L.	legge
Ll.Rep.	Lloyd's Reports

N.	number
NGGC	Nuova Giurisprudenza Civile Commentata
NLJ	New Law Journal
OFT	Office of Fair Trading
Para.	Paragraph
QB	Queen's Bench
Rep.	Repertorio
Riv. Giur. Sarda	Rivista Giuridica Sarda
S./ss.	Section/sections
Sent.	Sentenza
SI	Statutory Instrument
SLT	Scots Law Times
Trib.	Tribunale
WLR	Weekly Law Reports
Vita Notar.	Vita Notarile
Vol.	Volume

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Introduction

1. Purpose of the thesis

...Whatever else leads to a change in law, and there are, of course, many sources both internal and external, the very traditionality of law ensures that it must change. Although authoritative interpreters might police the present to see that it does not stray too far from their interpretation of the past, it is impossible for traditions to survive unchanged. Many traditions allow for deliberate change by, for example, revelation or legislation, or recourse to extra-doctrinal consideration. The changes thus made are then incorporated into the tradition and come to be interpreted in the traditional ways. Thus even radical legislation enters a continuing tradition which probably affected the way in which it was drafted and certainly will affect the ways in which it is read and applied.[1]

Krygier's conception of law as tradition provided, a few years ago, the first inspiration for this thesis. Since then, much has changed in the structure and aims of this work; but the idea that tradition is a central and not peripheral feature of all legal systems, and as such inescapable, has remained the theoretical underpinning of this thesis.

The purpose of the following chapters is not to find irrefutable demonstration of the above principle in the positive law. It is however hoped that, in dealing with the specific issues raised by this work, the inescapability of tradition in drafting and applying law will naturally come to light.

Beyond this general and theoretical concern this thesis has a twofold purpose.

First, it seeks to examine to what extent Directive 93/13 on Unfair Terms in Consumer Contracts[2] has influenced and continues to influence fundamental notions and principles in the area of contract law in the two countries under consideration, England and Italy. The thesis seeks in particular to examine the issue whether and to what extent the Directive requires defining (or rather re-defining) in a European perspective the central concept of "unfair term" as well as other ancillary notions such as "consumer", "public service", "core term" and "goods".

Second, the thesis seeks to answer the question whether European intervention in the field of contract terms has actually enhanced protection for the weak party to a transaction in comparison to that traditionally afforded by Italian and English law.

In order to achieve the above objectives, it has been essential to first identify the key notions, principles and rationale on which laws against unfair terms in England and Italy are based, as well as their weaknesses and shortcomings; analysis then moves into assessing the level of protection afforded to consumers in each of the two countries

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[1] M. Krygier 'Law as Tradition' (1986) Law and Philosophy 237, 251.
[2] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts OJ L95/29.

before the implementation of the Directive. This is done in a comparative perspective in the first two chapters, which provide an account of the laws relating to unfair terms in England and Italy and of their underlying rationales, values and policy choices. The scope of investigation is limited, due to the broad approach of this work, to the general laws on unfair terms, and does not look at provisions controlling specific terms in restricted areas such as banking, insurance, financial services; nor does this thesis look at the procedural aspects of unfair terms control, since focus is on the origin, rationale and values underlying the substantive test of fairness.

The third chapter aims to fit Directive 93/13 within the context of EC policies on free movement of goods and consumer law. This step is meant to provide the understanding of the aim and rationale of the Directive necessary to assess the reasons for its adoption and its impact on national legal systems.

The last two chapters seek to answer the fundamental questions posed in this enquiry. The provisions of the Directive and the relevant Italian and English implementing measures are examined in some detail; at the same time, an attempt is made to assess the significance of the Directive and the underlying Community *acquis* (such as the principles of effectiveness and transparency) in respect of 1) re-shaping and re-defining domestic principles and concepts, or even introducing new and previously unknown ones; 2) actually improving consumers' position.

At the same time, these chapters subtly re-propose, and emphasise the importance of the underlying question of whether tradition is an inescapable, necessary element in drafting and applying law.

2. Methodology

Studies in the field of European contract law are usually either comparative discussions of a certain doctrine or principle of contract law; or analyses on the implementation of 'contract' Directives within a certain legal system; lately, an intense academic debate has also developed on the desirability and attainability of harmonisation of European contract law and on existing differences and similarities among European systems in this perspective[3].

[3] The debate has been reinforced by the recent *Communication from the Commission to the Council on European Contract Law* COM(2001) 398 Final. The numerous and diverging responses triggered by the Communication, as well as the Commission's recent Action Plan can currently be found at: http://www.europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html

This work, on the other hand, intends to develop along two intersecting axes. The first axis, which could be defined "European", involves an appraisal of the Directive's meaning and rationale by considering its status within European policy, legislation and case-law. The other axis, the "comparative" one, acts as an epistemological tool by which the shortcomings, characteristics, rationales and values of each system reveal themselves with more clarity and vividness by means of comparison: "*Auf Vergleichen lässt sich wohl alles Erkennen, Wissen zurückfüren*"[4].

The intersection of the comparative and the European axes provides the necessary background to assess the actual value and significance of European intervention in the field of unfair terms: only from this platform it is possible to understand the spirit and aims of the Directive and also identify and explain differences and similarities among Member States in the drafting, interpretation and application of the implementing measures.

Accordingly, from a methodological point of view, this work aims to demonstrate the essential role played by comparative analysis in the understanding of the effects of European law on national legal systems. Although this thesis does not directly enter in the debate on harmonisation of private law, it suggests a method to assess the desirability and effect of measures of harmonisation: only comparison can unveil and explain the degree of divergence or convergence of legal systems; broader inferences can then be drawn on the viability and consequences of further measures of harmonisation.

While the choice of Italy and England as subject matters of comparison has been initially guided, at least in part, by personal circumstances, it has eventually proven a most significant one since the two legal systems have turned out to be at opposite ends not only in terms of legal techniques and methods, but also for their diverging conception of the role of law in society and legal thinking.

The method here followed to compare law is based on the idea 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. This means that the aim of comparison is not simply to juxtapose concepts and rules, but rather to compare the solutions given by different systems to a certain problem. In other words, 'the

[4] "All knowledge is based on comparison": Novalis, Works III (ed. Minor, Jena 1907) 45, fragment 229, as quoted in K. Zweigert and H. Kötz *An Introduction to Comparative Law* Vol.I, (Oxford: Clarendon Press, 1998) v.

question to which any comparative study is devoted must be posed in purely functional terms'[5]; the starting point of a comparative lawyer is therefore the *function* that concepts and rules fulfil within a certain society. This necessarily entails that the subject matter of comparison must be stated without any reference to the concepts of one's own legal system.

In all (Western) legal systems, the *function* of rules on unfair terms is to prevent a party from enforcing a valid contract term as against the other party even where 1) there are no vitiating factors of the will, such as misrepresentation or duress; and 2) in the absence of any abuse of a situation of danger or need. Accordingly, all rules, independently of whether they contain the word 'unfair term', that aim to (or have been used so as to) perform that specific function will be relevant to our discussion. So, for example, rules on unfair terms in Italy are not only contained, as one would expect, in the articles on *clausole vessatorie*[6] of the Civil Code, but also in the articles on interpretation of contracts.

The formulation of our starting point in the above terms explains why the structure of this work does not follow the order and titles commonly found in English text on unfair terms: headings and paragraphs are here ordered in accordance with the rationale of rules and remedies, rather than in accordance with their source (e.g. the Unfair Contract Terms Act 1977) or nature (e.g. statutory or common law).

3. Sources

As far as the Italian and the English legal systems are concerned, analysis is primarily based on statutory (including Code) provisions and case-law, although academic opinions are duly taken into account.

While examining the pre-Directive English case law has been relatively easy, since it is almost fully recorded in law reports and carefully systematised by academic works, providing a fair picture of the Italian pre-Directive case-law has been a demanding task for several reasons.

First, the number of judgements on unfair terms is very high, but finding common guidelines or denominators to those judgments is almost impossible: very often decisions on similar points of law (even if taken in the same year) differ for no apparent reason. This is perhaps due to the structure itself of the judgements, which are

[5] Zweigert and Kötz, op cit. n.4, 34.
[6] The Italian word equivalent to 'unfair terms', see artt.1341-1342 of the Italian Civil Code.

rather abstract and impersonal and do not allow a deeper insight into the reasoning that lies behind a decision, thus permitting only a limited understanding of the case.

Secondly, the case-law of the *Corte di Cassazione*, for its importance, attracts most of the attention and is more easily available and reported; the more innovative and interesting judgements, however, usually come from lower courts and are often unreported or anyway only available with difficulty.

Finally, the generality of the comments made in the following chapters must be taken with some caution: since lower courts are not bound by higher courts, the picture of Italian law here provided will inevitably be limited and partial – one may always find a decision from a *Tribunale* or *Corte d'Appello* that states something completely different from what may be constantly held by the *Cassazione.*

The scenario does not vary much in relation to the post-Directive case law.

In the UK, the measure implementing Directive 93/13 empowers the Director General of Fair Trading (DGFT), if he considers that a term drawn up by a trader for general use is unfair, to bring proceedings for an injunction to prevent the continued use of the term.

The Office of Fair Trading (OFT) has set up a special unit to deal with the complaints and disseminate information about the Regulations and their enforcement. Only in one case was the OFT forced to (unsuccessfully) resort to litigation: it normally seeks to proceed by negotiation, persuasion and consensus, first issuing warnings and advice and seeking informal undertakings and uses the threat of litigation as a last resort to obtain from business undertakings to alter terms and cease the use of those considered unfair[7]. The OFT keeps a record of all terms revised by traders after being approached by the OFT; an account of such terms is then made available to the public in the Unfair Contract Terms Bulletin, published roughly once every two-three months by the OFT itself. Such Bulletins provide a useful insight into the OFT's work and in its understanding and application of the new law, in particular of the fairness test; at judicial level, on the other hand, there has been only one instance of application of the new control[8].

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[7] R. Bradgate 'Experience in the United Kingdom' in *The Unfair Terms Directive, Five Years On* Acts of the Brussels Conference, 1-3.7.1999 (Luxembourg: Office for Official Publications of the European Communities, 2000) 47.

[8] *Director General of Fair Trading v. First National Bank.* The case was tried at three different instances: in the High Court [2000] 1 WLR 98; in the Court of Appeal [2000] 2 WLR 1353; in the House of Lords [2001] 3 WLR 1297.

In Italy, the measure implementing Directive 93/13 entitles organisations representing consumers and professionals and the Chambers of Commerce, industry, craftsmanship and agriculture to apply to ordinary civil courts to obtain an injunction against the use of unfair terms by traders or by their organisations. Preventive actions represent, as yet, the greatest majority of cases decided by Italian courts and in this respect the work carried out by Italian courts of first instance is comparable to that of the OFT. It must be noted, however, that although courts may order that a measure is published in one or more newspapers (of which at least one must have national circulation) the quantity of information available on Italian cases is not comparable to that available on the OFT work. There is, as yet, no official instrument for the dissemination of information concerning cases on unfair terms: this is left to normal case-reporting which does not certainly guarantee that cases are uniformly and coherently available to the public (which is, anyway, a "lawyers' public"). The action of consumers' associations has been un-coordinated and random, but the novelty of the subject has triggered an intense reporting activity on judicial decisions on unfair terms. The relatively large case law developed on art.1469-bis ff. is not yet sufficient to design a consolidated framework for its interpretation and application: many points are still awaiting clarification or have received diverging interpretations. Uncertainties are partially due to the lack of judgments of the higher courts (*Cassazione* and *Corti d'Appello*)[9] which, even if not binding as precedents, usually contribute to shedding some light on obscure legal texts and tend to be followed at the lower instances. Nevertheless, the set of decisions made in the areas of banking, insurance, tourism, education, car sales and water supply is sufficient to give a first impression of the general attitude of courts towards the new law and provides a suitable term of comparison to the work of the OFT.

As far as Directive 93/13 is concerned, it is well known that the text finally adopted is much more modest, in its content and scope, than what originally envisaged[10]. In the course of the lengthy legislative history of the Directive, a number of articles have been eliminated, the compulsory nature of others has been weakened

[9] It is likely, though, that the lack of a comparable case law at the highest level has to do with the duration of process in Italy as compared to England. It should be borne in mind, in this respect, that the European Court of Human Rights has condemned more than once Italy for its "elastic" interpretation of the wording "reasonable length" of the process, see P. Nebbia '*Judex ex Machina:* The Justice of the Peace in the Tragedy of the Italian Civil Process' (1998) CJQ 164, 167.

[10] See eg. C. Joerges 'The Europeanisation of Contract Law as a Rationalisation Process and as a Contest of Legal Disciplines' (1995) ERPL 175, 176.

and the scope of application remarkably reduced. It has therefore been necessary to take into account, in this work, not only the current text of the Directive, but also earlier drafts and *travaux préparatoirs.* Those have proven to be precious documents, since they offer the historical perspective necessary to explain the inconsistencies, the gaps, the shortcomings and ultimately the existence of the Directive itself.

Chapter 1.

Scope and rationale of unfair terms regulation in England and in Italy.

1. Introduction

This chapter shares with chapter two the task of setting out the scene for the thesis by describing and comparing the English and the Italian law on unfair terms.

After a general overview of the relevant legislation and case-law in the two countries, analysis concentrates on investigating the reasons that justify in each legal system judicial or legislative intervention aimed at preventing reliance on a particular term. Such reasons commonly include inequality of bargaining power, protection of the consumer but also (somehow paradoxically) preservation of the freedom of contract; however, the role played by each of these factors in justifying and shaping the law on unfair terms has been rather different in Italy and in England: and such difference in roles reveals, at a closer look, more fundamental divergence in the choice of the type of interest that deserve legislative or judicial protection.

2. Legislative and judicial intervention against unfair terms: general framework in England and in Italy.

a) England

Generally speaking, even a superficial analysis of doctrines such as consideration, incorporation of terms, undue influence, interpretation, implied terms and mistake shows that, behind the facade of the "hands off" approach to contracts, there exists a clear reluctance of courts to allow exploitation of the others by means of a contract[1]: the determination of whether a contract has been formed, on what terms and whether it is vitiated often allows references to notions adjacent to fairness[2].

One will easily notice, however, that the doctrines deployed in order to avoid enforcement of unfair transactions rarely refer to fairness as a relevant consideration but rather are "used instrumentally to achieve the outcome of invalidating the contract or a noxious term"[3]. In other words, a court will stress any elements of procedural impropriety that it can discover rather than address directly the unfairness of the bargain. Substantive unfairness may provide the motive for intervention, but the formal

[1] P. Atiyah *An Introduction to the Law of Contract* (Oxford: Clarendon Press, 1995) 282-296.
[2] G. Howells S. Weatherhill *Consumer Protection Law* (Aldershot: Dartmouth, 1995) 307.
[3] H. Collins *The Law of Contract* (London: Butterworths, 1997) 254.

legal reason given for upsetting the contract will be formulated in terms of a procedural defect, such as deception, manipulation or unfair surprise. The result is that although it may seem plausible that courts are concerned with substantive unfairness in a particular case, since their formal reasons for the decision inevitably latch onto a procedural impropriety, the case for believing that substantive unfairness is crucial to the decision may be regarded as unproven.

Accordingly, for the purposes of our analysis it is important to bear in mind that, if any reason of substantive fairness underlies a decision, it is unlikely that it would be clearly stated: this applies especially to the remedies elaborated by the common law, since the Unfair Contract Terms Act 1977 (UCTA) opened the route to more open judicial reasoning.

Remedies against unfair terms in England are stratified at different levels of legal sources, having been partially elaborated by courts (common law remedies), and partially introduced by means of the Unfair Contract Terms Act 1977 and of a few marginal provisions in related statutes (statutory remedies).

The common law rules developed by courts consist in (or, more correctly, consist in a particular use of) rules on incorporation of terms and interpretation. Rules concerning the so-called fundamental breach and breach of a fundamental term are also a part, even though slightly outdated, of this framework.

Rules on incorporation of terms into the contract are based on the principle that a certain term will only operate if it has been incorporated into the contract upon which it purports to have effect. In cases where a contract is partly oral and partly written, the party seeking to rely on the clause may have to show that he has incorporated it into the bargain: in cases of this type, the question of what should constitute sufficient notice of a written term for it to be regarded as part of the agreement has given judges rather wide room for action in excluding the enforceability of burdensome terms

Once an exclusion clause has, by whatever means, been incorporated into a particular contract, the next tier of judicial control consists in checking whether that clause is apt, as a matter of interpretation, to cover the particular event which has arisen.

Two main sets of rules have been created in this respect: the rule of construction *contra proferentem* and of negligence liability[4]. Both rules aim at excluding that a certain exemption clause applies to a certain event on grounds that such event is not covered by the clause when correctly interpreted.

Finally, fundamental breach and breach of a fundamental term are also part of this framework, but lost their importance since they started being considered as rules of construction rather than substantive rules. According to such rules, the possibility to rely on an exemption clause can be barred on grounds that it is the content of the clause itself that renders it unenforceable.

Judicial motivation to use indirect routes such as the ones above described to attack clauses perceived to be unfair was dramatically reduced by the adoption of the Unfair Contract Terms Act 1977. In spite of its name, the Act does not deal with all types of unfair terms, but only with exemption clauses[5]; nevertheless, it is the most important legislative limitation on the effectiveness of unfair terms.

First, it renders totally ineffective certain types of restrictions or exclusions of liability: according to s.2(1) a person who acts in the course of business cannot by any contract term or notice exclude or restrict his liability for death or personal injury resulting from negligence. Negligence is defined by s.1(1) to include "breach...of any obligation arising from the...terms...of a contract, to take reasonable care ..." . On the other hand, it is clear that s.2(1) does not apply if the breach of contract or duty is committed without negligence: clauses purporting to exclude liability for such breaches, however, may be ineffective under other provisions of the Act.

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[4] Some texts also mention the rule of "strict construction" of exclusion clauses: its content and rationale, however, are comparable to the *contra proferentem* rules, with the only practical difference that a term may be subject to "strict interpretation" in favour as well as against the *proferens*.

[5] The notion of "exclusion clause" under the Act is, however, wide enough to cover clauses which seek to achieve this effect indirectly. According to s.13 the notion of "exclusion or restriction" includes:

- clauses making the liability or its enforcement subject to restrictive or onerous conditions;
- clauses excluding or restricting any right or remedy in respect of the liability;
- clauses excluding or restricting rules of evidence or procedure.

The intention is clearly to embrace terms which, although they do not specifically exclude or restrict liability, have a similar effect, and thus to prevent the evasion of the policy of the Act. In practice, then, one party will be prevented from doing things such as imposing a short time limit within which claims must be brought (see e.g. *Thomas Witther Ltd. v. TBP Industries Ltd.* unreported, 15 July 1994 in R. Lawson *Exclusion Clauses and Unfair Contract Terms* London: Sweet & Maxwell, 2000, 106), or excluding a particular remedy (such as rejection or set-off) without affecting another (see *Stewart Gill Ltd. v. Horatio Myer & Co Ltd* [1992] 2 All ER 530 and the comment by E. Peel 'Making more use of the Unfair Contract Terms Act 1977: *Stewart Gill v. Horatio Myer'* (1993) MLR 98-103; see also *Esso Petroleum v. Milton* unreported, 5 February 1997 in Lawson *Exclusion Clauses and Unfair Contract Terms* op. cit. n.5 106), reversing the burden of proof and so on. Valid agreed damages clauses and agreements to submit present or future differences to arbitration, on the other hand, are commonly considered not to be subject to the Act, see G. Treitel *The Law of Contract* (London: Sweet & Maxwell, 1999) 228.

Second, the Act continues the effect of previous legislation concerning defective or dangerous goods. S.6 restricts the ability of sellers of goods to exempt themselves from liability for breach of the stipulations implied into contracts of sale or hire-purchase under the Sale of Goods Act 1979: in particular, it prohibits exclusions or restrictions of liability for breach of stipulations as to title[6] (s.6.1)[7] and it prohibits exclusions or restrictions of liability in relation to statutorily implied terms as to correspondence of goods with the description or sample, and as to their quality or fitness for a particular purpose[8] (s.6.2). It must be noted that this latter provision applies only to cases where the buyer is dealing "as a consumer"[9].

Finally, s.5 of the Act prohibits the exclusion or restriction of negligence liability of a manufacturer or distributor of goods by means of a written guarantee, subject to the requirement that the goods are of a type supplied for private use or consumption and the loss or damage has arisen from the goods proving defective while in consumer use.

Save for the instances above examined, where the 1977 Act prohibits absolutely the exclusion or restriction of liability, the contract terms controlled by the Act are subject to a test of reasonableness. Thus, under s.2(2) a contract term or notice by which a party acting in the course of business seeks to exclude his liability for negligence giving rise to loss or damage other than death or personal injury must comply with such a requirement.

A large number of contractual terms are subject to the reasonableness test under s.3, entirely dedicated to liability arising in contract. According to this provision, the following terms in a contract with a consumer or on standard terms are valid only if they satisfy a judicially administered test of reasonableness: 1) terms that exclude or restrict the other party's liability when in breach of contract. This refers to "any liability" and not only to negligence liability; 2) terms that entitle the other party to be able to render a contractual performance substantially different from that which was reasonably expected of him or to render no performance at all.

According to s.6(3), the reasonableness requirement must be fulfilled by a term in a contract for the sale or hire-purchase of goods purporting to exclude or restrict

[6] Implied by s.12 of the Sale of Goods Act 1979.
[7] It must be noted that s.6.1 applies not only to business liabilities but also to those arising under any contract of sale of goods or hire-purchase agreement: accordingly, even a private seller is subject to this provision.
[8] Ss.13 to 15 of the Sale of Goods Act 1979.
[9] As far as other contracts for the supply of goods are concerned (e.g. exchange, pledge or hire) when by statute those contracts contain implied terms as to title, correspondence with the description, quality or fitness

liability for breach of statutorily implied terms where the buyer or hire-purchaser deals otherwise than as a consumer[10].

UCTA also amends s.3 of the Misrepresentation Act 1967 so as to subject terms excluding or restricting liability for misrepresentation to the requirement or reasonableness.

It must be also noted that UCTA only applies at the level of individual contract: there is no provision for collective or public enforcement action against unfair terms since English law is not familiar with the concept of representative action.

Finally, a few prohibitions are scattered in sectoral legislation such as, for example, the one on consumer credit, fair trading, transport, employment and social security[11]. Because of their specificity, those provisions are outside the scope of the present work.

b) Italy

The Italian Civil Code, which dates back to 1942 but is still deeply rooted in the ideology of Enlightenment, does not envisage any form of direct and substantive control on fairness of contract bargains: private law, as *jus privatorum,* is the law of private individuals and as such shall encourage them to pursue their interests by allowing them a high degree of autonomy and self-determination and by ensuring in the first place formal equality before the law: in the name of "laissez faire" parties are free to pursue their own interests and neither the legislator nor the judge has the power to interfere and modify rights and duties freely undertaken by the parties.

Accordingly, control on the content of the contract takes place only in few exceptional cases listed in the Code[12].

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for a particular purpose, a person acting in the course of business cannot in a contract with a consumer exclude or restrict liability in this respect (s.7 UCTA).

[10] A similar rule applies to other contracts for the supply of goods under s.7(3); additionally, in those contracts terms excluding or restricting liability for breach of implied terms as to title to, or quiet possession of the goods, are also subject to the test of reasonableness. Furthermore, s.4 of the Act introduces the requirement of reasonableness to contract terms where a consumer undertakes to indemnify another person in respect of a business liability incurred by the other for negligence or breach of contract.

[11] See, for example, s.173(1) and (2) of the Consumer Credit Act 1974; s.151 of the Road Traffic Act 1960; s.1(3) of the Law Reform (Personal Injuries) Act 1948.

[12] Those are cases where performance becomes impossible (*impossibilità sopravvenuta della prestazione*, art.1218, 1256) or too burdensome (*eccessiva onerosità*, art.1467); cases where one party agrees to an extremely disadvantageous contract for the reason that he finds himself in a situation of danger or need and the other party takes the opportunity to derive an unfair profit for himself (*rescissione di contratto concluso in*

Outside those exceptions, it is not possible to interfere with the contractual arrangement of the parties and distribute the risk according to a model which is different from the one envisaged by the parties: the contract is a private matter between parties to which the judge has no access, save of course cases where the lawfulness (*liceità*) of the transaction is at stake (artt.1325, 1349(2), 1343, 1345, 1346, 1354, 1895, 1904, 1963, 2035, 2103(2), 2265, 2744).

That the modern age had brought relevant changes to the process of contract formation and to its content, however, was a well known and much discussed issue at the time when the 1942 Civil Code was adopted. The attention of the legislator was particularly attracted by the emergence of standard terms contracts (the closest translation to "condizioni generali di contratto"). Those are contracts the terms of which do not represent the result of a process of negotiation and the final convergence of the parties' wills; rather, terms are imposed by one party (usually the one with the stronger bargaining position) to the other by using a standard form adopted for a number of similar transactions.

The use of such tools was considered with no doubts positively, in that it laid down uniform conditions of contract for everybody and saved the costs and time of negotiation by allowing an immediate and fast conclusion of the contract: one only had to adhere to the contract[13]. However, since the beginning of the century the need to regulate this type of contract was felt for the reason that it left no room to individual choices and wishes, and no possibility to discuss or modify the content of the contract. The Italian Civil Code boasts the distinction of being the first in Europe to address specific norms to this phenomenon and of facing the conflict between the need to protect the party who cannot choose the content of the contract and the wish to encourage business activity, clearly facilitated by the use of standard terms contracts.

For this purpose, art.1341 ad 1342 c.c. were introduced. They apply to "condizioni generali di contratto" (standard terms of contract) i.e. to those terms which are contained in the so-called "contratti d'adesione"[14](adhesion contracts). Those are

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stato di pericolo, art.1447, and *per lesione*, art.1448); cases where a term imposes too burdensome duties on the party at fault in case of trivial breach or delay in performance (*clausola penale*, art.1382, 1384).

[13] For this reason they were also called "automatic" contracts "as they conclusion is very fast, almost mechanic" see Galizia *Industrialismo e nuove forme contrattuali* quoted in G. Alpa *Il diritto dei consumatori* Laterza, Bari, 1999, 157.

[14] From the wording of the Explanatory Memorandum and the Report to the Civil Code (quoted in G. Alpa G. Rapisarda 'Il controllo giudiziale nella prassi' in G. Alpa, M. Bessone (ed.) *I contratti standard nel diritto interno e comunitario* Giappichelli, Torino, 1991, 79) it appears that the words "contratti d'adesione" and "condizioni generali di contratto" refer to the same phenomenon as they are used interchangeably.

contracts where one party adheres to a contractual text which is pre-formulated by the other party in order to regulate in a uniform way certain contractual relationships.

Art. 1341(1) of the Code provides that standard terms of contract prepared by one of the parties are effective as to the other, only if at the time of formation of the contract the latter knew of them, or should have known of them by using ordinary diligence (*onere di conoscenza o di conoscibilità*). Art.1341(2) adds that in any case some specific types of clauses (commonly known as "clausole vessatorie") are not effective unless specifically approved in writing. Such clauses are those which establish, in favour of him who has prepared them in advance, limitations on liability, the power of withdrawing from the contract or suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defences, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses, or derogations from the competence of courts.

Art. 1342 adds that in contracts made by subscribing to forms or formularies prepared for the purpose of regulating certain contractual relationships in a uniform manner, terms added to such forms or formularies prevail over the original terms of said forms or formularies when they are incompatible with them, even though the latter have not been struck out. This does not affect the application of art.1341(2).

The essence of those two provisions can be summed up in the following rules: according to art.1341(1) the simple fact that the adherent had the possibility to become aware of a certain term is sufficient to make such a term binding; to compensate for failure to respect the principle that the contract results from parties' freedom, art.1341(2) imposes the formal requirement that the adherent's attention must be drawn on the most burdensome terms; according to art.1342, in standard terms contracts, forms and formularies, added terms prevail over the pre-determined ones, on the assumption that the former are the result of a bargaining process[15].

Those rules are to be read in conjunction with the relevant rules of interpretation laid down in art.1370 and codifying the ancient principle of *interpretatio contra proferentem:* terms contained in standard terms contracts or in forms or formularies which have been prepared by one of the contracting parties must be interpreted, in case of doubt, in favour of the other party.

[15] F. Lapertosa 'La giurisprudenza tra passato e futuro dopo l'avvento della nuova disciplina sulle clausole vessatorie' Foro It. 1997, V, 357.

Finally, art.1229 imposes a blanket prohibition on terms that exempt or limit one party's liability for cases of fraud (*dolo*) or gross negligence (*colpa grave*) by making them void (*nulli*): nor can a party exempt or limit liability in cases where the act of the debtor or his auxiliaries constitutes a violation of duties arising from rules of public order. It must be noted that this article applies not only to contractual relationships, but to any type of obligation (*obbligazione*).

Additionally, for many years the Italian system has not provided for any sort of administrative control on unfair terms[16]. Recent regulation for specific sectors has introduced some general and indirect forms of administrative control on contract terms promoted by bodies outside the public administration, the purpose of which is not to protect the consumers' interests but to assure compliance with the "general public interest"[17].

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[16] R. De Negri 'Report on the practical implementation of Directive 93/13/EEC in Italy' in *The Unfair Terms Directive, Five Years on* (Luxembourg: Office for Official publications of the European Communities, 2000) 304.

[17] Among the most important bodies of administrative control, CONSOB (for the control of companies listed in the stock exchange) and ANTI-TRUST (competition and market authority) can be mentioned. Moreover, it is necessary to mention the supervision of the Bank of Italy on the activities of banks and financial intermediaries and of ISVAP on the activities of insurance companies. The administrative controls of contractual frameworks carried out in such fields, however, aims mainly at preserving competition and assuring clarity of information for the market and not at balancing the substance of the contract. One example is the regulation contained in title VI (Transparency of contract terms) of the consolidated Act on Banking and Credit Matters (Legislative Decree 385/93).
For example, the Bank of Italy has carried out an investigation aimed at checking the compatibility between norme bancarie uniformi (n.u.b., i.e. the common rules for banking contracts elaborated by ABI, Associazione Bancaria Italiana) and the domestic rules on competition. This resulted in a list of n.u.b. which are considered to be incompatible with competition law, such as the terms which allow the bank the change *ad nutum* (without notice) the terms and conditions of the contract (the so-called *jus variandi*). Something similar happened in the insurance field, where an investigation carried out by the Authority for Market and Competition on the compatibility between the models of contract prepared by ANIA (Associazione Nazionale Imprese Assicuratrici) and competition law has forced insurance companies to amend some terms. On this topic, see P. Gaggero 'Disciplina del jus variandi nel testo unico bancario' in M. Bianca G. Alpa, *Le clausole abusive nei contratti stipulati con i consumatori* Cedam, Padova, 1996, 367-445; F. Martorano 'Condizioni generali di contratto e rapporti bancari' and M. Bin 'Condizioni generali di contratto e rapporti assicurativi' both in E. Cesaro. (ed.) *Clausole abusive e direttiva comunitaria,* Cedam, Padova, 1994, 117-130 and 131-144.
In C-215-216/96 *Carlo Bagnasco and Others v. Banca Popolare di Novara soc. coop. arl and Cassa di Risparmio di Genova e Imperia SpA* [1999] ECR I-135 the European Court of Justice (ECJ) had to consider the compatibility with art.81 (85) and 82 (86) of the Treaty with standard bank conditions imposed by ABI to its members that 1) enabled banks, in contracts for the opening of a current-account credit facility, to change the interest rate at any time by reason of changes occurring in the money market, and to do so by means of a notice displayed on their premises 2) provided for general guarantees to secure current-account credit facilities (the so-called and often criticised *fidejussione omnibus*) which derogate from the general law concerning guarantees. In holding that such terms do not have as their object or effect the restriction of competition within the meaning of Article 81(1) of the EC Treaty and do not constitute abuse of a dominant position within the meaning of Article 82 of the Treaty the ECJ judgment confirms, once again, the insufficiency of competition rules to ensure fair market conditions for the consumers.

In addition, if the review of unfair terms has been within the exclusive power of the judicial system, it must be said that the limitation of the means of protection turns out to be increased by the absence, like in England, of any form of class action that could extend the final decision *ultra partes;*. the possibility for consumers' associations to activate controls was heavily penalised by the lack of legislative tools, as well as by the scantiness of economic resources. In fact, the Italian consumers' associations, unlike those of other countries, were not admitted until recently to any official financial support and existed merely on a voluntary basis.

3. Rationale for the control: standard form contracts and inequality of bargaining power.

The arguments which are traditionally put forward in favour of legislative or judicial intervention against unfair contract terms are mainly two: increased use of standard terms and inequality of bargaining power. Even though the two arguments may appear to overlap to a very large extent, it is important to consider them as two separate rationales: each of them has had a different weight in shaping law and policy on unfair terms in the two countries under examination.

a) Standard form contracts

In England, academic writings and policy documents emphasised since the 40s how the ever-increasing use of standard contracts began to reflect a structure of the market where well-organised business impose take-it or leave-it terms upon consumers who are unable to protect themselves against this power[18].

[18] An influential source for those considerations was Kessler's discussion of contracts of adhesion in the US: "In so far as the reduction of costs of production and distribution thus *(by the use of standard terms)* achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts. The use of standard contracts has, however, another aspect which has become increasingly important. Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competition use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardised contracts are frequently contracts of adhesion: they are *à prendre ou à laisser*... Standardised contracts have also been used to control and regulate the distribution of goods from the producer all the way down to the ultimate consumer. They have become one of the many devices to build up and strengthen industrial empires (...) Freedom of contract enables enterprisers to legislate by contract and...to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrials and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals". F. Kessler 'Contracts of Adhesion: Some Thoughts about Freedom of Contract' (1943) Columbia L. Rev. 629.

The inadequacy of the common law to deal with standard term contracts first emerged in the infamous case of *L'Estrange v. Graucob*[19] where, in holding the plaintiff bound by his signature on a standard form contract, Maugham LJ lamented:

> I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations (...) I could wish that the contract was in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such a small print"[20].

Less than fifty years later, the problem of standard contract terms had found a vivid description in Lord Reid's well know analysis of the two problems generated by standard form contracts[21]: first, a problem of information, in that a customer would often not read contract terms or would not understand their impact on his situation; he would therefore be later taken "by unfair surprise"; second, a problem of lack of any room for bargaining, in that the customer may find that the business is unwilling to remove or alter any unwanted terms.

Most of the common law cases on unfair term are actually concentrated on cases where standard form contracts were at issue.

The problem of standard contract terms is also addressed by UCTA: s.3 provides that judicial control can be triggered not only in consumer contracts but also in cases where both parties are acting "in the course of a business" but one deals "on the other's written standard terms of business". The need to extend s.3 to standard form contract was explained by the Law Commission in the following terms:

> "The case for controlling clauses is evident in a situation where one party acts in the course of a business and the other does not. Injustice may arise because the consumer will frequently not understand the implication of the terms of the contract and, even if he does, he may not have sufficient bargaining strength to prevent their inclusion in the contract. But these factors are not limited to consumer contracts. In many cases a person acting in the course of a business is in a very similar position to the consumer (...) We believe that the situations where control is necessary (even though both parties to the contract are acting in the course of a business) arise where one party requires the other to accept terms which the former has decided upon in advance as being generally advantageous to him, and the customer must either accept those terms or not enter into the contract: that is, where there is a standard form contract"[22].

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[19] [1934] 2 KB 394.
[20] *Ibidem,* 405.
[21] *Suisse Atlantique SA v. Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406.

The above extract illustrates clearly the close link between arguments concerning standard form contracts and arguments concerning inequality of bargaining power. It should be noted, in this respect, that although inequality of bargaining power has never achieved the status of a doctrine in itself, it has been the object of judicial concern, often expressed by Lord Denning in terms that still have wide echo in the English legal environment.

In Italy, the 1942 legislator was also very much concerned with the use of standard contract terms: this was related to the desire to encourage rapidity of exchanges to the detriment of contractual freedom with a view to favour the activity of the enterprises. The widespread use of contract forms, however, rather than underlining a situation of disparity between the proponent and the adherent, marks the end of the classical concept of contract, where the two parties gradually come to an agreement that strikes a balance between the interests of both: this model of contract is now accompanied by a new model which is different on the level of contract formation, and the need arises to regulate this second, alternative, model[23].

This emerges from some unambiguous passages contained in the Report to the King on the Civil Code:

"the need to ensure the uniformity of the content of all the relationships of identical nature, for a more precise determination of the risk involved, the trouble of negotiating with customers, ...the need to simplify the organisation and the management of the enterprise induce the enterprise to establish forms the text of which cannot be discussed by the customer if he does not want to withdraw from the bargain. Such a way of making a contract cannot be considered as illegal just because it is not based on negotiation and discussion of the terms but one is forced to comply with the pre-arranged terms. The modern economic reality is based on a quick conclusion of transactions due to the acceleration of the phenomenon of production: the need to have a free bargaining must surrender to this reality as it would bring disadvantages that cannot be overcome.

On the other hand, the use of contracts of adhesion has given rise to abuses in those cases where the pre-determined forms contain terms that put the customer entirely in the hands of the enterprise (...).Artt.170 and 171 (i.e. 1341-1342) attempt at remedying this abuse by making enforceable only those terms that the customer knew or should have known when making the contract; and, in addition, terms

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[22] Law Commission 'The Law Commissions' 1975 Report: Exemption Clauses: Second Report' Law Com n.69, para.147.

[23] G. Chinè *La contrattazione standardizzata* in M. Bessone *Trattato di diritto privato* vol.III *Il contratto in generale* tomo II, Giappichelli, Torino, 2000, 494.

which bind in a burdensome way the adherent are not enforceable, unless attention is specifically drawn on them "[24].

It is therefore clear that the policy choice expressed by the legislator does not aim to protect the weak party to the transaction, but rather to serve business activity. This is even more evident if one considers that:

1) art.1341(1) makes the position of the customer in practice rather difficult: usually, the customer has no time to read long terms: the customer is, by definition, a "person in a hurry"[25]. If the rationale of the article is to allow commercial transactions in cases where there is no time for negotiation, how can the legislator then expect that the customer has the time to read and think over the terms of the contract offered to him? Paradoxically, this may favour those who insert in the contract unintelligible clauses, written in small print or hardly visible.

2) Art.1341(2) does not really offer any substantive protection but only excludes validity of standard terms in case where they are not specifically signed. The signing of the contract may make the customer aware of the content of the contract (provided that he has read and understood every single term, which is actually rather unlikely) but guarantees to the enterprise the possibility to insert clauses of any type and effect, which can be neither negotiated nor modified by the other party. In other words, nothing prevents the enterprise from using the harshest terms as long as the requirement of specific written approval is fulfilled.

3) Art.1342 has in practice a negligible importance as terms subsequently added to the standard form are an extremely rare occurrence; and, in any event, it does not provide any substantive protection but rather consolidates the principle that a negotiated term cannot be unfair.

The rule of interpretation of standard form contracts, art.1370, is of no help: as later[26] discussed, it has had such poor judicial use, that its role in the defence of the weak party is almost non-existing.

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[24] Relazione al Re, 78, quoted in Alpa Rapisarda 'Il controllo giudiziale nella prassi' in G. Alpa, M. Bessone (ed.) *I contratti standard nel diritto interno e comunitario* op. cit. n.14, 79.
[25] Alpa *Il Diritto dei consumatori*, op.cit. n. 13, 161.
[26] [26] Relazione al Re, 78, quoted in Alpa Rapisarda 'Il controllo giudiziale nella prassi' in G. Alpa, M. Bessone (ed.) *I contratti standard nel diritto interno e comunitario* op. cit. n.14, 79.

In other words, one can say that the above examined rules, especially artt.1341-1342, are laid down to preserve the principle that contracts are made by agreement, rather than to address inequality of bargaining power. It comes as no surprise that, as the use of standard form contracts affects the traditional process of formation of the contract, the relevant rules are located in the section of the Code concerning the agreement (*accordo*) of the parties:

"the location of such rules within the structure of the Code shows that the aim pursued by them is to regulate a peculiar way of concluding contracts in order to guarantee as much as possible the existence of the usual assumptions (*presupposti*) for the conclusion of contracts; certainly the aim was not that of limiting the autonomy of the parties by envisaging a control that goes beyond compliance with formal requirements"[27]

b) Defining "standard form contracts"

The question of defining what exactly makes a contract a "standard form contract" has arisen both in Italy and in England. Courts in the two countries, however, have had a different approach to the issue due to the different rationale for intervention in the field.

In Italy, courts have insisted on the fact that contracts subject to art.1341 must be made up for a indefinite number of transactions, not just for a single one, i.e. there must a "standardisation" of the terms so that the same text is meant to regulate a plurality of similar contracts; additionally, the contract must be unilaterally drafted. Reference to these features is made by the Relazione al Re and by art.1341 and art.1342 which refer to "standard" terms of contract ("condizioni generali di contratto") and "forms and standard form contracts which are pre-formulated by one party in order to regulate in a uniform way certain contractual transactions" ("moduli o formulari predisposti per regolare in maniera uniforme determinati rapporti contrattuali").

Accordingly, the majority of the cases adopt an approach such as the one that follows[28]:

The plaintiff received from the defendant a letter stating the terms of a certain contract. The terms had been entirely prepared by the defendant who then invited the plaintiff to sign the contract and send it

[27] S. Patti 'Introduzione' in G. Alpa S. Patti (ed.) *Le clausole vessatorie nei contratti con i consumatori* Giuffrè, Milano, 1997, XLVII.

back to him. It was obvious that no negotiation had taken place as the plaintiff simply adhered to the terms presented to him. He later claimed that the clause concerning territorial competence had not been specifically approved by him and therefore it was not enforceable. The Court declared that art.1341 did not apply as the document at issue did not fulfil the requirement of "generality" and reasoned as follows:

"...the rationale underlying the rules concerning contracts of adhesion (economic imbalance of the parties) cannot be referred to individual cases. On the contrary, one should look at cases of substantial, even though limited, monopoly (revealed by the fact that the contract has been pre-determined for an indefinite number of transactions) ...; the text itself of art.1341 by referring to 'condizioni generali di contratto'...is in favour of such interpretation".

Another judgement confirms that "contratti d'adesione ... are those aimed at regulating an indefinite number of transactions (...) Accordingly, the mere fact that a contract has been formulated in advance by one party, so that the other has no option other than taking it or leaving it without participating in its formation is not enough to trigger the application of art.1341 so far as the form and the terms are not meant to regulate an indefinite number of contracts"[29].

In England, a few cases clarify that a standard form contract under s.3 UCTA is one which is used with some regularity[30], but a number of other grey areas nevertheless surround the scope of the provision. In general, contracts have been considered to be on standard terms even though altered in part[31]; this includes cases where a contract is partially oral, or only part of the contract is on standard terms. Furthermore, a contract may still be regarded as on written standard terms even though the recipient of those terms negotiated and agreed certain matters and details: if "the section is designed to prevent one party to a contract from having his contractual rights, against a party who is in breach of contract, excluded or restricted by a term or condition, which is one of a number of fixed terms or conditions invariably incorporated in contracts of the kind in question by the party in breach, and which have been incorporated in the particular contract in circumstances in which it would be unfair and unreasonable for the other

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[28] Tribunale Messina 17/5/1962 *Danzé c. Infranca* reported in E. Cesaro *Le condizioni generali di contratto nella giurisprudenza* Tomo II Cedam, Padova, 1993, 33; see also Cass. 6/12/1999 n.13605 in Giust. Civ. Mass. 1988, 2451.

[29] Cass. 14.5.1977, n.1952 in Giust. Civ. Rep. 1997, item *Obbligazioni e contratti* n.86; see also Cassazione, 21.4.1988 n.3091 in Giust. Civ. Mass. issue 4.

[30] *McCrone v. Boots Farm Sales Ltd.* [1981] SC 68; see also *British Fermentation Products v.Compare Reavell* [1999] 2 All E.R. (Comm) 389 and the discussion in Law Commission 'Unfair Terms in Contract: a Joint Consultation Paper' Consultation paper n.116 (London: TSO, 2002) para.5.53

[31] See e.g *St. Albans City and District Council v. International Computers Ltd.* [1996] 4 All ER 481 with a comment by E. MacDonald 'The Council, the Computer and the Unfair Contract Terms Act 1977' (1995) MLR 585; *Chester Grosvenor Hotel Ltd. v. Alfred McAlpine Management Ltd.* (1993) BLR 115.

party to have his rights so excluded or restricted –then- the phrase "standard form contract" cannot be confined to written contracts in which both parties use standard forms. It is ... wide enough to include any contract, whether wholly written or partly oral, which includes a set of fixed terms or conditions which the proponer applies, without material variation, to contracts of the kind in question"[32].

In *Salvage Association v. CAP Financial Services Ltd*[33]. Thayne Forbes J., while reminding that in this respect the nature of the contract "will be a question of fact and degree to be decided in all the circumstances of the particular case", lists a set of facts to be taken into account in coming to a decision and which focus on the actual extent to which terms have been imposed by one party or rather negotiated and established by parties' common agreement. In this sense, the judicial refusal to embed the notion of "standard terms contract" in a rigid formula is fully consistent with, and somehow explained by, the argument of Law Commission that "courts are well able to recognise standard terms used by person in the course of their business, and that any attempt to lay down a precise definition of "standard form contract" would leave open the possibility that terms that were clearly contained in a standard form might fall outside the definition. In our view this would be unfortunate. We have not, therefore, attempted to formulate a statutory description of a standard form contract"[34].

As previously mentioned, it is submitted here that the different rationales for intervention justify the different attitudes of courts. In England, the strong role played by inequality of bargaining power as a reason for intervention relegates in a secondary position questions concerning the exact legal form through which such abuse takes place: in fact, the legal form should not be an obstacle to unveiling instances where terms are imposed rather than agreed. In Italy, on the other hand, the reason to regulate standard form contracts resides above all in their "law-like" nature that takes them out of the traditional model of contract and creates the need for a different legal framework: a contract drafted for individual use, even though plainly imposed on the weaker party, does not represent an exception to general rules on contract agreement.

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[32] *British Fermentation Products Ltd v Compair Reavell Ltd*, op.cit.n.30, 391.
[33] [1995] FSR 654.
[34] Law Commission 'The Law Commissions' 1975 Report: Exemption Clauses: Second Report' op. cit.n.22, para.157.

c) Inequality of bargaining power

Inequality of bargaining power is expressly acknowledged as being relevant to the fairness of a term by two provisions of UCTA: first, the strength of parties' bargaining position is one of the guidelines for the application of the reasonableness test under Schedule 2; second, some provisions of UCTA, such as s.3, apply only when one of the parties acts "as a consumer".

In practice, when dealing with parties of comparable bargaining power, judges have been reluctant to upset contractual terms: "It is always relevant to have in mind when construing a contract between commercial parties that the primary purpose of the relevant provision may simply be one of division of risk, often insurable risk (...). -A court, particularly a court accustomed to deal with commercial contracts, should show no reluctance to give full effect to the provisions of the contract – It also has to be borne in mind that commercial contracts are drafted by parties with access to legal advice and in the context of established legal principles as reflected in the decisions of the courts. Principles of certainty, and indeed justice, require that contracts be construed in accordance with the established principles. The parties are always able by the choice of appropriate language to draft their contract so as to produce a different legal effect"[35]. The judgment seems to suggest that in a commercial context, where parties have full understanding of the meaning and effect of contract terms, none of those can turn out to be a "bad surprise" for any of the parties: as long as they can be "reasonably expected", they are fair. On the other hand, if one party cannot read, understand or change the terms of the contract, at least he should not to be caught by "unfair surprise": he must be able to find in the contract what he -or a reasonable person in his shoes- expects, or what is more likely to correspond to his intention. In other words, the judicial test on unfair terms is based on whether an ordinary person would reasonably expect to find a certain term; or whether an ordinary person would reasonably interpret the intention of the parties so as to cover a certain event.

For this reason, for example, judges seem to be less prepared to accept incorporation by course of dealing in a consumer context: in *Hollier v. Rambler Motors Ltd.*[36] the Court of Appeal held, *inter alia,* that three or four transactions made by a consumer with a business in the course of five years were not sufficient to establish the

[35] Hobhouse J. in *EE Caledonia Ltd. v. Orbit Valve Co Europe* [1993] All ER 165 at 173. On the fracture between consumer and commercial law in general, see R. Brownsword 'The Two Laws of Contract' (1981) SJ 279-281.
[36] [1972] 2QB 71.

"course of dealing" needed to incorporate certain terms, included in forms only occasionally signed by the plaintiff. Commenting on that decision in *British Crane* Lord Denning observed "...that was a case of a private individual who (...) had signed forms on three or four occasions. The plaintiff there was not of equal bargaining power with the garage company (...). The conditions were not incorporated". Had the parties both been commercial men, contracting on equal terms, the result might well have been different.

In Italy, as already mentioned, formulation in advance and general use are the reasons justifying legislative intervention, and the causal link with inequality of bargaining power does not appear to be particularly relevant in the eyes of the Italian legislator[37]: the requirement that the contract must be drawn for general use seems to exclude that one party is able to rely on artt.1341-1342 in cases where he has been unable to negotiate its content but the contract in itself is drawn for individual use[38].

That the rationale is not strictly to protect the weak party to the transaction is also confirmed by the fact that the mentioned articles contain no reference to the *status* of the parties: they therefore apply to contracts concluded not only between consumers and enterprises but also between enterprises themselves, no matter what their position and their bargaining strength is.

Most of the times, the fact that the term must be unilaterally drafted[39] and that the economic position of the parties is irrelevant has gone to the disadvantage of the parties who attempted to claim that they were not bound to comply with the requirements in art.1341 for not being in a position of economic superiority[40]. On the other hand, the

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[37] P. Nebbia 'The Implementation of Directive 93/13 in Italy and in the United Kingdom: a Comparison' in H. Schulte-Nölke R. Schulze (ed.) *Europaïsche Rechtsangleichung und nationale Privatrechte* (Baden-Baden: Nomos, 1999) 312.

[38] see A. Tullio, *Il contratto per adesione – tra diritto comune dei contratti e la novella nei contratti dei consumatori* Giuffrè, Milano, 1997, 11-17; S. Troiano 'L'ambito oggettivo di applicazione della Direttiva CEE del 5 Aprile 1993: la nozione di clausola "non oggetto di negoziato individuale"' in M. Bianca G. Alpa (ed.) *Le clausole abusive nei contratti stipulati con i consumatori* Cedam, Padova, 1996, 599.

[39] In this respect, it is irrelevant whether the proponent himself drafted or not the contract: contracts drafted by professional associations or thirds with particular technical-legal knowledge are also covered as long as they are then imposed by one party to the other. This is the case, for example, of *norme bancarie uniformi,* draft terms agreed by the Associazione Bancaria Italiana (ABI) and widely used by banks in the contractual relationships with customers.

[40] An interesting debate had arisen on whether artt.1341-1342 could also apply to contractual relationships between the public administration (P.A.) when acting as a private *(jure privatorum)* and individuals. The answer to the question was uncertain until 1984, when the Constitutional Court ruled that "specific written approval of *clausole vessatorie* is necessary even in contracts made *jure privatorum* and based on standard terms unilaterally drafted by the P.A. for an indefinite number of relationships". The Court observed *inter alia* that the fact that the P.A. in carrying out its activity was inspired the general interest, impartiality and justice, was irrelevant for the purposes of compliance with art.1341; this is a merely formal requirement and, as such, must be complied with whenever a contract of adhesion contains a *clausola vessatoria,* and no matter what the

fact that the adherent was in a particularly weak position has been held irrelevant in those cases where unilateral pre-drafting was absent[41].

The irrelevance of parties' position is judicially confirmed by the case law on the so-called "clausole bilaterali".

"Clausole bilaterali" are terms which give a specific right or deprive of a specific right both parties to the contract, i.e. which apply in favour or to the detriment of any of the parties, so as to maintain formal equality between them. The characteristic of "bilateralità" is attached mainly to terms which allow parties to terminate or to suspend the performance of the contract *ad nutum* (without notice); or to terms that allow tacit extension or renewal of the contract. Such terms may be considered as *vessatori* under art.1341(2) on grounds that, as a matter of fact, the same clause can have remarkably different effects depending on the party which relies on it. The issue has been the object of an oscillating attitude of the *Corte di Cassazione* which, without any apparent logic, has held from time to time that such terms are *vessatori*, other times that they are not. However, a systematic analysis of the case-law reveals that terms which refer to the possibility to suspend or withdraw from the contract are usually held non *vessatori*, while terms concerning renewal and extension have been the subject of a gradually more evolving approach.

As to the first type of terms, the common reasoning one can find behind the decisions on their validity and enforceability is that, since the same right is guaranteed to both parties (it is interesting to note that in two of the "leading" cases one party is FIAT, in another AGIP, both against small enterprises)[42], there seems to be no reason why the term should be more burdensome for one party than for the other; on the other hand, the situation covered by art. 1341 is where the term is in favour of one party only, thus making the position of the weak party particularly burdensome.

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status of the parties is (in this case, the P.A. that prepared the contract could be considered the weak party): the rationale of the rule was not to protect the weak party (Corte Cost. 29/9/1984 n.4832 in NGCC 1985, II, 123; see also Alpa Rapisarda *Il controllo giudiziale nella prassi* op. cit. n.24, 95).

[41] In Cass.27/4/1991 n. 4638 in Giur. It. Mass. 1991, for example, the plaintiff had bought a pre-made wooden house. The contract contained a clause derogatory to the territorial competence of the court, which the plaintiff claimed to be invalid on grounds that it had not been specifically approved pursuant to art.1341(2). The court considered that there was no doubt that the plaintiff was the "weak" party and the seller/defendant was the "strong" one; however, the contract had been drafted and typed ("formato e dattiloscritto") at a notary's office and this excluded unilateral determination of the contract: the rationale of the rule, i.e. to make the party aware of the content of the contract, did not apply in this case and there was therefore no need of specific approval.

[42] Cass. 4/7/1986 n.4540 in Giur. It. Mass. 1986 and Cass. 27/2/90 n.1513 in Giur. It. Mass. 1990; see also Cass. 22/1/1991 n.544 in Giust. Civ., 1991, I, 853.

Nevertheless, a recent approach of the *Corte di Cassazione* to tacit renewal or extension of the contract seems to consider that such terms, even though bilateral, may have a particularly burdensome effect on the weak party: the reasoning of the Court refers to the different position of the parties, and considers that the proponent has a better chance to assess in advance the advantages flowing from the insertion of a term of that type in the contract[43]. This seems to be one of the very few cases where the Court shows willingness to go beyond the sterile wording of art.1341(2) in order to ascertain in practice, on grounds of the advantages and disadvantages actually conferred to the parties by the contract, whether its terms are fair or not, and accordingly whether they meet or not judicial support. The different treatment of the first and the second type of terms examined remains, however, an unexplained mystery.

d) The consumer.

Consumer policy emerged and developed in England as a "part of the social and economic policies of the Welfare State designed to establish minimum standards in the market place, provide equal access to consumption opportunities and enforce rights"[44] and to redistribute power and resources from producers to consumers. Accordingly, since the sixties several measures were enacted aimed at protecting consumers by regulating, for example, advertising, trade description, credit transactions, by giving consumers inalienable guarantees of fitness and quality and by creating in 1973 the Office of Fair Trading[45].

The Unfair Contract Terms Act echoes the concerns of the legislator for consumers' welfare where it lays down special rules for cases in which one of the parties deals as consumer.

The notion of consumer introduced by UCTA has required judicial clarification.

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[43] See Cass.27/2/1998 n.2152 in Foro It. 1998, I, 1051, but also Cass. 8/10/1968 n.3161 in Foro It. 1969, I, 383.

[44] I. Ramsay *Consumer Protection* (London: Weidenfeld & Nicolson, 1989) 47. To some extent, consumer protection can also be viewed as contributing to enhancing security for market transactions and developing trust and confidence in the traders. Both the Consumer Credit Act 1974 and the Financial Services Act 1986, for example, were intended to stimulate the confidence of consumers during periods of rapid expansion and change in those markets. Professional self-regulation also attempts to promote relations of trust in order to reduce uncertainty in the minds of consumers as to the quality of the service provided.

[45] At the beginning of this series of measure stood the Molony Report, drafted by the Molony Committee upon request of the Government with the task of considering and reporting what changes in the law were desirable for the protection of the consuming public (Molony Committee Final Report of the Committee on Consumer Protection (1962) Cmnd 1781).

In the case of *R & B Customs Brokers v. United Dominion Trust*[46], the Court of Appeal drew the guidelines for the adoption of a wide notion of consumer that would cover all transactions that do not form part of the buyer's business nor are incidental, unless regularly made, to it.

The plaintiff, a shipping and freight forwarding company, bought from the defendant finance company a car supplied by a third party. The agreement contained a term potentially covered by UCTA provided that the transaction was not done "in the course of a business". The car was the second or third acquired on credit terms and had been bought for both company and personal use. The Court of Appeal not only disregarded the fact that the plaintiff was not a natural person, but also ruled that the purchase was only incidental to the plaintiff's business activity and that, in such circumstances, a degree of regularity was required before the transaction could be said to be an integral part of the business and, hence, entered in the course of business. Since the car was at most the third bought on credit terms, there was no sufficient degree of regularity[47] capable of establishing that the contract was not part of a consumer transaction[48].

This decision seems to draw the line between who is regarded as a consumer and who is not, but the rationale of the distinction is debatable. On the one hand, equating the buying company with a consumer may be a good policy, because there is no reason why a business buying a car should be in any less need of consumer protection than an ordinary private citizen: a firm of shipping brokers may be just as unqualified to assess a car and the value of the bargain as is the man in the street. If the firm regularly buys a car for its directors, however, it is no longer to be equated with a consumer; but certainly, a consumer who regularly buys a car would still be treated as such on grounds that the frequency of the bargain would not place him in a better position. Accordingly, it is unclear why the frequency of a transaction should be the distinguishing criterion for enlarging protection to purchasers buying otherwise than for private consumption.

In addition, this decision may negatively affect the scope of consumer protection in two possible ways.

In the first place, the decision in *R&B Customs Brokers* may end up unduly restricting the scope of application of the Act if applied to the business party of a

[46] [1988] 1 WLR 321.
[47] In this context, it is probably more correct to talk about "frequency" rather than "regularity".
[48] For a similar, but more briefly justified conclusion see *Peter Symmons & Co. V Cook* (1981) N.L.J. 758. A comparable reasoning is also contained in the decision under the Trade Description Act 1968 of *Davies v. Sumner* [1984] 3 All ER 831.

contract: a business that makes a contract which is not an integral party of its activity may be considered as not having acted "in the course of a business", with the consequence that the consumer who makes a contract with it will not be protected by the UCTA: s.1(3) limits the scope of the Act to "business liability", i.e. liability for breach of obligations and duties arising "in the course of a business". So, for example, if R&B had sold their car to a consumer, the contract would not be subject to UCTA since R&B would be considered not to be acting "in the course of business"[49]. It can be argued that when faced with such a case a court could decide that a different approach should be taken to the interpretation of "in the course of a business" so as to ensure to the maximum possible extent protection of the consumer. However, it appears odd that the same formula in the same piece of legislation can be subject to two different interpretations.

Secondly, the recent decision of *Stevenson v. Rogers*[50] gives rise to additional inconsistencies in the definition of the consumer. *Stevenson v. Rogers* concerned the interpretation of "in the course of a business" in s. 14(2) of the Sale of Goods Act 1979 in a contract for the sale by a fisherman of his own boat to another fisherman. In deciding whether the selling fisherman had acted "in the course of a business" the Court of Appeal analysed the legislative history of the section at issue to conclude that the sale had been made "in the course of a business" and accordingly a condition as to the satisfactory quality of the boat was implied. This decision focused on the capacity of the seller at the time of the sale and, accordingly, so long as it could be established that the seller was involved in a business then he would be caught by s.14(2) even though the goods sold were not of the type he may specifically deal with. The Court insisted that there was no contradiction with R&B Customs Brokers since the ratio of the latter was limited to its context, and the meaning of s.12 UCTA was not to be treated as dependant upon the meaning of s.14(2) SoGA. The Court further demonstrated that the two cases were somehow in harmony since the purpose of both of them was to increase consumer protection.

In spite of the Court's desire to avoid contradictory interpretations, it must be regretted that a uniform understanding of "in the course of a business" -and hence of consumer- has not been attempted in view of the fact that the two Acts are strictly

[49] E. MacDonald ' "In the course of a business": a fresh examination' (1999) Web Journal of Current Legal Issues 1999.
[50] [1999] 1 All ER 613.

related to each other[51]. If, for example, R&B were to sell the car bought (as already mentioned), they would be not be doing it "in the course of a business", thus depriving the buyer of the protection afforded by UCTA, but on the other hand they would be acting "in the course of a business" for the purpose of SoGA and thus there would be in the sale an implied term as to satisfactory quality. Such term, however, could be freely excluded since s.6, like the whole UCTA, is inapplicable to the transaction due to the fact that the seller is not acting "in the course of business".

If the English panorama on the issue is therefore rather confused, very little confusion can arise on the definition of consumer in Italian law: the *persona* consumer does not exist in the Italian Civil Code.

The reason for absence of any direct means of protection, neither in contract nor in tort, is to be found in the aforementioned[52] idea, underlying the Civil Code, of neutrality of the law towards the social status of the parties. The common opinion among lawyers was that the consumer was indirectly protected by the Civil Code as "aderente" (adherent, artt.1341-42, 1370 cc.), "acquirente" (buyer, art.1470 cc.) "terzo" (third party, art.1494 cc.), "danneggiato" (injured party, art.2043 cc.) and by the laws on trade marks, enterprises and unfair competition[53]. It was clear, however, that the protection enjoyed by the consumer was only a mediated and indirect protection: to give just one example, the Italian Constitutional Court (*Corte Costituzionale*) denied *locus standi* to consumers' associations in actions concerning unfair competition[54] on grounds that those are representatives of interests which have nothing to do with the fairness of commercial relationships ("interessi del tutto estranei alla correttezza dei rapporti economici di mercato").

It has been pointed out, however, that some provision of the Italian Constitution could be understood as being referred to consumers[55]. In particular, the combined

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[51] For wider comments see J. De Lacy 'Selling in the course of a business under the sale of Goods Act 1979' (1999) MLR 776; A. Brown 'Business and Consumer Contracts' (1988) JBL 386.

[52] See above, page 12 ff.

[53] G. Sannia 'Commento all'art.1469-bis comma 2' in E. Cesaro (ed.) *Clausole vessatorie e contratto del consumatore* Cedam, Padova 1998, 83. For example, the consumer was mentioned in the Explanatory Memorandum to art. 2597c.c. (duty to contract for an enterprise in position of monopoly) that justifies such a duty "in defence of the consumer and as a necessary counterbalance of the elimination of competition" (*Relazione n.1046 del Ministro Guardasigilli al libro IV del C.C., Delle Obbligazioni* ibidem, 82).

[54] In 1980, the *Tribunale di Milano* made a reference to the *Corte Costituzionale* concerning the compatibility between art.3 of the Constitution and the failure to confer *locus standi* to consumers' associations in actions brought under art.2601, but the *Corte Costituzionale* (ord.21/1/1988, n.59 in *Foro It.* 1988, I, 2158) rejected the reference as "manifestly inadmissible" for the reasons above mentioned.

[55] According to G. Alpa *Consumatore (protezione del) nel diritto civile* in Dig. Disc. Priv.III, Giappichelli, Torino, 1988, 547 it is possible to identify a "constitutional humus for the interests of consumer".

provisions of Art.41 par. 2 and 3 of the Constitution[56], which entitle the law to regulate and limit economic activities for the purpose of protecting the interest of the society, have been understood as ensuring that consumers' security, freedom and dignity and, more in general interests, are preserved against any economic activity that might endanger them.

However, rather than serving as a foundation for the elaboration of a consumer policy, the provision has been used as a yardstick for the evaluation of constitutionality of laws having the potential to restrict private economic activities or to allow a penetrating State control on them[57]. Although the notion of "social utility" and "interests of the society" has not found a clear and consistent application in the case law of the Constitutional Court, it is possible to identify a relevant number of decisions where, in the name of "social utility", the Court "saved" several laws which it considered aimed a protecting citizens and consumers' interests (but very often also national production[58]): so, for example, the Court declared compatible with art.41 of the Constitution the obligation imposed by a law to produce pasta with durum wheat flour only: the aim of such restriction being, the Court reasoned, the protection of the consumers and of public heath, as well as the support to specialised wheat cultivation.

The notion of consumer in this context has obviously very little to do with the creation of a set of rules aimed at re-establishing the lost bargaining equality (if ever there was one) between consumers and traders; however, it provides a good example of

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[56] Art.41.1. Private economic initiative is free.

2. Private economic initiative cannot be carried out so as to be contrary to public utility or so as to be detrimental to security, freedom and human dignity.

3. The law shall establish programmes and controls which are appropriate to guide and co-ordinate public and private economic activity for social purposes.

[57] A. Maltoni *Tutela dei consumatori e libera circolazione delle merci nella giurisprudenza della Corte di Giustizia* Giuffré, Milano, 1999, 22-33.

[58] Corte Cost. Sent. N. 137 of 1971 in Giust. Cost. 1971, I, 1577. The case is particularly interesting if compared to case 407/85 *Drei Glocken v. USL Centro-Sud* [1988] ECR-4233, where the ECJ held the obligation to make pasta with durum wheat only as incompatible with art.28. In other, similar, decisions the Constitutional Court declared compatible with art.41 laws aimed at: price-fixing of medicines as a measure aimed at preserving public health, threatened by the danger of a free competition market (Corte Cost. Sent. N. 29 of 1957 in Giur. Cost 1957, I, 404); legal regulation of prices of beef for the purposes of preserving social welfare ("benessere sociale") (Corte Cost. Sent. N. 47 of 1958 in Giur. Cost. 1958, I, 527). Later on, in the seventies, the Court introduced the criteria of reasonableness/proportionality in its evaluations and demanded for itself the task of "assessing the adequacy of the means to the ends in order to preserve the guaranteed freedom against interventions which are arbitrarily restrictive (...) or against interventions which in practice nullify the basic rights attached to such freedoms" (Corte Cost. Sent. N. 78 of 1970 in Giur. Cost. 1970, I, 1052). This brought to a drastic reduction in the number of laws that could pass the constitutionality test: for example, the Court declared unconstitutional the law that prohibited patenting of medicines as it was "disproportionate to the end of protecting the right to health", which could be achieved by means that were less restrictive of private economic initiative (Corte Cost. Sent. N. 20 of 1978 in Giur Cost., I, 454).

how measures concerning methods of, and limits to, production and sale of goods can, on good or on ill grounds, be justified to the detriment of free market and competition.

Welfarism had, nevertheless, some impact in Italy, which resulted in the adoption of statues in the field of labour law, tenancy and banking law. Legislation specifically addressed to consumers, though, was merely the result of outside pressures coming from European institutions rather than indigenous initiatives.

Chapter 2

Formal and substantive control on unfair terms in England and Italy.

1. Introduction

This chapter focuses on the different types of unfair terms control in place in England and Italy before the implementation of Directive 93/13. Those can be broadly divided into two categories, formal and substantive controls.

The term "formal controls" is meant to include all rules which do not involve a direct assessment of the substance of contractual terms, but rather compliance with certain general, formal, requirements for their validity and enforceability. So, for example, giving appropriate notice to a term or complying with certain formalities required for its acceptance does not entail an assessment of its fairness but rather concerns the question whether the term is to be considered or not as part of the contract. Formal controls, however, may often provide the indirect means for more substantive control of fairness on particularly burdensome terms.

"Substantive controls", on the other hand, aim to address directly the content of contractual terms, which accordingly may be totally forbidden (blanket prohibitions, "black lists") or subject to judicially administered tests.

The analysis of the scope and rationale of unfair term control in Chapter 1 and of the content and practical application of such control in this chapter should provide a fair picture of the meaning of the notion of "unfair term" in the two countries under examination. This will reveal deep differences in the perception of what is "unfair" under English and Italian law.

2. Formal controls

As previously mentioned, the application in England of formal controls based on rules of incorporation and interpretation hides a more penetrating and substantive investigation on fairness: however, the legal reason given for upsetting the contract would still be disguised under formal argumentation based on whether and on what terms a contract has been formed. On the other hand, formal procedural requirements imposed by Italian law for the approval of certain terms, originally justified by their burdensome nature, do not appear to have been developed so as to offer a more substantive protection and are still considered as merely formal controls.

A comparison of the different development followed by formal controls in the two legal systems can therefore offer useful insights not only of the different legal techniques for regulating contract formation and interpretation; above all, it allows a better understanding of the relationship between law and the social context and of judges' perception of their own role within such a context.

a) Rules on incorporation

As already briefly discussed, rules on incorporation focus on the question of whether a certain term is part of the contract.

In England, the harsh rule laid down in l'*Estrange v. Graucob* excludes that a term which is part of a signed contract is not incorporated. Besides the few cases of fraud, misrepresentation[1] and *non est factum*[2] in signed contracts, attention has therefore concentrated on other issues, such as incorporation of notices, incorporation of term in unsigned documents, incorporation by course of dealing. In Italy, on the other hand, the case-law has concentrated on the interpretation of artt.1341-1342 in respect of signed contracts.

A common point for investigation in the two systems concerns the time of incorporation: in England, no exclusion clause is effective unless adequately brought to the other party's attention before or at the time the contract is made[3]. Cases of this type are quite straightforward and leave some room for interpretation only on the question of who makes the offer and who makes the acceptance and at what point the contract is concluded.

In Italy, absence of case-law on the time of incorporation is actually rather surprising. In at least one case decided at last instance it is made clear that reference to the moment where the party concluded the contract excludes the enforceability of clauses where the adherent has the opportunity to know them after the conclusion of the contract: so, the *clausole generali di contratto* inserted in a receipt sent after the conclusion of the contract are not enforceable as the requirement of *conoscenza* or *conoscibilità* at the moment when the contract is made is not fulfilled, unless it is otherwise clear that the party knew them or should have known them[4].

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[1] See e.g *Esso Petroleum v. Mardon* [1976] 2 All ER 5.
[2] See e.g. *Gallie v. Lee* [1970] 3 All ER 961.
[3] See the leading case *Olley v. Marlborough Court Ltd.* [1949] 1 KB 532.
[4] Cass. 9/10/1962 n.2890 Giur. It. Mass. 1962. Apart from this rather old case, the principle does not seem to find application in Court. The only other -not particularly enlightening- available example is the case where a

More radical divergence between the two systems emerges when tackling the issue of the steps that have to be taken to bring a clause to the attention of the other party.

In England, it was established in *Parker v. South Eastern Railway*[5] that a term will only become incorporated in the contract if notice of it has been given and that notice is reasonably sufficient in all the circumstances of the case. This is a question of fact, "in answering which the tribunal must look at all the circumstances and the situation of the parties"[6].

Although the question of the reasonableness of the steps taken is one of fact, the test is objective so that the personal circumstances of the plaintiff are irrelevant provided that the notice is reasonably sufficient for a person normally entering into such transaction.

In *Thompson v. L.M. & S.Ry*[7], for example, the plaintiff asked her niece to buy a railway excursion for her. The ticket had on its face the words "see back" and on the back a statement that it was issued subject to the conditions set out in the company's time-table, which included an exemption clause and was available for customer purchase. The plaintiff was unable to read the words on the ticket as she was illiterate but the Court of appeal held that the notice was clear and the clause was incorporated in the contract.

The case, however, was an extreme one since the likelihood of the timetable being bought (let alone read) by a passenger was, to say the least, remote. The same result, however, would not be achieved where the person seeking to rely on the clause knows of the particular disability of the other party: in an earlier case[8], some reliance

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lady sought a declaration of nullity of a term of her insurance policy concerning special conditions that would apply to cases where the same risk in insured by more than one insurer. This term was contained in a leaflet which was available to customers, but was not given to the plaintiff when she signed the contract. The Court observed that such a term roughly reflected some mandatory provisions contained in the section of the Code on insurance contract, and therefore it was to be presumed that the plaintiff knew it -*ignorantia legis not excusat*! (Cass. 7/6/1988 n. 3846 Giur. It Mass. 1988).

[5] (1877) 2 CPD 416.

[6] *Hood v. Anchor Line* [1918] AC 837 at 844. Later cases refined more precisely the rules by stating, for example, that the clause will not be incorporated if there are no words on the face of the document drawing attention to it or if the words are made illegible by a date stamp or if the exemption clause is buried in a mass of advertisements. One other factor that will affect the reasonableness of the notice is the kind of document in which the exclusion clause is contained: "there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread" (Mellish L.J. in *Parker v. South Eastern Railway Co. Ltd.* op. cit. n.5, 422; see an application of the principle in *Chapelton v. Barry Urban District Council* [1940] KB 532).

[7] [1930] 1 KB 41.

[8] *Richardson, Spence & Co. Ltd. v. Rowntree* [1894] AC 217.

was placed on the fact that the other party was a steerage passenger and so belonged to a class of persons who could not be expected to read clauses in small print and therefore much more strenuous efforts to bring the conditions to the attention of the passengers were required. The two cases are not easy to reconcile since, in practice, the probability that a passenger in the first case buys and reads the timetable is no higher that the probability that a steerage passenger in the second case reads small prints, and the different treatment between the two cases does not seem to have a coherent reasoning behind.

Rather, the rule that a clear reference to the standard terms may be enough to incorporate them in the contract can be explained in practical terms by the impossibility of including sometimes lengthy lists of terms in a ticket; and the real issue lies in whether the customer could expect or not that a certain term would be introduced.

On the basis of the principle of parties' reasonable expectation, courts created what may be called "special notice test" which requires that a party who seeks to rely on a particularly onerous or unusual term may have to take special steps to bring that term "fairly and reasonably" to the attention of the other party[9]. The rationale of the rule seems to be that only if a clause is of a type commonly found in a particular class of contract can a party reasonably be expected to be aware that it contains a term of that particular type.

In a later case, *Interfoto v. Stiletto*[10], the test was slightly re-formulated so as to shift focus from the "type" of clause to its *per se* harshness. The plaintiffs sought to rely on a term in a contract for the hire of photographic material which imposed a heavy charge for their late return. The court had evidence that the terms used by other suppliers were comparable, even though the amounts charged were much lower. Bingham LJ emphasised the unusual nature of the plaintiff's terms even though this related to the extent of the charge, not to the nature of the term itself, considered whether in all the circumstances (nature of the transaction, character of the parties, notice given) it was fair to hold the defendant "bound by the condition in question" and gave judgement in favour of the latter.

Accordingly, the relationship between the doctrine of informed notice and the principle of contractual freedom seems to assume on the one hand that in the modern

[9] *Thornton v. Shoe Lane Parking* [1971] 2 QB 163.
[10] [1989] QB 433.

standard form contracts it is unusual that the offeree reads and consents to the terms of the contract; on the other hand, it prescribes that if the general expectations of the offeree are not met, owing to the existence of an unusual or unexpected clause, of which he had no notice, then the clause is an unfair one. There is no need that every term of the contract is an exact reflection of the agreement of the parties: it is sufficient that the terms are usual and within the general expectations of the offeree. Actual knowledge and assent to the terms are only required for onerous or unexpected clauses[11].

As earlier mentioned, the "reasonable expectation" criterion also features in cases where one party attempts to incorporate terms in a contract on ground of previous oral or written dealings between the parties containing such terms (the so-called incorporation by course of dealing): there, the simple fact that one party knows that the other is contracting on certain terms, previously communicated, is enough to incorporate those terms in the contract[12].

Within this framework, cases like *AEG Ltd. v. Logic Resources Ltd.*[13] present some peculiarities. The plaintiff, a multi-national company, had supplied to the defendant equipment of a certain specification. On the reverse were printed extracts from the conditions of sale and a notice that a full set of terms would be available upon request. The defendant did not request it. The case concerned the issue whether a certain burdensome clause could be thereby held incorporated or not. In holding that the term was "particularly onerous" and accordingly not incorporated the court had no evidence that this was not the practice of other similar business: on the contrary, it appeared that in commercial practice the term at issue was not an unusual one. Accordingly, the only explanation for this decision is reading it as supporting an absolute and not comparative test, reading "particularly onerous" as "unacceptably onerous". This would explain the decision of the majority in *AEG* where the real objection of the court appears to have been that the clause was unacceptably onerous or, in effect, unreasonable. On this approach, the test of incorporation becomes a (hidden) test of reasonableness, the criteria of which are not spelled out. Since this type of test would involve a direct attack on freedom of contract which many judges would

[11] G. Gluck 'Standard Form Contracts: the Contract Theory Reconsidered' (1979) ICLQ 90.
[12] See *British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.* [1975] QB 303 and *Laceys' Footwear Ltd. v.Bower* unreported, 18 April 1997 in R. Lawson *Exclusion Clauses and Unfair Contract Terms* (London: Sweet & Maxwell, 2000) 24.

feel uncomfortable with, courts usually prefer the "particularly onerous or unusual" formulation above described[14].

In Italy, the requirement of *conoscenza* or *conoscibilità* in art.1341(1) has not contributed much to unfair terms control. There has been widespread agreement at academic level that *conoscenza* or *conoscibilità* must concern not only the existence but the actual content of the terms[15], even though, according to the parameter of ordinary diligence, such a knowledge must only be superficial and not full and detailed. In the case-law, however, only few judgements hint at translating *conoscibilità* into a duty to draft terms in clear, intelligible language[16]. At the last instance, the *Corte di Cassazione* has restrained itself to declaring in an abstract way that terms must be known by using "ordinary diligence", i.e. by what we should reasonably expect from the mass of adherents in relation to certain types of transaction, without further specifying what this in practice entails. In this perspective, the actual content and the potential harshness of a contract term bear no relation with its "physical availability": the question is not whether a certain term could "reasonably be expected" in a contract, but whether a "reasonable person" should be expected to read the contract terms. This is sufficient to legitimise all forms and types of unfair terms while preserving the principle that a contract requires the parties' agreement in order to be valid.

Yet, the requirement of *conoscenza* or *conoscibilità* could have acted as a potential cornerstone for a new, groundbreaking type of control, where courts could assume an active role in imposing on the proponent a duty to ensure full knowledge and understanding of the content of the contract; such a duty may vary, according to the court's view of the particular case, from an obligation to emphasise terms in proportion to their harshness, to a more substantive requirement to make sure that the other party actually understands what he is agreeing upon[17].

Analysis of the case law flourished around art. 1341(2) is not more comforting.

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[13] [1996] CLR 265; see also *Circle Freight International Ltd. v. Mideast Gulf Exports Ltd* [1988] 2Ll Rep 427 and *Keeton Sons & Co. V. Carl prior Ltd.* [1986] BTLC 30.

[14] see R. Bradgate 'Unreasonable standard terms' (1997) MLR 586-589.

[15] See e.g G. De Nova 'Le condizioni generali di contratto' in P: Rescigno (ed.) *Trattato di diritto privato* Giappichelli, Torino, 1995, 123; G. Chinè 'La contrattazione standardizzata' in M. Bessone (ed.) *Trattato di Diritto Privato* vol.III *Il Contratto in generale* tomo II, Giappichelli, Torino, 2000, 503.

[16] see e.g. C. App. Napoli, 3/4/1970 "L'onere di rendere le clausole conoscibili, di cui al comma 1 dell'art.1341 c.c., non può dirsi assolto se le clausole non sono redatte in modo chiaro e comprensibile. Dall'oscurità del testo, in relazione alla pratica del settore, deriva la nullità delle clausole per indeterminatezza dell'oggetto della previsione" in *Dir. Giur.* 1970, 548.

[17] G. Alpa *Il diritto dei consumatori* Laterza, Bari, 1999, 164.

The rationale of the rule is to draw the adherent's attention to the consequences and importance of certain particularly harsh terms. This is, and has been interpreted as, a merely formal requirement which is independent of whether the adherent was actually aware of such term. In the same way as effective knowledge of terms is irrelevant in the application of art.1341(1), so is effective knowledge or understanding of the *clausole vessatorie* irrelevant in the application of art.1341(2).

Litigation has mainly revolved around the modalities required to specifically approve a *clausola vessatoria*.

Even though the literal text of art.1341 seems to require that each *clausola vessatoria* is specifically approved in writing, it is a consolidated trend just to require that all the *clausole vessatorie* are approved as a single block. In practice, the system is based on a double signature: the first is a simple acceptance of the contract; the second is aimed at approving as a block all the *clausole vessatorie*. This is the necessary and sufficient condition of enforceability of those clauses[18].

More interesting litigation has arisen in relation to the question whether the list in art. 1341(2) is exhaustive, i.e. whether terms not contained in the list in that article need or not specific written approval. The majority of academics and of the case-law consider the list contained in art. 1341(2) as exhaustive, with the exception of few isolated commentators and few decisions of lower courts[19]. This conclusion is achieved by means of a strict legal reasoning based on the exceptional character of art.1341 with regard to the general principle of liberty of the forms[20]; a different but comparable reasoning is based on the argument that, by imposing the extra requirement of written approval in a set of special cases[21], art. 1341(2) creates an exception to the rule laid down in art.1341(1) that a term shall be deemed effective if known or knowable to the other party; in both views, however, art.1341(2) is considered as an exception, and

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[18] A number of judgements also specify how in practice reference to *clausole vessatorie* should be made: for example, reference to their number (such as "I specifically approve the terms listed under nn.1, 2, 3, etc. of the contract") is now safely considered as sufficient to fulfil the requirement. According to a widespread view, this would be suitable to exclude the danger of reckless acceptance since this type of reference enables the adherent to identify, in the contractual document, terms which are particularly burdensome and accordingly understand their specific content. See e.g. Cass. 9/2/1998 n. 1317 (Giur. It Mass. 1998) Cass. 20/6/1997 n.5533 (Giur. It. Mass 1997). The *Cassazione*, however, has affirmed that ascertaining whether a certain modality of reference to *clausole vessatorie* complies with art.1341 is a matter of fact and cannot be decided by a court like *Corte di Cassazione* which is in charge of deciding points of law only, see Cass. 10/1/1996 n.166 (Vita Notar. 1999, 1189)

[19] The best known case (and probably the only one!) is Tribunale di Milano 21/6/1984 *Soc. Ernex c. Mediocredito Lombardo* in *Banca, borsa, tit. cred.* 1986, II, 503.

[20] M. Bianca 'Condizioni generali di contratto. Diritto Civile' in *Encicl. Giur.* VII, Treccani, Roma, 1988, 5.

[21] G. Sicchiero 'Condizioni generali di contratto' in *Riv. Dir. Civ.* 1992, II, 472.

therefore it must be interpreted in a narrow way as required by the rules of the civil Code[22]. This is directly confirmed in the Report to the civil code where the Guardasigilli describes the list as "subject to extensive interpretation (*interpretazione estensiva*) but not to analogy (*interpretazione analogica*)"[23]. The difference between the two processes is explained in the following terms by the *Corte di Cassazione*[24]:

" Art.1341(2) is not subject to interpretation by analogy, but only extensive interpretation is allowed. Resort to analogy is made when the need arises to regulate one case not provided for by the law; one would then refer to the rules applicable to a similar case i.e. a case which is based on the same rational assumptions (*ratio*). Accordingly, interpretation by analogy is an intellective process that (...) allows to determine the *ratio*, the underlying principle from which rules derive in order to establish if, within those, one can also include the case not provided for. Extensive interpretation, on the other hand, occurs only when the case apparently not provided for is the same as the one provided for, and therefore it must be considered implicitly inside the rule.

According to this formalistic reasoning, courts have held not to fall within the list of art.1341(2) burdensome terms such as penalty clauses, forfeitures, terms that allow the seller to increase the price of the goods after the contract is made.

On the other hand, courts have considered included in the list of art. 1341(2), for example, terms which reverse the burden of proof or terms which prevent one party from requesting the other party's performance before carrying out their own performance since they limit one party's defences.

In practice, it is difficult to see how terms such as forfeitures differ from terms having the effect of limiting one party's defence.

The formalism of courts' reasoning and more in general the scenario here presented is disappointing if compared with the potential of art. 1341(2), which could have been fruitfully combined with art.1341(1) to achieve a more penetrating control of contract terms: while it is widely assumed that written specific approval of a term pursuant to art.1341(2) entails automatic satisfaction of the requirement of *conoscenza* and *conoscibilità* under art.1341(1), this is not in fact self-evident. Accordingly, written specific approval could be considered not sufficient to satisfy art. 1341(1), with the

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[22] See art.14 Preleggi, according to which rules which are exceptions to more general rules must be interpreted so as not to extend them "behind the cases and the times envisaged".
[23] *Relazione n.1046 del Ministro Guardasigilli al libro IV del C.C., Delle Obbligazioni* para.612 (quoted in G. Alpa G. Rapisarda 'Il controllo giudiziale nella prassi' in G. Alpa, M. Bessone (ed.) *I contratti standard nel diritto interno e comunitario* Giappichelli, Torino, 1991, 79)
[24] Cass. Sez. Un. 14/7/ 90 n.5777 Giust.Civ.1991, I, 79.

result that the two paragraphs could act as a two tier-control instead of being mutually exclusive: however, as such a solution must necessarily be attached to a deeper understanding of the duty of *conoscenza* and *conoscibilità*, it comes as no surprise that it has not raised any interest in courts.

b) Rules on interpretation

The second set of rules that can be used to indirectly control unfair terms are rules of incorporation, such as the English rule of construction *contra proferentem* and of negligence liability.

The *contra proferentem* rule simply requires that a person who seeks to exclude liability by reference to an exemption clause must do so by using words which clearly and unequivocally apply to the case in hand. Thus, a provision that a seller gives "no warranty, express or implied" does not protect him from liability for breach of a condition[25]; nor does a clause protecting him for "breach of implied conditions and warranties" cover breach of an express term of the contract[26]; the list of examples could be long as the case-law is rich of applications of this device[27].

The rule on negligence entails that in order to exclude liability for negligence (to the extent that UCTA today permits), clear words must be used since the courts regard it as "inherently improbable that one party to a contract should intend to absolve the other party from the consequences of his own negligence"[28].

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[25] *Wallis, Sons & Wells v. Pratt & Haynes* [1911] AC 394.

[26] *Webster v. Higgins* [1948] 2 All ER 127.

[27] On the other hand, a clause which places an upper limit on the damages recoverable while still to be construed *contra proferentem* will not be construed quite as strictly as an exclusion clause. This was made clear in *Ailsa Craig Fishing Ltd. v. Malvern Fishing Co and Securicor* [1983] 1 WLR 964 where Lord Fraser explained that strict construction is not "applicable when considering the effect of clauses merely limiting liability". Such clauses will of course be read *contra proferentem* and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity classes. The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the *proferens* from a liability that would otherwise fall upon him. In this case, there was also the special factor that, as a contract clause itself made clear, the potential losses which could derive from negligence were great in relation to the sum that could be charged by the *proferens* for its services".

[28] The principle is neatly illustrated by the example of *White v. Warwick* [1953] 2 All ER 102: the plaintiff hired a bike from the defendants. A term of the agreement stated that "nothing ...shall render the owners liable for any personal injuries to the riders of the machine hired". The saddle tipped over while the plaintiff was riding it and he suffered several injuries. He brought an action, suing alternatively for breach of contract and in tort for negligence. Since liability could be grounded in either negligence or strict liability for breach of contract, the Court of Appeal felt able to hold that the exclusion clause extended only to a claim concerning the latter. Accordingly, the defendants remained liable in negligence.

This remedy has been widely used, and its rules are neatly laid down in the case *Canada Steamship Lines Ltd. v. The King*[29]:

"...(1) If the clause contains language which *expressly* exempts the person in whose favour it is made...from the consequences of the negligence of his own servants, effect must be given to that provision...(2) If there is no express reference to negligence, the court must consider whether the word used are *wide enough*, in their ordinary meaning, to cover negligence on the part of the servant of the *proferens*. If a doubt arises on this point, it must be resolved against the proferens...(3) If the words used are wide enough for the above purpose, the court must then consider whether the 'head of damage may be based on some ground other than that of negligence'...The 'other ground' must not be so fanciful or remote that the *proferens cannot be supposed to have desired protection* against it" (italics added)[30].

It is, at any rate, reasonably clear that an exclusion clause is more likely to fulfil its intended role when negligence is the only ground for liability: if negligence is the only possible ground for liability, more general words can be used in exemption clauses since those clauses will "more readily operate to exempt liability"[31]: the exemption would otherwise be deprived of content.

Not all cases, however, see a coherent application of such a test, especially when involving consumers' claims; in *Hollier v. Rambler* Motors, for example, the court rejected the argument that, because liability only appeared to lie in negligence, "no sufficiently clear words are required": when this is the only source of liability, the law may more readily operate to give sanction to the exclusion clause, but "the law goes no further than that". The decisive test was stated to be what an ordinary person in the position of the plaintiff would have thought the effect of the clause was. Only if he thought that negligence was the most likely cause of loss and that therefore the clause covered liability for such negligence would the clause protect the defendant. In the present case the ordinary person would not have contemplated that the clause covered negligence, but would have thought it was only a warning that the defendants were not liable for damage done by fire in the absence of fault.

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[29] [1952] AC 192, 208.
[30] See also: *Monarch Airlines Ltd. v. London Luton Airport Ltd.* [1997] CLC 698; *Lamport & Holt Lines Ltd. v. Coubro & Scrutton* 1982 Lloyd's Reps 42; *Industrie Chimiche Italia v. Nea Ninemia Shipping Co.* (1982) Financial Times 11 November.
[31] *Rutter v. Palmer* [1922] 2 KB 87.

This approach pushes the law to its limits: as noted[32], it seems improbable that the defendants intended such a clause to be a warning that they were not liable in the absence of fault. In addition, it is difficult to find a reason to decide this case in way different to the one in *Alderslade v. Hendon Laundry Ltd.*[33], where, on a similar set of facts (concerning the delivery of hankechieves to a laundry for washing) it was decided that construing a certain exemption clause so as to exclude negligence would be to leave it "without any content at all".

Rules on fundamental breach and breach of fundamental term, now seldom used, also deserve to be mentioned.

The words "fundamental breach" and "breach of a fundamental term" retain different meanings but in practice have been used interchangeably in cases where a breach of a contract is so totally destructive of the obligations of the innocent party that liability for such a breach cannot be excluded or restricted by means of an exemption clause[34]. Those doctrines first arose in shipping cases about deviation and were then developed by courts to protect consumers as rules of substantive law[35]. Having enjoyed some popularity for a couple of decades, these doctrines underwent a gradual decline as it appeared that, when applied to commercial transactions negotiated at arm's length, they were liable to upset perfectly fair bargains for the reasonable allocation of contractual risk: they were an indiscriminate tool for the control of exemption clauses. Accordingly, in *Suisse Atlantique*[36] and later in *Photo Production Ltd. v. Securicor*

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[32] Barendt (1972) 35 MLR 644, 646-647.

[33] [1945] 1KB 189.

[34] This is actually the definition of "fundamental breach". "Breach of a fundamental term", on the other hand, describes a category of terms, express but more often implied, which is narrower than a condition of the contract. A fundamental term "underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates" (*Smeaton Hanscomb & Co Ltd. v. Sassoon I. Setty, Son & Co.* [1953] 1 W.L.R. 1468, 1470). A detailed and complete account of such doctrines and of their development is given by D. Yates *Exclusion Clauses in Contracts* (London: Sweet & Maxwell, 1982).

[35] In *Karsales v. Wallis* [1956] 1 WLR 936, for example, the defendant was shown a second hand Buick in excellent condition, and wished to acquire it. Arrangements were made with a finance company for hire-purchase and the agreement contained a clause excluding liability for breach of conditions or warranties of any description. After the contract was concluded the car was towed at night to the defendant's premises. It was in a very poor state, many parts had been detached or replaced with old parts, and the engine was so defective that towing was the only means of propulsion. The defendant refused to accept or pay for it and was sued by the assignees of the finance company. Birkett and Parker LLJJ held that the plaintiffs could not rely on the exclusion clause because they had not performed their contract at all: a car had been contracted for but a car had not been delivered: the defendant could easily set up the breach of a fundamental term as a defence to the plaintiff's action. Denning LJ referred instead to a "breach which goes to the root of the contract": even where the breach of contract is not sufficiently serious to amount to a complete non performance of the core obligations, nevertheless an exclusion clause may still not apply where the breach caused serious loss to the other party.

[36] *Suisse Atlantique Société d'Armement Maritime SA v. Rotterdamsche Kolen* [1967] 1 AC 361.

Transport Ltd.[37] the House of Lords put forward the view that although there was recent authority in favour of the substantive doctrine of fundamental breach, it preferred the view that the doctrine was one of construction only. As Lord Reid noted, exemption clauses "differ greatly in many respects...but this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable, or whether it was freely agreed by the customer"[38]. If special rules are needed to protect consumers, they should, Lord Reid continued, be provided by the Parliament.

The House of Lords, however, did not overrule any of the previous cases on fundamental breach but rather explained them as applications of a rule of construction[39]. In *George Mitchell v. Finney Lock Seeds Ltd*[40], however, it was finally clearly stated that "the passing of the Supply of Goods (Implied Terms) Act 1973 and its successor, the Unfair Contract Terms Act 1977, had removed from judges the temptation to resort to the device of ascribing to words appearing in exemption clauses a tortured meaning so as to avoid giving effect to an exclusion or limitation of liability when the judge thought that in the circumstances to do so would be unfair"[41]. The doctrines of fundamental breach remain, as a rule of interpretation, only to the limited extent that they do not entail the adoption of a strained construction of the exemption clause, but their rise and fall of this doctrine tells a lot about judges' readiness to bend legal rules at the service of justice.

Of all the interpretation rules which flourished in the UK in support of weak parties, Italy recognises only the *contra proferentem* rule embedded in art.1370. This article unfortunately lacks almost completely of practical applications due to the position assigned by the Code to objective, as compared to subjective, rules of interpretation.

The Italian civil Code provides for two types of rule of interpretation, subjective (artt.1362-1365 c.c.) and objective (artt.1367-1371)[42]; subjective norms prevail over objective norms, which supplement and are hierarchically inferior to the former. The reason for this is that the objective meaning of a certain term is irrelevant when the

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[37] [1980] AC 827.
[38] *Suisse Atlantique Société d'Armement Maritime SA v. Rotterdamsche Kolen* op. cit. n.36, 404.
[39] See the comments made by G. Treitel in his case note (1966) MLR 552.
[40] [1983] 2AC 803.
[41] Lord Diplock in *George Mitchell v. Finney Lock Seeds ibidem* at 810.
[42] Art.1366 (interpretation of the contract according to good faith) concerns, at the same time, subjective and objective interpretation.

subjective research of the meaning brings to a useful result[43]. In the first place, one should apply the rules that are aimed at researching the real intention of the parties, such as art. 1362 (in interpreting a contract one must find what the common intention of the parties was, and not restrain himself to the literal meaning of the words; in order to find out the common intention of the parties one must take into account their behaviour as a whole, even after the conclusion of the contract): only after this process, and only if any interpretative doubt remains, can one resort to the rules of objective interpretation and, finally, to the closing rule of 1371[44]. The residual role played by objective rules of interpretation explains why, in practice, art.1370 has received no application[45].

c) Formal controls: a first evaluation

The difference in treatment of unfair terms (and the notion of "unfair term" itself) in Italy and in England is remarkable.

Until UCTA, incorporation and interpretation were the only ways of attacking unfair terms in England and were accordingly widely used. The panorama which emerges from the English case law is that of a rather confused set of remedies open to over-use and abuse if not carefully weighted, as noted in *Suisse Atlantique*, but at the same time regrettably incapable of providing satisfactory solutions to "deserving" case. The insufficiency of the indirect controls of unfair terms is thus evident and it is no surprise that judges such as Lord Reid called for parliamentary intervention:

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[43] See, as one of the many examples, Cass.10/1/1981 n.228 Giur. It. Mass 1981; see also F. Carresi *Dell'interpretazione del contratto. Commentario Scialoja-Branca*, Zanichelli, Bologna, 1992; G. Criscuoli *Il Contratto* Cedam, Padova, 1996, pp.335-347.

[44] See Cass.20/1/1989 n.345 Giur It. Mass 1989: "Resorting to the so called rules of objective interpretation laid down in artt.1366-1370 or to the subsidiary criteria in art.1371 of the Code is allowed only in cases where the so-called subjective interpretation of artt.1362-1365 is not sufficient".

[45] See, for example, Cass. 19/7/91 n.8038 Giur. It. Mass 1991. An insurance company brought an action against the insured for the recovery of money paid to an injured party to an accident which was due to the fault of their insured. The action was based on the fact that the insurance cover did not apply in the cases where the insured "is not enabled to drive in pursuance of the law in force". The insured had passed both the theoretical and the practical exam for obtaining his driving licence, but the licence had not actually been issued by the Prefettura (the competent authority). The insurers claimed that the term entailed that the insurer who does not hold a proper driving licence would not be covered. The insured claimed *inter alia* that the contract, if interpreted according to the parties' intention as prescribed by art.1362, would extend the cover this case; that an interpretation according to good faith would bring to the same conclusion; and anyway, art.1370 suggests to adopt the most favourable interpretation for the adherent (himself). The court disagreed and claimed that reference to art.1362 and to the "common intention of the parties" brought to a different conclusion: the wording of the clause meant that completion of the whole procedure to obtain the driving licence was necessary: it was well understood by the parties that the requirement of being "enabled to drive in pursuance of the law in force" was not fulfilled until the actual document was issued. The court also added that, once ascertained the common intention of the parties, there was not need to resort to the other criteria as art.1362 prevails on and absorbs any other criteria of interpretation.

"There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the parties. And it does not seem to me to be satisfactory that the decision must always go one way (...). This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to the Parliament (...)...there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation[46].

On the other hand, such doctrines were not in themselves meant to provide a direct form of control of contract fairness and it is therefore understandable that they were unable to offer adequate protection. However, the fact that fundamental breach and breach of a fundamental term declined relatively fast as an explicitly recognised consequence of the creation of more convenient statutory remedies nevertheless proves judges' willingness to adapt the available legal techniques and concepts to socio-economical needs and to avoid results that would be unacceptable from a moral point of view. It was only when strict legal reasoning and the wish to preserve the formal coherence of the legal system and of its remedies brought to an abuse of such tools that their death was decreed and UCTA took over.

A recurrent argument in courts' reasoning is based on parties' reasonable expectation: a term will be incorporated and interpreted in accordance with what a party to the contract (often the weaker one) would reasonably expect. In some cases, however, the "reasonable expectation" is used by courts as a tool to discard a particularly onerous terms term used against particularly vulnerable customers, with little regard to the fact that the term at issue may actually be in common use.

As to Italy, the overview of the above case law clearly demonstrates the lack of any wish to remedy the shortcomings of legislative formulae and a stubborn and formalistic respect for the words and the intention of the 1942 legislator: with few exceptions, there seems to have been little or no attempt at turning into a more penetrating and substantive control the poor tools provided by the Code[47]; in addition, the narrow interpretation given to the list in art.1341(2) has left with no remedy parties to contracts that contain terms certainly not less burdensome than the ones included in the list.

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[46] *Suisse Atlantique Société d'Armement Maritime SA v. Rotterdamsche Kolen* op. cit.n.36, 406.

[47] See e.g. M: Bessone 'Contratti di adesione, "potere normativo d'impresa" e problemi di "democratic control"' in Riv. Trim. Dir. Pubbl. 1973, 2028; S. Patti 'Responsabilità precontrattuale e contratti standard' in P. Schlesinger (ed.) *Il codice civile, Commentario*, 329 ff.; V. Roppo, *Contratti standard* Milano, Giuffrè 1975, 38ff.

3. Substantive controls

Controls that tackle the substance of a term itself are rare in Italian law, more common in English law. It must be added, however, that some provisions of the *Codice Civile* expressly prohibit certain burdensome terms in specific types of contracts: for example, the combined operation of art. 1784 and art.1785 *quater* has the effect of prohibiting all terms which exclude or limit the landlord's liability for things kept in a hotel, for the loss or damages to which he is responsible[48].

This probably reflects the legislator's concern for the existence on unbalanced terms in certain contracts, but also reflects its reluctance to impose a more general tool of control which would work as a powerful and possibly unpredictable means to upset any type of contractual arrangement.

Before describing the content and application of the rules that control unfair terms in England and in Italy, it is necessary to draw the exact borderlines of the scope of application of such rules in relation to exemption clauses - the most common type of unfair term. In fact, in many cases concerning the alleged unfair nature of an exemption clause, the issue has arisen of whether such clause simply operates as a defence to breaches of the contractual obligation (exclusionary term) or it actually plays a part in defining those obligations in the first place (definitional term).

a) Definitional and exclusionary terms

The effect of the above distinction is that only the former are subject to control: for example, the warning of a seller of a painting that he has no expertise in paintings of that type may be considered in England as precluding the implication of obligations under the Sale of Goods Act, thus simply defining the seller's obligations; or it may be considered as excluding his liability, thus acting as an exclusion clause.

The issue, seldom raised in UK courts, has been particularly popular in Italian insurance law cases, where insurance policies contain terms which exclude insurance cover whenever a certain event or certain circumstances occur. Faced with insurers' refusal to pay in such cases, the insured have sought a declaration of invalidity of those terms on grounds that, in relation to the subject matter of the contract, they reduced the objective scope of the responsibility of the insurer as already established by the

[48] Those specific rules are, however, outside the scope of this work since its purpose is to examine general controls on unfair terms.

contract or by the law: and, being exemptions or limitations of liability, they should have been (but in fact were not) specifically approved in writing; the insurers, on the other hand, would claim that such terms only defined the subject matter of the contract and describe the party's obligations in relation to this: they do not entail any limitation or exemption of liability and accordingly need no specific approval.

A common feature in the judicial response to the definitional argument in Italy and in England is a remarkable discomfort in accepting that such a distinction can be used as an artifice to escape liability. In the English leading case on the matter, *Smith v. Eric Bush*[49], the House of Lords observed that applying the definitional argument to that case "would not give effect to the manifest intention of the 1977 Act but would emasculate the Act". Similarly, in deciding a seminal case on banks' liability for loss of items contained in safe deposit boxes the *Corte di Cassazione*[50] expressed annoyance at the fact the term at issue in the case was nothing but a clever re-formulation of a type of term which the Cassazione itself had previously declared to be a limitation of liability[51]: the fact that the term was carefully worded so as to appear as a determination of the subject matter did not prevent the Court from examining its substance and effect to conclude that it was rather a limitation of liability.

Beyond the similarity of approach, Italian and English courts have tackled the question of the definitional or exclusionary nature of contract terms from different angles.

In England, before UCTA, only a *dictum* by Lord Diplock in *Photo Production v. Securicor Transport*[52] unsuccessfully adopted a definitional approach to exclusion clauses by acknowledging that primary obligations (the promises of the contract, the breach of which gives rise to the secondary obligation to pay damages) may be modified or recast by the terms of the contract no less than the secondary obligations to pay damages.

The provisions of UCTA itself appear to be drafted on the unquestioned premise that exception clauses operate as defences to accrued rights of action: the wide

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[49] [1990] 1 AC 831.

[50] Cass. Sez. Un. 1/7/1994 n.6225 Giur. It. 1995, I, 206.

[51] Since 1976 the Court had held that a term that states in advance the maximum value of the content to be kept in the safe deposit box amounts to a limitation of liability and may therefore be caught by art.1229. The court noted here that the term at issue was a simple re-formulation of the same concept: the only difference is that the positive formula previously used (pre-determining the maximum value of the items kept) has been replaced by a specific prohibition to keep in the safe deposit box items above a certain value.

[52] [1980] AC 827.

wording of s.13(1) seems to be intended to make it clear that even a clause which defines the obligations of the parties is an exemption clause; additionally, it prevents a party from excluding or restricting duties as opposed to liabilities in two cases: where a provision purports to exclude the duty of care giving rise to liability in negligence or the duties arising out of terms implied by statute in contracts for the supply of goods[53]. A seminal application of this principle in *Smith v. Eric Bush*[54] reconfirmed the impression that courts are not prepared to accept the definitional argument:

> A surveyor who had negligently surveyed a house claimed that a disclaimer of liability contained in the report did not exclude a duty of care but rather prevented it from arising, and therefore the Unfair Contract Terms Act 1977 had no application to his case. In other words, the Act was limited to instances where a duty of care had in the first place arisen; in his case, on the other hand, the duty had not even arisen. The question was therefore whether such term could be treated as a term excluding or restricting liability under s.13(1) of the Act. In order to determine whether a duty of care existed, the House of Lords reasoned that one should disregard the term purporting to exclude it, and ask itself whether, but for the existence of the term, there would have been such a duty; in other words, the existence of a common law duty of care should be judged by considering whether it would exist "but for" the notice excluding liability: if so, the effectiveness of term would then be subject to the restrictions imposed by the Act.

The solution such as the one indicated by *Smith v. Eric Bush* is perhaps a bit too strict[55], but at least it has the advantage of certainty and closes the leeway to excluding the application of the statutory control to a large number of cases where "a party to a contract or a tortfeasor could opt out of the 1977 Act by declining to recognise their own aswerability to the plaintiffs"[56].

The advantages of a "but for" approach must have been evident to the Italian *Corte di Cassazione* when, in the 1994 judgment above mentioned[57], it clarified the

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[53] Apart from this, the Act does not strike down provisions that specify the duties of the parties, but for a deeper discussion on the issue see the comments to the Act by B. Coote 'Contract Terms Act 1977' and J. Adams 'An Optimistic Look at the Contract Provisions of the Unfair Terms in Consumer Contracts Act 1977' both in (1978) MLR pp.312-324 and 703-706..

[54] op. cit.n.49, 831.

[55] For example, in a contract to supply and fit a cowl to a chimney of a smoking fireplace, parties act on the understanding that the cowl may or may not cure the fault. However, the customer would later have the possibility to argue that the builder's statement concerning the possibility that the fault is not cured as an exemption clause. Under s.7 Act, this would be nullified since the provision prevents any contracting out from the quality warranties. See E. Macdonald *Exemption Clauses and Unfair Terms* Butterworths, London, 1999, 92-93.

[56] Nourse LJ in *Harris v. Wyre Forest District Council* [1988]1 All ER 691 at 697.

[57] Cass. Sez. Un. 1/7/1994 n.6225, op.cit. n.50

issue of the bank's liability for loss of items contained in a safe deposit box in the *caveau.*

The plaintiff had made a contract with a bank for the deposit of some items in the safe deposit box of the bank. The contract, drafted on the pattern of the model provided by ABI (the Italian banks' association) prohibited deposit of items for a value higher than 1 million lire. Later, upon payment of a higher charge, the limit was raised to 25 millions lire.

Due to the bank's negligence, a theft occurred and the content of the safe deposit box was stolen. The plaintiff sued for the recovery of the value of the items contained, for a sum equal to 300 millions lire.

The failure of the bank to ensure proper surveillance was certain and out of question. Accordingly, the plaintiff claimed that the limit imposed by the bank on the value of the items deposited was in fact a limitation of liability, prohibited by art.1229 in cases where the damage is due to gross negligence. The bank claimed that the term only aimed at defining the subject matter of the contract and not their liability.

The Court observed that the performance of the bank does not concern the content of the box (this is actually unknown to the bank) but consists in providing a suitable place and suitable surveillance, plus ensuring the integrity of the box with the maximum level of care –and the term at issue did not affect the level of care to adopt. In other words, the subject matter of the contract is not the determination of the content of the box or of its value: this is irrelevant. Accordingly, the term at issue does not determine the subject matter of the contract but just puts a roof on the bank's liability in case of breach of one of its obligations.

The term at issue cannot be considered as determining the subject matter of the contract for another reason: at the moment when the contract is made the bank has no means to force the customer to comply with the rule on the value of the item deposited, as this must remain secret: accordingly, the term cannot determine the subject matter of the contract since this would be unknown anyway: the term operates only once failure to perform properly occurs, i.e. at the stage of liability.

The judgement raised attention for the Court's unusual willingness to wipe away the clever "maquillage"[58] under which banks were hiding burdensome limitations of liability.

The common argumentation to the English and the Italian cases, apparently rather different, lies in the emphasis on the set of obligations attached by the law to a certain contract. Those are the necessary point of reference to determine the obligations of each party, and an exemption (or limitation clause) will be considered as such whenever it intervenes to modify such obligations.

[58] F. Caringella 'L'art.2 delle norme bancarie uniformi in Cassazione: niente di nuovo sul fronte delle cassette di sicurezza' in Foro It., 1993, I, 877.

This is, however, only one possible criterion of distinction. In England, for example, it has been suggested[59] that courts should determine whether a term in a contract "excludes or restricts" liability by asking whether it deprives a contracting party of the contractual performance which it reasonably expected. However, while in England this suggestion remained at academic level, a similar idea was applied in a number of cases by the Cassazione where it invited lower courts to investigate, in case of doubt, whether, under the veil of a delimitation of the object, there hides or not an attempt to limit the allocation of the risk *normally* related to the performance owed. A comparison of two apparently similar cases can provide an example of this reasoning:

In Cass. n.10947 of 16/6/1997[60] a transport company was providing services of furniture removals. The relevant insurance cover would not apply to cases where damage occurred to the goods while the vehicles were unattended. During one of the journeys the driver of one of the lorries stopped in Marseille to have lunch in a restaurant. The furniture was stolen and the insurance refused to pay. The insured claimed that the clause was not enforceable as it was not specifically approved. The Court held that, as the clause had the purpose of defining the subject matter of the contract, it was not to be considered as a limitation of liability and was therefore not covered by art.1341(2).

In Cass. n.8643 of 21/10/1994[61] the owner of a small yacht insured his boat against theft. The insurance policy contained a clause that excluded the insurer's liability in cases where the owner did not take all suitable measures for the safety and surveillance of the yacht when on ground or in unsafe places ("idonee misure di sicurezza e sorveglianza per la protezione dell'imbarcazione (...) durante gli spostamenti a terra o in luoghi non sicuri"). When the yacht was stolen, the insurer tried to rely on that term, but the insured claimed that it had not been specifically approved in writing. The court held that such term was a *clausola vessatoria* as it aimed at limiting the insurer's liability rather than at defining the subject matter of the contract; accordingly, it required specific approval.

The difference between the two cases does not lie in the nature and the position of the parties but rather in the extension of the exclusion of liability. As opposed to the first case, the second case identifies the situation justifying the exemption not on grounds of a simple lack of ordinary diligence: for the exemption not to apply, the insured should have undertaken an extremely burdensome and penetrating activity of surveillance –which is in practice impossible to carry out unless the owner chooses not

[59] E. MacDonald 'Exclusion clauses: the ambit of s 13(1) of the Unfair Contract Terms Act 1977' [1992] L.S. 277.
[60] Danno e Resp., 1998, 384.
[61] Dir. Economia Assicuraz., 1995, 921.

to leave the boat. The circumstances envisaged in the term at issue, i.e. the owner leaving the boat and being therefore unable to watch properly over the boat are deemed, sooner or later to occur: and, because these events will necessarily occur, the term turns out to be an exemption to the commitment undertaken by the insurer. In other words, the event of the owner leaving the boat unattended was certainly one of those, in view of which the policy had been made: accordingly, a term that entails loss of the insurance cover when this occurs, is an exemption of liability rather than a determination of the subject matter of the contract.

The distinction between exclusionary and definitional terms, however, is far from being clearly drawn and consolidated, and in some cases Italian courts resort to simply analysing the way terms are worded in the single contract, thus contributing to the creation of a huge and often contradictory amount of case-law[62].

The court's arguments strongly reminds of the judicial reasoning on fundamental breach as to the concern that a party may be able, by means of a clause, to take away the core of the contract, ie. the reason for which the contract had actually been made. This may explain, to some extent, the lack of English cases on such issue as compared to the abundance of Italian ones: in English law, the solution to problems of definitional terms could be found in the doctrine of fundamental breach, where this argues that a term cannot be interpreted so as to deprive a party of the core performance of the contract.

b) Blanket prohibitions

The hierarchy of values underlying UCTA is clearly identifiable when looking at what type of blanket prohibitions the Act imposes. It ensures, for example, a minimum standard of protection when human life and integrity are at stake: nobody can escape liability for the attacks to such supreme values, and the quality of the other party, the legal framework within which liability arises and any other surrounding circumstances are irrelevant[63]. The rationale for such a strict prohibition can be easily found in the idea that "a civilised society should attach greater importance to the human person than to property"...and accordingly there was "...a *prima facie* case for an outright ban on

[62] Any civil Code that includes the case law, if opened at the page corresponding to art.1341, can provide a long list of insurance, transport and deposit cases that deal with the issue: see, for example, Bartolini (ed.) *Il codice civile commentato con la giurisprudenza*, La Tribuna, Piacenza, 1996.

[63] The only limitation to this provision is the requirement of negligence: UCTA would otherwise introduce a regime of strict liability for death and personal injuries, however caused.

clauses totally excluding [but UCTA also applies to clauses limiting] liability for death or personal injury due to negligence"[64].

At the same level of protection UCTA places the economic interest of those, whose position is presumed to be one of inferiority (consumers): accordingly, certain basic rights, such as the ones relating to ss.13-15 of the Sale of Goods Act, cannot be taken away by terms what would "deny [the consumer] what the law means him to have" [65].

The counterpart to this is, to some extent, the prohibition of art. 1229 of the Italian Civil Code. The rationale of the provision is to ensure a minimum level of diligent performance under any contractual or tortious relationship and to ensure respect of the fundamental principle of "ordine pubblico" contained in art.31 *preleggi*, according to which any act or law of the Italian State, of a foreign state, of any other body or institution, or any agreement between private parties have no effect in the Italian territory if they are contrary to public order or public morals (*ordine publico* or *buon costume*). Most cases arisen on art.1229 concern the actual meaning of "ordine pubblico", understood by courts as "a set of duties aimed at satisfying interests, the safeguard of which responds to fundamental needs of the society, i.e. duties concerning the safeguard of a party to an obligation in his physical/moral integrity[66]. In practice, this has been understood as forbidding terms which exempt liability for death and personal injuries or for breach of rules which are criminally sanctioned.

c) Judicially administered test

The limits of Italian law in the area of unfair terms become more evident when dealing with judicially administered fairness tests. While English law leaves large room to judicial discretion in the assessment of unfair terms, Italian law creates no judicially administered test of fairness; nor have courts given any significant contribution to the protection of vulnerable parties. Comparison with English law is therefore impossible, and the few comments one can make on Italian law refer to unheard suggestions rather than to the actual law.

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[64] Law Commission *The Law Commissions' 1975 Report: Exemption Clauses: Second Report* Law Com n.69, para.68. The Law Commission, however, had suggested a narrower scope of application for this provision limited to certain types of contract.

[65] *Ibidem,* par.68. The only exception to this breach of stipulations as to title, where liability cannot be excluded even against a non-consumer: the need of certainty in goods' circulation must have appeared to be particularly important.

[66] M. Bianca *Diritto Civile* Giuffré, Milano, 1994, 67.

c(i) Reasonableness in English law

The cornerstone of the control under UCTA is the requirement of "reasonableness". The reasons for its adoption lie in its flexibility and the opportunity it leaves open to give special treatment to special cases, without interfering unduly with contractual arrangements.

> The objection that the introduction of a general reasonableness test would involve unjustifiable interference with freedom of contract is essentially an objection to any general control over exemption clauses (...). It is valid only to the extent that there is true freedom of contract to interfere with, and the objection has no validity where there is no real possibility of negotiating contract terms, or where a party is not expected to read a contract carefully or to understand its implications without legal advice. In our view no legislative formula can distinguish between situations where there is genuine freedom of contract and those where there is not. Only individual scrutiny of all the circumstances to take into account, the strength of the bargaining position of the parties, the knowledge and understanding of the term in question, the extent to which one party relied on the advice or skill of the other, and every other relevant fact, can lead to a valid distinction. This is why a reasonableness test is needed[67].

The guidelines to the reasonableness test provided by UCTA are contained in s.11 of the Act, but the list there provided is considered to be non-exhaustive and courts have therefore taken the liberty to increase their number to a remarkable extent[68].

Accordingly, the range of circumstances which are considered to be relevant to the reasonableness test vary dramatically. It is however possible to divide the reasonableness guidelines into two main types.

On the one hand, there are circumstances that are taken into account at a more abstract level, i.e. outside the specific context where the contract is signed: such are, for example, the nature and the location of terms and whether their size and prolixity or clarity make them easily understandable or not[69]; the position of the party who intends to use the contract in terms, for example, of its importance in the market (e.g.

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[67] Law Com. 1975 op.cit. n.64, paras.65-67.

[68] That the list is not exhaustive is confirmed by the Law Commission itself, when stating that "...no such list can ever be complete. The omission of a matter which may well be relevant in a particular case may carry the implication that it should be disregarded, and the inclusion of particular matters may mean that they receive more importance than they merit. If however, the matters listed are introduced by words indicating that regard should be had to all the circumstances of the case the Law Commission think that the risk that other relevant matters will be disregarded is slight" (Law Com. 1975, op. cit.n.64, para.185).

[69] *Wight v. British Railway Board* [1983] CL 424; *Stag Line v. Tyne Shiprepair Group Ltd.* [1984] 2 Ll Rep 210.

monopoly) or availability of insurance[70]. At this stage, it is also possible to take into account the content and capriciousness of the term at issue and similarity with other contracts in use[71], as well as availability of alternative, less burdensome, terms, for example possibility to introduce less burdensome terms upon payment of a higher sum[72].

On the other hand, certain aspects of the reasonableness test can be assessed only in relation to a specific contract when signed by a specific customer: this includes in the first place the strength of the bargaining position of the parties[73]; but also the difficulty of the task and the practical consequences of the decision (i.e. sums of money involved and capability of each party to bear the loss) [74], the party's knowledge of the existence and the content of the term and his appreciation of its significance[75], availability of legal or specialised advice[76]. Such guidelines can be considered to be of "procedural" nature, in that they are attached to the events and circumstance surrounding the conclusion of the contract itself.

The distinction between those two categories is not sharp and it is possible that the same criteria fall in one or the other depending on the case: for example, inducement to enter the contract can be assessed both at the time of contract drafting (e.g. offer of special conditions) or at the time of conclusion (e.g. the seller has persuaded the buyer). In the case law concerning reasonableness, criteria from both types are freely used, so that the unreasonableness of a term is assessed in relation to the abstract features of the contract and to the circumstances existing at the moment of conclusion of the contract. UCTA itself encourages appreciation of circumstances relating to the conclusion of the contract: according to s.11(1), a term must be a fair and reasonable one to be included at the time when the contract was made and not at the time when it is sought to enforce liability.

It is submitted here that failure to draw a distinction between the two types of criteria, together with a too heavy reliance on the criteria falling in the latter category,

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[70] *Photo Production Ltd. v. Securicor Transport* [1980] AC 827; *Singer Co (UK) Ltd. v. Tees and Hartlepoole Port Authority* [1988] 2 Ll Rep. 164; *Flamar Interocean Ltd. v. Denmac Ltd.* [1990] 1 Ll Rep. 434.
[71] *Rasbora Ltd. v. JCL Marine Ltd.* [1977] 1 Ll Rep. 645; see also *Stag Line v. Tyne Shiprepair Group Ltd.* [1984] 2 Ll Rep 210, where the operation of a term depended on where a ship happened to be when a casualty occurred and whether it was convenient and economic to return it to the repairer.
[72] *Woodman v. Photo Trade Processing Ltd.* unreported, 3 April 1981, Exeter CC in R. Lawson, *Exclusion clauses and Unfair Contract Terms* (London: Sweet & Maxwell, 2000) 163.
[73] UCTA, Schedule 2 (a).
[74] *Smith v. Eric S Bush* op. cit. n.49.
[75] *MacRae and Dick Ltd. v. Philip* [1982] SLT 5.

entail that no sufficient account is taken of the reality of modern contract making and additionally creates dramatic uncertainty on the outcome of the reasonableness test[77].

Contracts today are drafted in advance for an indeterminate number of contractual relationship; only exceptionally, when the counterparty is of comparable size and bargaining power, will the contract result from a real bargaining process, sometimes after several draft contracts. Accordingly, it is not clear how and why circumstances surrounding the conclusion of the contract should be particularly relevant to a fairness test: the reality which is regulated is one where circumstances surrounding the conclusion of the contract are presumed to be irrelevant because the contract submitted for signature would always be the same, independently of the position of the customer, his capacity to bear the loss, availability of expert advice, etc.

At the level of legal certainty, taking into account the circumstances relative to each individual contract makes an *a priori* assessment on the fairness of terms rather difficult, since the fairness of a certain set of terms would be unclear until the moment when the contract containing them is actually signed: only at that point, by taking into account all circumstances surrounding the conclusion of the contract, would it be possible to carry out a reasonableness test; accordingly, a trader would be unable to predict whether the terms he is using are fair or not. On the other hand, certainty would require that, to a large extent, a trader who wishes to be "on the safe side" should be able to present to his customers a (standard) contract which he knows in advance as being, almost certainly, drafted on fair and reasonable terms. This requires, however, that the fairness and reasonableness of the contract are assessed *in abstracto*, not at the time of conclusion of the contract.

To make things worse, focus of the reasonableness test under UCTA is occasionally shifted from the moment of incorporation of a clause (i.e. whether the clause is a reasonable one to incorporate) to the moment of reliance (i.e. whether the clause is a reasonable one to rely upon).

In *Rees-HoughLtd. V. Redland Reinforced Plastics Ltd.*[78], for example, the decision against the reasonableness of certain terms issue was also dictated by the

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[76] *Walker v. Boyle* [1982] 1 All ER 634.

[77] See eg. *Smith v. Eric S. Bush* op. cit. n.49 where the House of Lords held that a term purporting to exclude the liability for negligence of surveyors to buyers of dwelling houses did not satisfy the reasonableness test on grounds that the parties were not of equal bargaining power, the houses were of modest value so that it was not reasonable to expect the buyers to seek alternative sources of information, and that the surveyors could easily have insured against the risk without unduly increasing their charges.

[78] (1985) 1 Cons. L. J. 67.

remark that the defendants had never sought to rely upon them in his past dealing with the plaintiff: this estopped them from relying on such terms in the case at issue.

The essence of the estoppel argument above is that the *proferens* has not previously relied on the protective term, which sends out the signal that the term will not be relied upon: accordingly, it would not be fair to rely on the clause. The relevant question to be asked under UCTA, however, is whether the term at issue is a fair and reasonable one to be included in the contract, not to be relied upon. The point had been discussed during the drafting of the Act between the English Law Commission (supporting a reliance-based test) and the Scottish Law commission (supporting an inclusion-based test). The view of the latter prevailed since it appeared to guarantee more certainty:

> it must be clear or at least determinable from the outset what each contracting party has agreed to do or to give or to abstain from doing. (...) It would be a considerable impediment to the undertaking of contracts ...if the party...were not in a position to ascertain in advance the range of the obligations he undertakes. ...A contracting party must be in a position to assess his risks before he enters into the contract....

In other words, the test of reasonableness referred to the moment of incorporation had the advantage of placing judges behind a veil of ignorance concerning post-formation circumstances, with the result of increasing commercial calculability and security[79]: however, judicial response appears not to have always respected the choice of the legislator.

Another reason for the uncertainty of the fairness test seems to be that the availability of a direct mean of control of contractual terms has increased the margin for "different presumptions about the propriety of judicial intervention" of each judge. For example, cases such as *Photo Production v. Securicor Transport*[80] seem to take as a starting point the traditional non-interventionist approach to exemption clauses in commercial contracts[81]; in Photo Production, where the arguments in favour and against the reasonableness of a clause were roughly of equal strength, it was not

[79] J. Adams R. Brawnsword. 'The Unfair Contract Terms Act: a Decade of Discretion' (1988) LQR 118-119.
[80] Op. cit. n.70.
[81] See Lord Wilberforce, op. cit n.70, 843.

difficult for the judges to "build the argument for the reasonableness of a protective clause by highlighting a particular presentation of the insurance situation"[82].

In other cases, however, judges seems to have started from different, more neutral, assumptions and simply put various arguments "in the scale on one side or the other and decide at the end of the day on which side the balance comes down"[83].

In *Savage Association v. CAP Financial Services Ltd.*[84], for example, the referee Thayne Forbes J. was dealing with a clause, contained in two contracts relating to the supply of computer software between the parties, limiting the supplier's liability to 25,000 pounds. The referee considered that, according to the facts, the parties were of equal bargaining power; the contracts were freely negotiable and there were other suppliers to whom the relevant party could have gone; the terms were subject to negotiation and advice was sought from solicitors, accountants and insurers. The referee, however, first subtly distinguished the case from Photo Production and found that the remarks (above reported) by Lord Wilberforce were not "...particularly helpful in this case, because I am satisfied that the position of SA [the plaintiff] cannot be categorised as that of a party whose financial risks are normally borne by insurance, in contrast with the position which applies to CAP". He then decided against the reasonableness of the clause by taking into account other factors such as the inability of CAP to justify the figure that constituted the upper limit and its inadequacy to cover the loss occurred, and the fact that CAP had, at the time of the contract with SA, already decided to increase the limit of their liability applied in all the other contracts.

The argument of the insurance used to distinguish this case from Photo Production appears to be rather fragile since it was still obvious that the parties were able to look after themselves and willingly accepted the terms that apportioned the risks. It is therefore reasonable to suspect that the referee had a rather different opinion concerning judicial intervention in commercial contracts, hence the different conclusion.

Finally, it cannot be denied that the core provisions of UCTA allow large room for judicial discretion. According to the test, judges have leeway at a number of points: for example, they must select the relevant reasonableness factors (and there the choice is practically unlimited, e.g. consent, insurance, fault, bargaining position, etc.): then,

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[82] J. Adams R. Brownsword 'The Unfair Contract Terms Act: a decade of discretion' op. cit. n. 79, 103.
[83] *George Mitchell v. Finney Lock Seeds*, [1983] 2AC 803 at 815.
[84] [1995] FSR 654.

they must specify the requirements for any particular reasonableness factor (for example, what is precisely required for there to be consent? Is simple non-objection sufficient or are there more stringent requirements?); third, the directional pull of any particular reasonableness factor must be identified, i.e. judges must determine in whose favour a certain factor lies; finally, the reasonableness factors must be weighted, individually and in aggregate. Taking into account infinitely various factual situations makes it difficult to derive authoritative guidance from the particular rulings: in other words, the leeway in identifying, specifying, applying and weighting the reasonableness factors gives little value to decisions as precedents: accordingly, "...there will sometimes be room for a legitimate difference of judicial opinion as to what the answers should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded on some erroneous principle or was plainly and obviously wrong"[85]. In such a panorama, where the role of appellate court is restricted to a "Wednesbury" sort of jurisdiction[86], trial judges are free to decide UCTA cases on their own particular facts and with "minimal citation of authority"[87], thus reducing dramatically the degree of certainty given by the value of precedents in common law systems.

c (ii) Other common law controls

A thin line of authority, grounded mainly in certain remarks by Lord Denning, shows that a term fairly stigmatised as unreasonable may not be enforced in courts. In *John Lee & Son v. Railway Executive*[88] he expressed the opinion that an unreasonably onerous term in a standard form contract would not be enforced in courts which, while allowing freedom of contract, watch to see that it is not abused. Similar remarks can be found in a number of other cases, which are all, nevertheless, *obiter dicta* and have been more than once contradicted. In *Photo Production*, Lord Denning switched from the reasonableness of the clause to the different question as to whether the clause was one which it would be fair and reasonable to allow reliance. Even though no discussion

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[85] Lord Bridge in *George Mitchell v. Finney Lock Seeds* op.cit.n.83, 815-816.
[86] J. Adams R. Brownsword 'The Unfair Contract Terms Act: a decade of discretion' op. cit. n.79, 99.
[87] Lord Wilberforce in *Photo Production v. Securicor Transport*, op.cit.n.70, 843.
[88] [1949] 2 All ER 581.

took place among the other judges on whether such a doctrine existed, Lord Wilberforce affirmed that he found the clause to be a "reasonable allocation of the risk".

It is equally well established that even when a term is incorporated into a contract and its meaning is clear on its face, a party may not be able to rely on it if he has misled the other party as to its meaning or effect[89].

Finally, a well consolidated rule establishes that a clause which is inserted *ad terrorem* as an intended punishment in case of breach will be held to be ineffective: in other words, a term in a contract fixing the amount of compensation payable in the event of a breach is enforceable only if it is a genuine pre-estimate of the loss but not if it is intended to penalise the party in breach (penalty clause)[90]. A similar provision in Italian law, art.1382, allows terms which, in case of breach or delay in performance, impose a certain duty (the so-called "penale", usually consisting in payment of a sum of money) to the party at fault. Art.1384, however, provides that if the breach is of trivial importance or if the *penale* is manifestly disproportionately high the judge can, according to what is fair and honest (equita'), accordingly decrease its amount.

c (iii) Italian law and unfair terms: proposals for reform

As already mentioned, there are basically no provisions in the Code which entrust judges with the task of assessing the fairness of a term, except for the above mentioned power of courts to reduce the amount of a manifestly disproportionately high *penale*. Accordingly, the scope of this section is necessarily limited to analysing how, according to academic suggestions, courts might have been able to carry out a more penetrating control.

Since the 70ies, academic commentators started arguing in favour of a more effective protection for the adherent, who

> "...may be fully aware of the content of the terms determined by the enterprise, but certainly he cannot negotiate or modify it...The basic problem of *condizioni generali di contratto* is that it is a phenomenon which shows that the enterprise has a unilateral normative power through the contract"[91]

Suggestions for reform included inserting in the Code an article providing that terms, even when approved in writing, should not be enforceable where they alter the

[89] *Curtis v. Chemical and Dyeing Co* [1951] KB 805.
[90] *Dunlop Pneumatic Tyre Co v. New Garage and Motor Co* [1915] AC 79.
[91] M. Bianca *Le condizioni generali di contratto,* Milano, Giuffrè, 1979, VII.

balance of the contract to the detriment of the adherent without being objectively justified within the business and, in general, when they do not comply with the requirement of honesty (*correttezza*), including professional honesty, or fairness (*equità*)[92].

However, given the legislator's persistence in avoiding the subject of unfair terms, it was also pointed out that other tools for control, beyond art.1341-1342 and art.1229, could have usefully been developed.

A general principle underlying the whole Book II (obligations)[93] is good faith, which is also specifically mentioned in artt.1175 (fair behaviour), 1337 (good faith in negotiation and pre-contractual liability), 1358 (behaviour of parties while condition is pending), 1366 (interpretation according to good faith) and 1375 (performance according to good faith); in addition, a duty of good faith is specifically mentioned by the *Relazione al Codice Civile* with regard to *contratti d'adesione*. There seems, however, to be no judicially elaborated definition of its content and its exact meaning[94]: courts have never attempted to clearly express and rationally systematise the criteria and guidelines that from time to time brought them to decide that a certain behaviour was or not "in good faith"[95]. Decisions concerning good faith are traditionally justified by simply declaring that a certain behaviour complies or not with "correctness and loyalty"[96]; "respect of the word given and protection of the expectations raised"[97]; "solidarity"[98]: the exact parameters that make good faith a

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[92] This is the proposal put forward by M. Bianca at the Fiuggi Meeting (5-6-June 1981) and reported by S. Tondo 'Su un progetto di riforma della disciplina delle condizioni generali di contratto (in margine al Convegno di Fiuggi, 5-6-Giugno 1981)' in Foro It. 1981, IV, 282 ff.

[93] The Civil Code actually suggests that there are two different notions of good faith: objective and subjective good faith (*buona fede oggettiva e soggettiva*).Subjective good faith refers to the subjective state of mind of a person: in this sense, a person who (wrongfully) believes to be acting in accordance with the law is "in good faith"; a person who ignores that, by doing something, he will damage someone else's rights is "in good faith"; and so is the person who, without fault, acts in reliance of a certain situation which is later discovered not to be true. The legal consequence attached to subjective good faith is usually that the legal effects which the person "in good faith" aims at creating are nevertheless maintained (for example, according to art. 1147 c.c.: the person who buys a good from a seller who has no title to transfer the good is entitled, under certain circumstances and provided that the purchase was made "in good faith", to keep the good (to the detriment of the real owner). For the purposes of this work, only objective good faith is relevant

[94] This is particularly true for artt.1337, 1358, 1460 and 1366; in addition, art.1337, which could have played a fundamental role in establishing a clear set of duties of honesty and transparency in the pre-contractual stage, has mainly been used as an appendix of art.1338 or as a means to establish liability for sudden interruption of the bargaining process leading to a contract.

[95] This has been done by German courts, which have elaborated a consolidated set of cases where good faith could be used with predictable results, see D. Medicus *Allegemeiner Tei des BGB* Müller, Heidelberg, 1997, 56-60.

[96] F. Galgano *Diritto Privato*, 1981, Cedam, Padova, p. 321; Cass.16/2/1963 n.357 in Foro Pad.1964, 1284.

[97] P. Rescigno *Manuale di diritto privato italiano*, Jovene, Napoli, 1977, 647

(decisive) argument in favour of one party are not expressed, and it is therefore difficult to identify the causal relationship between the final decision and good faith as a criterion for such a decision[99]. Additionally, courts have sometimes been reluctant to use good faith as a leading criterion for fear of undermining legal certainty and predictability of decisions. A rather well known example of such a reluctance is a judgement delivered by the *Corte di Cassazione* in 1966 stating that "a behaviour which is contrary to loyalty, correctness and social solidarity cannot be unlawful and cannot be a source of liability for damages as long as it does not entail at the same time a violation of someone else's rights embedded in other rules"[100]. In order words, simple violation of good faith is deprived of legal consequences unless there is a concurrent violation of other legally protected rights. This principle was later confirmed by the Court in several other cases[101], but did not become so certain and consolidated as to prevent good faith from playing a central role in other decisions[102].

The analysis of some decisions can nevertheless reveal the existence of model situations and recurrent types of conflict where good faith has been successfully applied[103]. In principle, good faith seems to come into play when assessment of conflicting interests is required, and no contractual or legal provision provides a solution for such conflict; good faith, as a "closing" rule, plays an integrative role in respect of the contract or the law.

So, for example, in cases concerning conflicts on the modalities of exercise of a certain right given to a party by the contract or by the law good faith prevents the exercise of that right in a certain way when there is another way of exercising the same right which is less burdensome to the other party: good faith thus guarantees a satisfactory achievement of both parties' interest (i.e. a better fulfilment of the purpose of the contract) by avoiding an improper use of rights and duties granted or imposed to

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[98] S. Rodotà *Le fonti di integrazione del contratto*, Giuffre', Milano, 1969; Cass. 5/1/1966 n.89 in Foro Pad. 1966, I, 524.

[99] In addition to this, the *Corte di Cassazione* refused in several cases (e.g. Cass. 22/3/1969 n.926 in Giust.Civ.1969, I, 1720) to review on appeal the assessment of good faith made by a lower court on grounds that their competence was limited to re-considering points of law only. This approach assumes that an assessment of good faith is entirely a matter of fact, and that there exists no guideline for its appreciation that could be general and abstract enough to be considered as a point of law.

[100] Cass. 16/2/1963 n. 375, Foro Pad.1964 1284.

[101] Cass.20/7/1977 n.3250 in Giust.Civ. Rep.1977, Item *Obbligazioni e contratti* n.32; Cass. 18/10/1980 n.5610 in Foro It. Rep. 1980, item *Contratto in genere*, n.79; Cass.22/11/1983 n. 6933 in Foro It. 1984, I, 456.

[102] Of course, this is possible thanks to the fact that judgments are not binding on courts, which allows not only 'revirements' but also the creation of different 'trends', sometimes even within the *Cassazione* itself.

[103] In this respect, an excellent work has been done by A. D'Angelo, 'La tipizzazione giurisprudenziale della buona fede contrattuale' Contratto e Impresa, 1990, 702-755.

them by the contract or by the law. Thus, for example, the behaviour of a creditor who takes legal action against a debtor who pays a debt by means of an unsigned (hence not payable) cheque was considered as contrary to good faith[104]: respect of the interest of the debtor and compliance with good faith would require that, before taking legal action, the creditor informs the debtor of the mistake and gives him the opportunity to make a proper payment. In other cases, good faith serves to impose on the parties duties which are not imposed by the contract or by the law: accordingly, one party to a contract must give to the other party all the information which are necessary to that party in order to perform the contract; a creditor must inform the person who guarantees repayment of someone else's debt that the debtor, to whom he keeps on lending money, is in financial difficulties; a landlord who receives from the tenant notice to quit must inform the tenant that the notice was not signed (hence ineffective) so as to give him the possibility to remedy the mistake and avoid tacit renewal of the contract. The duties imposed by good faith range from simple information, as in the cases above, to the obligation to take a certain action or to refrain from taking a certain action (e.g. failure of an employee, absent from work for health reasons, to stay home to facilitate a quick recovery was held to be "contrary to good faith"); finally, good faith has been used to solve conflict of interests where circumstances unforeseen by the parties at the moment of conclusion of a contract, without rendering performance impossible, affect the balance of interests envisaged by the contract[105]: In those instances, judges have referred to good faith as a means to fairly allocate risks between the parties, to preserve the economical balance of the agreement initially envisaged by the parties and to avoid unfair enrichment.

In practice, therefore, good faith is a tool to integrate the contract or the law, and to impose duties and obligations which are ideally instrumental to the achievement of the purpose of the contract; in other words, good faith is understood as a means to guarantee that the economic and legal balance established by the parties is achieved in accordance with, and beyond, the provisions of the contract or of the law. The purpose of good faith is ultimately to ensure that parties' actions are always directed towards the achievement of the purpose for which they originally made the contract.

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[104] Tribunale di Bologna 21/7/1970 Giur. It. 1971, I, 2, 211.

[105] This is called 'presupposizione' and is not contemplated by the Code. It corresponds to a limited extent to frustration as applied to cases such as the 'coronation case' (*Henry v. Krell* [1903] 2KB 740).

In relation to unfair terms, the good faith clause could have been usefully applied so as to increase the duties imposed on the proponent in relation to *conoscenza* and *conoscibilità* of the terms; and to make sure that, in making the contract, parties take into account each others' interests so as to realise a fair balance. In practice, good faith has not found any application of this type.

Another criterion which may have usefully been applied to unfair terms is that of *meritevolezza*: according to art.1322, the interest pursued by the parties in the contract must be one that deserves protection (*meritevole di tutela)*. The control of *meritevolezza* is carried out on the aim of the contract, but could also be carried out on the single terms: on those grounds, it would be possible to declare terms not enforceable when they impose a heavy burden on the customer without a corresponding advantage: the interest of the enterprise to harm the consumer through a certain term cannot be considered as *meritevole di tutela.*

Public order and public moral are also general clauses of the Civil Code which could have been applied to unfair terms: in France, for example, courts have elaborated the concept of 'ordre public technologique" by considering the highly specialised technical knowledge enjoyed by the enterprise as opposed to the naive reliance of the consumer: in this context, the use of technological information cannot be made against the consumer and in this sense an unfair term, if not counterbalance by some other advantage, can be unenforceable[106].

Finally, all the techniques of interpretation of the contract could have allowed some form of manipulation of the contract in other to balance the content of the obligations of the parties, to interfere with the economic arrangements made by them, and to improve the position of the weak party.

Those remained, however, unheard suggestions.

4. Conclusion: "personalised" v. impersonal justice

In spite of few points of convergence, English and Italian law on unfair terms appear to be at two opposite ends. Before going into more detail, it is necessary to clarify some basic concepts on which this conclusion is based. In any legal system, contract law (like any other area of law) is based on two elements, identified as:

[106] M. Bessone 'Controllo sociale dell'impresa e ordine pubblico tecnologico' in Pol. Dir. 1973, 777 ff.

- the actual legal material relating to contracts (e.g. relevant articles of the code and their judicial application; case-law);
- theories and models of contract (i.e. principles and concepts relating to contract law, such as the principle of freedom of contract);

Theories and models of contract have a fundamental importance in that they constitute the primary instrument of legal discourse: the actual legal material is meaningless and fragmented unless it is shaped, arranged and systematised by the legal doctrine along the lines of certain principles, concepts and models relating to a certain area or sub-area. On the other hand, the choice of the principles, concepts and models which are deemed to become the guidelines for systematisation has its roots outside the law, in the field of the moral and social values of a given society. Accordingly, a contract theory, with its models, concepts and principles, plays a key role in a legal system since it can be considered as the door through which the legal material and the society are connected; in other words, the legal material relating to the area "contract law" would be systematised by the legal doctrine in accordance with certain principles and concepts, i.e. to a certain type of contract model which is itself related to wider social and moral principles and ideologies.

In both Italy and England the prevailing contract model according to which legal doctrine shaped and arranged the legal material was for a long time based on the ideology and values of the past century (i.e. the described *laissez-faire* and freedom of contract).

In England, the awareness of new needs and realities, however, triggered the judicial development of remedies and rules which, while still being based on the traditional models and principles (e.g. freedom of contract), aimed to give an adequate response to the new social and economic framework: in other words, if on the one hand the available remedies based on the traditional model of contract were pushed to their limits, on the other hand fairness, social equality and re-balancing of the bargain did not become the dominant paradigms and underlying principles of contract law: the legal principles and models of the past century remained unchanged, acting as brakes on legal change. In order words, England did not adopt a more general doctrine of "contract fairness" or "contractual balance", or "good faith", whatever one wants to call it; rather, it preferred to give individual solutions to deserving cases through the formal rules of incorporation and interpretation, applied with reference to the criterion of "reasonable expectation", trimmed in accordance with parties' bargaining position.

The adoption of Unfair Contract Terms Act 1977 certainly marked a real change against the "hands-off" approach of courts to contracts, providing them with open tools for re-arranging the contractual agreement in accordance with reasonableness and thus opening the way to a "bifurcation" of contract law, "one for the consumer and the other one for the commercial sector"[107].

This constituted, however, only a partial solution to the problem of unfair terms: the uncertainty surrounding application of UCTA means that consumers still lack effective tools of redress. It is submitted here that the persisting inadequacy of the law to deal with unfair terms has much to do with "personalisation" of justice.

In section 3.c(i) it was emphasised that the guidelines provided by UCTA, for a number of reasons, do not allow predictability of the reasonableness test; this appears to be due, to some extent, to the fact that the assessment is strictly related to the specific features, and the specific context, of individual cases. As compared to the pre-UCTA case-law, the introduction of more direct means of control on contract terms did not increase legal certainty: while in the pre-UCTA case-law customers' reasonable expectation *in abstracto* determined the issue of how a term had to be incorporated or interpreted, after UCTA customers' expectation is now measured in relation to the expectations created *in concreto* by parties' (or rather the trader's) behaviour.

In other words, rather than providing judges with a new principle, UCTA (as interpreted by courts over the years) has simply provided direct tools for granting "personalised" justice.

"Personalised justice" is, to some extent, more suitable to the inductive nature of the common law legal reasoning: as opposed to the civil law reasoning, which is based on abstract normative propositions, the common lawyer "commence à partir du particulier, d'ou l'obsession anglaise des faits"[108]: accordingly, the circumstances surrounding the conclusion of a certain contract act as structuring elements of legal reasoning more than they do in civil law thinking. Second, familiarity with "personalised" justice is certainly stronger in England than in any civil law system, given that England has for centuries accepted Equity as a source of law: accordingly, tailor-made, rather than "standard" solutions are easily accepted in English courts.

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[107] R. Brownsword 'The Two Laws of Contract' (1981) SJ 279. In favour of a special *lex mercatoria* for the business to business contracts see, recently, A. Schwartz and R. Scott Contract Theory and the Limits of Contract (2003) 113 YLJ, 2.

[108] G. Samuel 'Entre les mots et les choses: les raisonnements et les méthodes en tant que sources du droit' (1995) RIDC, 512.

In this context, the comments made by Beale[109] to the case of *Phillips Products Ltd. V. Hyland*[110] are enlightening: while the Court of Appeal stressed that the question in the case was not whether the clause at issue was fair in other similar contracts, but in relation to the particular contract at issue, Beale suggested that such an approach was mistaken: while individual circumstances could be taken into account in negativing any unreasonableness[111], the normal question should be "whether the clause is a fair one for the normal run of contracts rather than for the individual customer".

The inability of English law to provide an adequate level of certainty means that standard form terms require a different approach than the one adopted so far.

Italian law on unfair terms, on the other hand, presents very different features (and shortcomings) if compared with the English one.

First, "the existence of specific rules about general conditions of contract has brokered the constructive contribution of Italian courts, which limited themselves to the pure application of the articles specifically dedicated to the point"[112]. Wherever the poor cover provided by artt.1341-1342 applies, judges (and practitioners alike) refrain from resorting to more general principles like that of good faith, thus showing a sort of unspoken mistrust for such ambiguous clauses, and in the strictest respect of the principle *lex specialis derogat legis generalis.* In addition, in examining the relevant case-law one cannot avoid noticing that most of the actions involving artt.1341-1342 are also based on other grounds: matters concerning those provisions seem to be considered as "ancillary" and never dealt with great attention, as if they could support only marginally the plaintiff's (or defendant's) claim.

Second -and more importantly- the legal material developed by courts has always adhered rather faithfully to the classical principles and to the "neutral" model of contract, the only attempts at change being embedded in a few obscure cases and being usually limited to very specific problems. This may probably be explained by the wish to preserve the coherence of the private law system but above all the habit to consider law, especially private law, as a closed system, relegated outside the political, social and economical realities. The problem of unfair terms is a social problem, and the

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[109] H. Beale *Unfair Contract in Britain and Europe* (1989) Current Legal Problems 208.
[110] [1987] 2 All ER 620
[111] For example, the absence of bargaining power or choice would not necessarily count against a clause, if the customer was important enough to have choice but did not exercise it: his would actually be an argument in favour of the clause.

Italian private lawyer has traditionally considered social problems as outside his competence, thus restraining his field of action strictly to the data provided by positive law, and avoiding, in accordance with the kelsenian principles, any contamination of his judgements by "metalegal" considerations[113]: "the attitude is that the law is a self-contained discipline or phenomenon that can be understood and perfected by systematic study. It is summed up in the phrase *legal science,* which carries with it the assumption that the study of law is a science, in the same way as the study of other natural phenomena –say those of biology of physics- is a science (...). The theoretical structure of legal science consists of general concepts and institutions of a high order of abstraction, arranged and interrelated in a systematic way. The components (...) of the structure are strictly legal, and indeed it is believed that their purity, and hence their validity, would be destroyed by the introduction of non-legal elements"[114]

Another reason for the mistrust of lawyers in any form of substantive control of *condizioni generali di contratto* can be found in the concern not to threaten any further the principle of contract freedom. Such principle already appeared to be reduced by the prohibitions contained in the Code and by the automatic insertion of *clausole imperative* (art.1339). While it would be possible, however, to admit that the legislator can bring limitations to private autonomy, the idea that such an autonomy may be subject to a judiciary or administrative power, competent to give a substantive assessment of the parties' will, is unacceptable to many; for those who see in freedom of contract a constitutional value, the idea of such a control may even raise suspects of unconstitutionality.

It is true that, during the "Welfare State" years, the principle of freedom of contract was subject to several exceptions in the areas, for example, of labour and tenancy law: those exceptions, however, were by their own nature restricted to certain types of contracts only, and did not introduce any general derogation to contract law principles. In addition, as opposed to trade unions, consumers associations were highly unorganised and therefore incapable of exercising any lobbying power on the legislator.

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[112] R. De Negri 'Report on the practical implementation of Directive 93/13/EEC in Italy' in *The Unfair Terms Directive, Five Years on* (Luxembourg: Office for Official publications of the European Communities, 2000) 304.

[113] M. Bianca 'Le tecniche di controllo delle clausole vessatorie' in M. Bianca G. Alpa (ed.) *Le clausole abusive nei contratti stipulati con i consumatori* Cedam, Padova, 1996, 357.

[114] M. Cappelletti *The Italian Legal System. An Introduction* (Standford: Standford Univeristy Press, 1967), 170-171.

In conclusion, the Italian system seems to suffer from the opposite defect to the English one, i.e. it provides too "impersonal" justice.

The task of the following chapters shall therefore be to analyse the impact of Directive 93/13 in England and in Italy with the purpose of identifying the principles and concepts underpinning European legislation on unfair terms and assessing whether and to what extent any change in the traditional theories and models of contract is likely to occur following European intervention.

Chapter 3. Directive 93/13 in the context of the development of EC Consumer Law and Policy.

1. Introduction.

As most Community measures on consumer protection, Directive 93/13[1] has a Janus-faced nature: formally based on art. 95 (formerly 100a) and therefore aimed at reinforcing the internal market, it also pursues the objective of ensuring protection of consumers against unfair terms throughout Europe.

This chapter aims to investigate the relationship between consumer policy and internal market both in general terms and with specific reference to Directive 93/13. In this latter respect, it must be noted that the pre-existence of different domestic measures controlling unfair terms in most Member States constituted not only a reason justifying Community intervention in the area, but also an important source of inspiration for those who drafted the Directive: the attempt to mirror and combine various domestic solutions in the Directive can therefore often explain ambiguities and inconsistencies existing in the European piece of legislation.

Understanding the extent to which the interplay between the internal market and the consumer protection rationale against the background of different legal traditions have played a role in the drafting of the Directive is a necessary step in order to understand the Directive's effect on national legal orders: it is therefore important to analyse those elements in a separate chapter before moving to consider domestic implementation.

2. The Rise and Development of EC involvement in Consumer Law and Policy and the roots of Directive 93/13.

The original EEC Treaty, as signed in Rome in 1957, lacks any explicit reference to the consumer as such. Even though the consumer is mentioned four times[2], he cannot be considered "a point of reference or the object of a single policy objective or measure"[3] as the Treaty does not determine his rights and duties, nor imposes or allows for active measures to improve his position. The provisions of the Treaty that explicitly

[1] OJ L95/29.
[2] In articles 33 (39), 34 (40), 81 (85), 82 (86).
[3] L. Krämer *EEC Consumer Law* (Brussels: Bruylant 1996) 2.

refer to the consumer illustrate what could be called a "productivist"[4] perception of his interests in the common market: the attention to consumption has its "raison d'être" in the fact that it is directly dependent on the production and distribution, and as a prolongation of the latter it would finally be related to the raising of real income.

In other words, the Treaty proceeds on the basis that the consumer is the ultimate beneficiary of the economic objectives of the Community: at the European level, consumer law revolves around the application of the substantive provisions of the Treaty which act as an instrument for the achievement of the economically efficient integrated market. For instance, the transformation of relatively small-scale national markets into a large single Community Market will stimulate competition and induce producers to achieve maximum efficiency in order to protect and to expand their market share. In this context, competition is regarded as the "consumer's best friend" and its intensification should serve the consumer by increasing the available choice of goods and services.

Thus, under the Treaty of Rome, consumers' interests appear as a mere by-product of more fundamental Community policies or concerns and of the application of rules designed to serve wider purposes. The lack of a definition of consumer shows that no consideration is given to collective consumer concerns; consumers are individual entities who buy products or use services, and the only means for the identification of their real needs or for the expression of priorities on the supply is the market; their satisfaction is to be measured in terms of private consumption rather than in terms of fulfilment of collective or group needs.

The Member States' attitude at the moment the Treaty was drafted and their trust in market forces rather than in governmental intervention to correct or replace the functioning of the market may be considered as surprisingly contradictory. By signing the Treaty of Rome, States basically agreed upon a traditional conception of the market and a full confidence in its free functioning. Meanwhile, as described in the previous chapters, the emergence of what is generally called the "Welfare State" ("Etat Providence", "Sozialstaat", "Stato sociale") involved at domestic level new forms of State control and intervention in the market: the State intervened to devise new principles to govern the operation and the outcomes of the market; instead of permitting the distribution of wealth to be determined by voluntary choices to enter

[4] T. Bourgoignie D. Trubek *Consumer law, common market and federalism* (Berlin/New York: De Gruyter, 1986) 100.

market transactions, the social security system, funded largely through progressive taxation, re-shaped the eventual outcomes of the distribution of wealth[5]. Ideas of social justice justified the channelling and regulation of market transactions; alleviation of the problems of poverty and of the disadvantaged has been a continuing undercurrent in consumer protection[6]. Similarly, employment legislation was passed to confer rights on employees which they could not secure for themselves by contract; landlord and tenant legislation was been enacted to give minimum rights to tenants; the increasing awareness of consumers' rights and the development of consumers' representative groups in the late fifties in may European States also involved revising to different extents the classical principles of freedom of contract, competition and fault liability, seen as mechanisms discriminating against consumers and other weaker parties or groups in the society, like tenants and small traders.

In brief, while Member States seemed to assert that the free market mechanisms would benefit consumers at European level they were at the same time enacting interventionist measures within their territory. On the other hand, the concern of the European founder at the time was certainly not social policy but the creation of an economically integrated European market; at the same time, nobody was probably unaware of the fact that, in the evolution of the Community, it would be those very interventionist measures which would run the risk to be considered, later on in the development of European integration, obstacles to its full achievement.

It did not take too long, however, before the contradiction in Member States' behaviour emerged. In 1961, four years after the signing of the Treaty, the vice-president of the Commission, Sicco Mansholt, acknowledged that "the general interests of consumers in the Common Market are not represented to the same extent as those of producers"[7] .

Therefore, despite the exclusion of consumer protection from the explicit constitutional structure of the Treaty of Rome, the status of the consumer as a partner of the developing structure of Community law and practice started earning recognition, at first largely at an informal level by "soft law" initiatives.

Since the Paris Summit of October 1972 various political declarations insisted on the social dimension of the European consumer policy. The objective of consumer

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[5] H. Collins *The Law of Contract* (London: Butterworths, 1997) 9.
[6] See for example the study conducted in F. Williams (ed.) *Why the Poor Pay More* (London: National Consumer Council 1977).
[7] Quoted in V. Kendall *EC Consumer Law* (London: Chancery Law Publishing, 1994) 7.

protection was said not to be confined to the establishment of the internal market, but to promoting an active and comprehensive social policy throughout the Community.

The first Preliminary Program of the EEC for a Consumer Protection and Information Policy[8] was the Commission's answer to the Paris demand. A second, similar Program was issued in 1981[9]. Under these programs, consumers were granted five basic rights (right to protection of health and safety, right to protection of economic interest, right of redress, right to information and education, right of representation).

The roots of the Directive on unfair terms can be found at those early stages of the development of EC consumer policy. According to the 1975 Programme, the increased abundance and complexity of the goods offered had as a side effect abuses and frustration of the consumer who was no longer able to fulfil the role of a balancing factor; as a consequence, producers and distributors had increasing opportunities to determine market conditions. The need had arisen to formulate a specific community consumer policy aimed at securing, *inter alia*, effective protection against damage to consumers' economic interests. Within this framework, it would be the Community's task to adopt measures aimed at ensuring that purchasers of goods or services were protected "...against the abuse of power by the seller, in particular against one-sided standard contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit, demands for payment for unsolicited goods and against high-pressure selling methods"[10].

The Second Programme for a consumer protection and information policy, referring to the question of unfair contract terms, reported that the Commission had considered "...that the first step should be to draft a discussion paper in which it will set out all the problems which this subject involves and the various options open with a view to harmonising those aspects which may be affected by discrepancies in this area"[11]. The fulfilment of the task of raising the standard of living of European citizens requires that disparities between Member States are eliminated so that a high standard of consumer protection against unfair terms can be enjoyed by all consumers throughout the Community. In other words, the existence of a genuine internal market

[8] Council Resolution of 14.4.1975 O.J. C92, 25.4.75, 1.
[9] Council Resolution of 19.5.1981 O.J. C133, 3.6.81, 1. Both the 1975 and the 1981 Resolutions are expressly referred to in Recital 8 of Directive 93/13.
[10] Council Resolution of 14.4.1975 op. cit.n.8, para. 19.
[11] Council Resolution of 19.5.1981 op. cit. n.9, para. 30.

with rules providing the same protection to consumers appeared to the Council to constitute a considerable direct benefit to the consumer, while, on the other hand, avoiding distortions of competition[12].

In relation to unfair terms, between 1975 and 1977 the Commission prepared a few draft proposals, which were discussed by governments' experts, but in the same years an intense burst of legislative activity on the part of the Member States took place[13]: in 1976 the Federal Republic of Germany adopted a statute on unfair contract terms[14], in 1977 the UK did so too[15] and France followed in 1978[16]. The introduction of different regulatory frameworks for unfair terms in several Member States certainly did not facilitate the attainment at Community level of a degree of consensus sufficient to proceed with work in that area; in addition, conflicting visions of the appropriate intensity of social regulation on the matter and of the acceptable degree of Community involvement in its realization were accompanied by serious doubts on the existence of a proper legal basis for an EC consumer policy. Owing to this, to commitments in other areas and to lack of staff the Commission works in the field of unfair term halted for almost ten years.

In 1984 the Commission took the initiative again by publishing a consultation paper entitled "Unfair Terms in Contracts Concluded with Consumers"[17], which constituted the main background to the Directive; nonetheless, sixteen more years had to pass before the Commission put forward its first proposal for a directive on unfair terms.

As a whole, almost twenty years had to pass since the idea of a Directive on unfair terms was put forward: such a long lapse of time, apart from raising obvious criticism on the efficiency of the European law-making process, allowed a radical change in the framework against which the Directive had to fit: year by year, almost all of the Member States enacted their own legislation, which made the adoption of a directive not only partially redundant, but also more and more complicated since it had

[12] See also the Council Recommendation on Unfair Contract Terms contained in Resolution No.76(47) adopted by the Council of Ministers on 16 November 1976 and the Parliament's call for the adoption of a Directive on Unfair Terms in its Resolution on the Second Programme (OJ C291, 10.11.1980).
[13] see figure 1, p.72.
[14] Gesetz zur Regelung des Rechts der Allgemeiner Geschäftsbedingungen (AGB-Gesetz) of 19.12.1976.
[15] Unfair Contracts Terms Act (UCTA) 1977.
[16] Loi sur la protection et l'information des consommateurs des produits et des services (Loi Scrivener), n.78-23 of 10.1.1978.
[17] Commission Communication presented to the Council on 14.2.1984, Bulletin of the European Communities, Supplement 1/84, 5.

to fit within a domestic framework, which in most cases would not have existed had the Directive been enacted earlier.

This reflects a common problem of Community directives: their period of "gestation" is often so long that their innovative force turns into being a "disturbing" element for national legislation that has meanwhile been adopted: thus, Community law ends up following, rather than triggering and leading, law reform in the Member States.

Between 1977 and 1984 and 1984 and 1990, however, relevant changes in the legal framework of the European Community deeply affected the development of consumer law and policy: such changes are also reflected in the history and in the substance of the Directive on Unfair Terms, and accordingly the analysis of the context in which the Directive was adopted can give account of its content but especially of its unresolved tensions and contradictions.

Action at Community level	Action at Member States' level
• First Action Programme of 14/4/1975 • Resolution of the European Council from 16 November 1976	• Danish Marketing Act 1974 • German AGB-Gesetz 1976 • British Unfair Contract Terms Act 1977 • French Loi Scrivener 1978 • Finnish Consumer Protection Act 1978 • Austrian Konsumenschutzgesetz 1979
• Second Action Programme of 19/5/1981 • Green Book on Unfair Terms in Contracts concluded with Consumers of 14/2/1984	• Luxembourg Loi relative a la protection du consommateur 1983 • Spanish Ley general para la defensa de los consumidores y usuarios 1984
• 1st Proposal for a Council Directive on Unfair Terms of 24/7/1990 • Opinion of the ESC of April 1991 • Opinion of the EP (first reading) of October 1991 • 2nd Amended Proposal for a Council Directive on unfair terms in consumer contracts of 4/3/1992 • Common position of the Council of 22/9/1992 • Opinion of the EP (second reading) of December 1992	• Portuguese Decree Act 446/85 of 1985 • Belgian LPC of 1991 • Greek Act n.1961 on Consumer Protection of 1991 • Dutch Burgerlijk Wethoek of 1992

Fig.1. Chronicle of the *travaux préparatoires* and parallel development between 1975 and 1993[18]

3. A new framework for the development of consumer law and for a Directive on Unfair Terms.

a) Consolidation of the minimum harmonisation formula.

The introduction by the Single European Act (SEA) of qualified majority voting in the Council in art. 95 (100a) allowed an acceleration in the development of indirect consumer protection policy through the possibility that harmonised standards of protection can be put in place at Community level, even without unanimous consensus among the Member States. The introduction of the qualified majority voting must be seen in conjunction with an increasing use of the minimum harmonisation formula, which since SEA has been institutionalised through express incorporation in the Treaty. The replacement of unanimity by majority voting extenuated the ability of individual Member States to resist the will of the Community even when they felt that important questions of social policy were at stake: a State could be obliged by the demand of harmonisation to lower its own existing standards for the sake of complying with the majority's preference for a minimalist Community norm: accordingly, the minimum harmonisation formula represented a compromise which is to some extent comparable, in its rationale, to the Cassis the Dijon ruling in that market integration should not constitute a threat to consumers' interests[19].

From the consumers' point of view, this formula can be considered as the legal response to the concern that positive integration (and therefore common standards) could entail a reduction in the standards which already existed in some states. The traditional idea of pre-emption underpinning the Treaty would in fact entail that national rules should be replaced by Community law and that a field which is occupied by the Community would be barred to national law making. However, it was soon realised that treating national rules of market regulation as mere barriers to trade instead of considering their broader social function would lead to the suppression of long established and well developed national initiatives in the field of consumer protection. Accordingly, an attempt had to be made to accommodate those different traditions within a flexible Community framework; to attain this effect, the Community

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[18] Source: M. Tenreiro J.Karsten 'Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelties of a Directive' in H. Schulte-Nölke R. Schulze (ed.) *Rechsangleichung und nationale Privatrechte* (Baden Baden: Nomos, 1999) 278.

[19] For an overview of this type of legislation, see K. Mortelmans 'Minimum Harmonization and Consumer Law' (1988) ECLJ, 2.

decided that they would establish a minimum standard, but Member States remain entitled to enact or maintain stricter rules if they wanted to[20].

Accordingly, art.8 of the Directive on Unfair Terms entitles Member States to "adopt or retain the most stringent provisions compatible with the Treaty" in the area covered by the Directive, thus jeopardising the target of achieving similar market conditions throughout Europe. Such a formula would still guarantee that consumers can enjoy the minimum level of protection ensured by the Directive no matter where they chose to buy goods or services; but from the traders' point of view, the fact that disparities can still remain to a large extent would entail that they still could not use the same standard form contract throughout the Community. It must be noted, however, that the minimum harmonisation formula was not included in the 1990 and 1992 texts and was slipped in only in the final version, probably under the pressure of some Member States, understandably concerned that the Directive would lower their own standard of protection.

b) *Cassis de Dijon* and the recognition of the consumer as an economic partner

The *Cassis de Dijon*[21] ruling is well known for its dramatic consequences on free movement of goods in terms of securing wider choice for the consumers by allowing recognition of diverse national traditions; decreasing the Commission's workload in the area of positive harmonisation[22] by reducing the need to adopt common rules; sweeping away the concerns for the rise of an "Europroduct"[23] by promoting the circulation of national products.

What is relevant to the present discussion, however, is that the ECJ considered consumer protection as one of the possible justifications for upholding indistinctly applicable national measures which have the effect of restricting trade between Member States:

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of products in question must be accepted in so far as those provisions may

[20] See Council Resolution of 7.5.1985 OJ C136/1.
[21] Case 120/78 *Rewe-Zentral v.Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649.
[22] See the positive comment of the Commission Communication in OJ 1980 C256/2; COM(85) 310, the White Paper on the completion of the Internal Market, para.61 ff.
[23] See S. Weatherill, *EC Consumer Law and Policy* (London: Longman, 1997) 47.

be recognised as being necessary in order to satisfy mandatory requirements relating in particular to ... the defence of the consumer.

By including consumer protection among the grounds on which a measure restrictive of trade can be upheld, the ECJ made a sharp turn towards the conferral of a citizenship on the consumer in the European Community. The ECJ clearly recognised that the consumer was entitled to the status of an economic partner, whose needs and welfare had to be taken into account as much as producers' needs.

This decision represents an important landmark and a remarkably far reaching achievement, especially if one considers it in the light of the secondary position consumers had previously occupied in the EC landscape.

The growing importance of consumer law at this stage can also be inferred by the emergence of a definition of consumer in Community secondary legislation. The early pieces of legislation which mentioned the consumer did not give any guideline for building up a notion of consumer: for example, Directive 79/112 and Directive 79/581[24], concerning the labelling of foodstuff, mention the "ultimate consumer" and the "final consumer", but do not offer any further explanation of what is meant by those terms[25]; in the mid-eighties, on the other hand, a few Directives started borrowing from the Brussels Convention on Jurisdiction and Enforcement of Judgments the definition of consumer as "the person who concludes a contract for a use which can be regarded as being outside his trade or profession": Directive 85/577[26] on doorstep selling contracts defines the consumer as "a natural person who in transactions covered by this directive acts otherwise than in a commercial or professional capacity", and Directive 87/102[27] on Consumer Credit defines the consumer as a "natural person not acting predominantly in a commercial or professional capacity". This definition will then regularly appear in most Directives in the field of consumer protection, including the one on Unfair Terms.

[24] OJ 1979 L33/1, now repealed by Directive 2000/13; OJ 1979 L158/19, now repealed by Directive 98/6.
[25] Directive 85/374 on product liability does not include a definition of "consumer" but provides that in cases of personal injury each injured person shall be entitled to damages, if the item of property "is of a type ordinarily acquired for private use or consumption, and was not acquired or used by the claimant exclusively for the purpose of his trade, business or profession". Similarly, Directive 84/450 on misleading advertising gives no definition of the consumer when it declares that its purpose is the protection not only of traders, producers and other groups, but also of "the consumer".
[26] OJ 1985 L372/31.
[27] OJ 1987 L42/48.

Another important factor in the development of European consumer law was the insertion by the Single European Act of art.95 [100a], which provided the foundation for a legal recognition of consumer policy by empowering the Commission to propose measures designed to protect consumers, taking as a base "a high level of consumer protection" (para.3). This did not entail a formal recognition of its independence: consumer policy merely became part of a more general policy of completing the Single Market. However, from a consumer's point of view, harmonisation does not constitute an aim as such: it is only welcome if it takes place at the highest level of consumer protection existing within the Community. Competence of the Community to act in the field of consumer protection independently of internal market reasons will only be established in the Maastricht Treaty in art.3 and in art.153 [129a][28], although it has been noted that the relationship between internal market policy and consumer policy which is still mentioned in art 129a creates confusion and doubts about the legitimacy of strictly consumer-oriented measures[29].

The Directive on Unfair Terms, as it appears from its chronology and from its rationale, has its roots in the pre-Maastricht framework, but in some respects marks an important change in the conception of consumer. Together with the Maastricht Treaty and a few, more recent, directives on consumer protection it has placed new emphasis on a consumer who is "active in the market, not simply a consumer who awaits the

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[28] Art.3 now lists "a contribution to strengthening of consumer protection" as one of the actions of the Community to achieve the objectives laid down in art.2; art.153 [129a] states: "The Community shall contribute to the attainment of a high level of consumer protection through: a) measures adopted pursuant to art. 95 [100a] in the context of the completion of the internal market; b) specific action which supports and supplements the policy pursued by the member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers (...).Para.3 of art. 153 [129a] also includes the "minimum harmonisation formula" which allows Member States to maintain or introduce more stringent protective measures, subject to the requirement of compatibility with the Treaty and notification to the Commission.
If the Maastricht Treaty has for the first time recognised a high level of consumer protection as an explicit EU objective in its own right, the Treaty of Amsterdam develops this objective further and reinforces the basis for taking measures in favour of consumers. Art.153 [129a] sets out EU objectives in terms of protection of health, safety and economic interests of the consumers and promotion of their right to information, education, and to organise themselves in order to safeguard their interests. It also obliges the EU institutions to take consumer requirements into account in the definition and implementation of other EU policies and activities. The Treaty does not set out in detail the priorities for action and the measures to be taken, thus leaving to the Commission the task of translating those provision into practice.

[29] T. Bourgoignie *Foundations, features and instruments of EU Consumer Law and Policy*, Acts of the conference held in Louvain La Neuve, 3-12 July 1996, 17. On the other hand, H, Micklitz and S. Weatherill ('Consumer policy in the European Community: before and after Maastricht' (1993) JCP 300) foresee problems in drawing a demarcation between art.129a(2) and art.100a as basis for adoption of legislation. "It may be difficult-they say-to determine when a legislative initiative touching on consumer protection is properly viewed as a contribution to internal market policy or a contribution to the objectives indicated in art.129a(2). Not infrequently, measures will perform both functions. However, the distinction will be important in law because

economic advantages of integration". Hints of this new conception can be found in the Preamble of the Directive on Unfair Terms:

> Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than in their own, govern contracts for the sale of goods or services;
>
> Whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;

The development of cross border shopping, mentioned *inter alia* in the Recital of the Directive on Consumer Guarantees, remains nowadays a firm concern of the Community legislator where it affirms "I want consumers to be as confident when shopping across borders as they are at home (...)" [30].

c) Internal market and consumer protection

The *Cassis de Dijon* ruling had a landmark influence on the understanding of the relationship between national consumer protection measures in Europe and the goal of ensuring the free flow of trade and factors of production.

In this respect, various options were available[31]. At one extreme, the Community may have decided that the existence of strong consumer protection at the national level and substantial diversity between national approaches to consumer protection posed no problems for open borders. On the other hand, the European Community may have felt that diverse national consumer laws substantially inhibited intra-European economic activity and that diversity in consumer protection law posed a serious threat to efficient allocation of resources within Europe. In the latter case, implementation of the open

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although art.100a and 129a(2) employ the same legislative procedure, they differ in flexibility accorded to the Member States wishing to introduce more stringent measures in the field covered by the Directive".

[30] See Speech 02/461 of David Byrne, European Commissioner for Health and Consumer Protection: 'The Single Market delivering the promise' Annual Assembly of Consumer Associations Brussels, 8 October 2002. On the active consumer, see also M. Tenreiro, 'Guarantees and after-sales service: brief analysis of the Green Paper presented by the European Commission' (1995) CLJ 81 (Tenreiro is Administrator in the Consumer Policy Service-D.G. XXIV of the European Commission and has participated in the drafting of the Directive on Unfair Contract Terms). He explains the notion of active consumer in the following terms: "The principles of free movement no longer apply only to goods, capital and labour, but also to persons unconnected with the production process and even to those for whom the results of the process are intended. The abolition of physical inspections at the borders, the new systems applying to VAT, the right of residence irrespective of having an occupation or employment, the very concept of "European citizenship", are all factors which prove that it is no longer a matter of implementing or ensuring the free movement of products, capital and labour but of accomplishing a global economy and society in which every citizen must be able to develop as an "agent of the economy" (agent économique) and as an individual, beyond and in spite of national borders. As a consumer, the European citizen participates fully in this global economy. Through the multiplicity of the goods and services he uses, the consumer influences innumerable production processes and has a greater determining effect on the directions to be given to the economic system than he does as an active participant (worker) in a particular, limited, economic sector. Hence the increasing importance of the concept of the "active" consumer".

[31] see T. Bourgoignie D. Trubek *Consumer Law, Common Market and Federalism* op. cit.n.4, 104 ff.

borders policy would have required that the Community played an active role in consumer protection.

Cassis de Dijon explicitly states that the diverse national consumer laws can actually act as a brake on the free flow of goods. However, the absence of Community harmonisation in a specific field would allow Member States to take or maintain reasonable measures to prevent unfair trade practices. The consequence is that

> ...upholding the national law...amounts to a recognition that the State maintains certain powers and responsibilities which are not overridden by the process of market integration. Market fragmentation persists. In such circumstances the limits of negative laws are reached, which implies a need to shift the emphasis towards positive law. Traditionally, this would take the shape of Community legislative action in the field to establish free trade on common rules throughout the Community while ensuring that an appropriate level of protection is also secured[32].

The ECJ opts and pleads in favour of positive integration in the field of consumer protection as a remedy to the diversity of national measures: positive harmonisation is needed in cases where national rules act as an obstacle - a lawful obstacle- to trade.

Accordingly, it has been often underlined that most of the legislation affecting consumers has been adopted after this seminal judgement was given[33]; the Commission themselves have recently[34] re-affirmed that the development of consumer policy at EU level has been the "essential corollary of the progressive establishment of the internal market".

The Directive on Unfair terms must also be placed against this background: adopted, like most consumer protection Directives[35], on the legal basis of art.95 [100a], it is still fully part of the programme of achievement of the internal market: by

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[32] H. Micklitz S. Weatherill, 'Consumer policy in the European Community: before and after Maastricht' (1993) JCP 289.

[33] However, even before the *Cassis* judgement was given, similar ideas can be found in the first proposal for a Directive on Product Liability, where it stated that '...approximation of laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergencies may distort competition and affect the movement of goods within the Common Market and entail a different degree of protection of the consumer against damage caused by a defective product to his health or property; (...) Protection of the consumer requires that all the producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective...'

[34] Communication from the Commission to the European Parliament, the Economic and Social Committee and the Committee of the Regions. Consumer Policy Strategy 2002-2006 COM(2002) 208 final.

[35] See e.g. Directive 94/47 on time share property, Directive 97/7 on distance contracts and Directive 99/44 on consumer sales and guarantees.

safeguarding consumers' rights the Directive can help to open up the internal market for both the consumers and the traders.

From the consumers' point of view, the Directive would serve to encourage consumers to take advantage of the internal market by cross-border shopping:

"it cannot be assumed that consumers who cross frontiers to buy goods or services, or to invest or acquire property in other Member States, have understood and agreed the terms of a contract they have made, if they do not speak the local law, especially if it is complex (...). Unless there is some assurance that they will not be seriously disadvantaged by unfair contracts, consumers will lack the confidence to use the new possibilities opened up by the completion of the internal market, for example the opportunity to buy goods and services at more favourable prices in other Member States than their country of residence"[36].

From the traders' point of view, the Directive would contribute to decreasing the doubts, difficulties and above all the disparities between them when selling goods or providing services in another State from their own, as also explained in Recital 7 of the Directive.

The policy of removing obstacles to trade within the internal market is strictly related to the broader objective of enhancing competition within the single market: removal of the deterrent of variations in law to the free circulation of goods and services would enhance competition between products. This will then be echoed in the Unfair Terms Directive where it states that "national markets for the sale of goods and services to consumers differ from each other and (...) distortions of competition may arise amongst the seller and suppliers, notably when they sell and supply in other Member States".

4. EC Consumer policy and the arguments for a Directive on Unfair Terms.

The arguments so far presented represent the "orthodox" view of the relationship between consumer law and internal market. It is submitted, however, that the idea that internal market necessarily requires harmonisation of consumer law is in several respects questionable.

a) General remarks

In the first place, it is not clear why "consumer Directives", including the one on Unfair Terms, only apply to consumers: most of the argument on internal market which are applied to contracts with consumers may well equally apply, *mutatis*

mutandis, to contracts between small traders and suppliers: in the field of unfair terms, for example, it is more likely that distortions of competition occur at the level of small traders rather than at consumers' level: a small trader will probably pay some attention to the terms of the contract he is about to sign, and accordingly the level and type of protection ensured in a certain country may affect his choice of the contracting party; a consumer, on the other hand, is likely to be completely unaware of the different market conditions existing in the various States and his choices would be in this respect somehow "accidental" or merely "price-driven"[37].

Second, the constant use of the minimum harmonisation formula, even though acceptable at political level, jeopardises the achievement of the whole objective of internal market: the market fragmentation targeted by the harmonising measures would still be permitted, as States may make different choices as to what level of protection they want to ensure. The "minimum harmonisation formula" may certainly be detrimental to, if not in conflict with, market integration to the extent that it does not prevent Member States from adopting or maintaining more restrictive provisions if those are more favourable to the consumers[38].

Additionally, a trader wishing to offer his goods or services in other Member States would still be obliged to research the legislation in force in each State, thus transaction costs would persist.

The relationship between market integration and consumer protection in the Community framework could therefore be summarised in the following stages:

1) Partial negative integration

Deregulation does not occur in cases where the ECJ identifies a need to protect consumers. In those instances, domestic regulation stands and market fragmentation persists;

2) Re-regulation and positive integration

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[36] Explanatory Memorandum to the 1990 Proposal, COM(90) 322 Final, 2; see also Recital 6 of the Directive.
[37] See also G. Astone 'Commento all'art.1469bis, secondo comma' in G. Alpa S. Patti (ed.) *Le clausole vessatorie nei contratti con i consumatori* Giuffré, Milano, 1997, 102.
[38] Several examples of this approach to technical harmonisation can be found: Directive 84/450 on misleading advertising allows Member States to maintain or introduce stricter provisions; Directive 85/557 on doorstep selling is defined as a measure of minimum harmonisation; Directive 87/102 incorporates this formula in the field of consumer credit; Directives 90/314 and 93/13 adopt the same model in the fields of package travel and unfair terms; Directive 97/7 on distance contracts allows Member States to adopt more stringent provisions, such as "a ban, in the general interest, on the marketing of certain goods and services...by means of distance contracts" and finally Directive 99/44 on the Sale of Consumer Goods and Associated Guarantees includes the possibility for the Member States to adopt or maintain more stringent provisions to ensure a higher level of consumer protection.

EC law is issued in order to achieve harmonisation in the field where market fragmentation persists by setting common rules and standards;

3) Adoption of the minimum harmonisation formula in re-regulating the market

Because of the minimal character of EC legislation, Member States are allowed to maintain their own regulations. In those cases, market fragmentation would once again persist.

Theoretically, it is possible to imagine cases where the market would not be subject to any variation from stage 1 to stage 3: a domestic measure restrictive of trade would be entitled to stand on the basis of *Cassis'* mandatory requirements first; on the basis of the minimum harmonisation formula once positive integration has occurred. In practice, however, the ECJ attitude to admitting exceptions based on the mandatory requirements has been quite restrictive; justification under the minimum harmonisation formula, on the other hand, would probably enhance remarkably the chances of a domestic measure to be upheld: rather than being simply tolerated, the measure would be fully legitimised under the provisions of a related "minimal" Directive[39].

b) Domestic laws of obligations[40] and procedure as an obstacle to trade.

More radical criticism may be made when one looks at the fundamental assumptions on which EC consumer policy is based.

The interpretation of the Cassis ruling so far discussed is based on the idea that any rule of consumer protection can potentially be an obstacle to trade. On the other hand, this view does not take into account the different nature of the rules which can be grouped under the wide umbrella of "consumer protection law": those can be

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[39] See case 328/87 *Buet v. Ministère Public* [1989] ECR 1235. Recent communications from DG XXIV, however, show some awareness of the problem: in its recent speech 02/461 (op.cit. n.31), Commissioner Byrne admits that "the history of EU consumer protection measures is largely one of minimum harmonisation. The Member States wanted to retain discretion to add national provisions to those laid down by EU law. However, the downside of this approach has been to dilute the harmonising benefits of EU legislation and also to provide a backdoor means by which internal barriers can be created not only in relation to business, but also to consumers".
One example of this may be the operation of the Consumer Credit Directive. Adopted under art.94 (100), it aimed at reducing discrepancies between Member States' laws in consumer credit. Art.15 provided that the Directive should not preclude Member States from retaining or adopting more stringent provisions. Member States took advantage of the provisions to a considerable extent, with the result that the Directive had only a modest impact on the original objective of harmonisation (see Commission Report COM(95) 117 Final) and the Commission is currently considering reform.
In measures which are only partially or indirectly aimed at consumer protection, more stringent domestic measures to the detriment of harmonisation are allowed less frequently, see e.g. C-233/94 *Germany v. Parliament and Council (Re Deposit Guarantees)* [1997] 3CMLR 1379.

[40] Laws of contract, tort and restitution can be referred to as "law of obligations". The word, of civil law origin, has started being commonly used in England, see for example J. Cooke D.W. Oughton *The Common Law of Obligations* (London: Butterwhorths, 2000); G. Samuel, *The Law of Obligations and Legal Remedies* (London: Cavendish, 2000).

"technical" rules concerning the product in itself, i.e. its composition, packaging, presentation, such as the ones at issue in *Cassis* and in several other *Cassis*-derived cases; but they may also be domestic rules contract or tort law that relate to the consumer in a broad sense (i.e. the "consumer" narrowly understood, but also to "the weak party", "the customer", "the injured party", the "*aderente*"), such as, for example, "laws of the Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand"[41].

In *Keck*[42], the ECJ drew the well know distinction between rules relating to products themselves and selling arrangements, on grounds that the latter do not "hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgement...provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States".

The judgement was accompanied by a widespread critical reaction by academia[43], advocating a less formalist test rather based on whether "measures introduced (...) in a Member State (...) apply equally in law and in fact to all goods or services without reference to origin and (...) impose no direct or substantial hindrance to the access of imported goods or services to the market of that Member State"[44]. This has slowly triggered a shift in the Court's attitude towards a less formalistic approach which takes into due account not only the discriminatory nature of a certain measure, but whether there is a "substantial hindrance" to market access for foreign producers[45].

How would this reasoning apply to the relationship between art. 28 and domestic contract law rules?

Alsthom Atlantique[46] is a case that involved exemption clauses. Sulzer, involved in a claim for latent defects in two vessel engines provided to Alsthom, was, according to French law, unable to rely on a clause that exempted its liability. This was because a

[41] Directive 93/13, recital 2.
[42] C-267 and 268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097.
[43] See, for example N. Nic Shuibhne 'The Free Movement of Goods and art.28 EC: an Evolving framework' (2002) ELR 408; C. Barnard ' Fitting the remaining pieces into the goods and persons jigsaw' (2001) 26 ELR 35; P. Oliver 'Some further reflections on the scope of articles 28-30 (ex 30-36) EC (1999) 36 CMLRev 783; S. Weatherill 'After *Keck:* some thought on how to clarify the clarification (1996) CMLRev 885.
[44] Weatherill 'After *Keck:* some thought on how to clarify the clarification' op. cit. n.44, 896-897.
[45] See C-405/98 *Konsumentombudsman (KO) v. Gourmet International Products AB (GIP)* [2001] ECR I-1795.
[46] C-339/89 *Alsthom Atlantique SA v. Compagnie de Construction Mécanique Sulzer SA* [1991] ECR I-107.

peculiar but consolidated case-law of the Court de Cassation interpreted the relevant provisions of the French Code Civil so as to allow clauses limiting liability only where the parties to the contract were engaged in the same specialised field (which was not the case). Sulzer therefore claimed that such case law distorted competition and hindered, contrary to art.34, the free movement of goods by putting French undertakings at disadvantage compared to the foreign competitors who were not subject to such stringent liability. The Court held that art.34 applied to restrictions on intra-Community trade which placed the export trade at disadvantage for the benefit of domestic trade. Accordingly, the fact that all traders subject to French law were at disadvantage, without there being any advantage for domestic production, did not trigger the application of art.34. In addition, parties to an international contract of sale are generally free to determine the law applicable to their contractual relations and can thus avoid being subject to French law[47].

Leaving aside the issue of choice of law, the case gives rise to further legal issues: would it be possible, for example, to claim that French law constitutes an obstacle to trade pursuant to art.28 [30] if a foreign trader claimed that his access to the French market is restricted by the fear of being subject to the French rules of liability?

Although the question cannot be found in the terms proposed in the ECJ case-law, cases such as *Krantz GmbH v. Ontvanger der Directe Belastingen and Netherlands*[48] provide some enlightenment. The case concerned non-discriminatory domestic tax legislation allowing tax authorities to seize goods in possession of a taxpayer even when those are actually property of a supplier in another Member State: Krantz' allegation was that such rules could prevent traders from selling goods to purchaser established in other Member States. Both the Advocate General and the Court pointed out that the rules at issue were indistinctly applicable to domestic and imported goods and, in addition, "the possibility that nationals of other Member States would hesitate to sells goods (...) to purchasers in the member State concerned because such goods would be liable to seizure by the collector of taxes if the purchaser failed to discharge their Dutch tax debts is too uncertain and indirect to warrant the

[47] Sulzer's claim was also based on an alleged breach of art.81 [85] by the French State that, with their law, distorted competition among traders. The argument was rejected by the Court by pointing out that art.81 [85] and 82 [86] of the Treaty concern the conduct of undertakings and not measures adopted by the authorities of the Member States, unless the latter were adopting or maintaining in force measures which could deprive art.81 [85] and 82 [86] of their effectiveness (e.g. if national case-law was in favour of the adoption of agreements contrary to art.81 [85]).
[48] [1992] 2 CMLR 677.

conclusion that a national provision authorising such seizure is liable to hinder trade between Member States"[49].

The criterion introduced by such judgement had been briefly mentioned in a previous case[50] concerning the question of whether a duty of information in German contract law could be an obstacle to trade under art.28 [30], but the case was then decided mainly on other grounds. However, a number of cases, not limited to free movement of goods[51], echo the reasoning in Krantz. This was further elaborated by the Court in *BASF AG v. Präsident des Deutschen Patentamts*[52] by emphasising the importance of predictability of repercussions on intra-community trade of a certain domestic rule (in the specific case, the rules that an application for a European patent in Germany would be void if not translated into German). In other words, in deciding whether a domestic rule potentially capable of dividing the market can fall foul of art.28 [30], account must be taken of "the actual unforeseeable decisions taken by each operator concerned in the light of the economic conditions existing on the various markets". Such choices will depend on an overall assessment of the advantages and drawbacks of each option, which includes complex economic evaluations of the commercial interests.

The Court did not mention Keck or any of its cognate cases but appeared to introduce a sort of *de minimis* rule according to which a remote possibility that a rules acts as a hindrance to trade is not sufficient to trigger the application of art.28 [30]. Interestingly, the concept is comparable to the "substantial restriction" principle laid down by Jacobs AG in his well-known opinion in *Leclerc Siplec*[53], particularly where he emphasises the need to consider the direct or indirect, immediate or remote, or purely speculative and uncertain effect of a certain measure.

Both routes take us to the same result: that national laws of obligation (and procedure) are unlikely to be successfully considered as a serious threat to market integration. The legitimacy of an EC action in the field, on the other hand, seems to be

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[49] *ibidem,* at 687.

[50] C-93/92 *CMC Motorradcenter v. Pevin Baskiciogullari* [1993] ECR I-5009. The question was whether the obligation under German law to communicate to the other party of a contract facts which may determine its decision to make the contract was a MEQR within the meaning of art.28 [30]. The ECJ held that it was the behaviour of the parties to that particular case that obstructed the free movement of goods, thus avoiding to give a ruling on the matter.

[51] See, for example, C-412/97 *Ed Srl v. Italo Fenocchio* [1999] ECR I-3845; in relation to free movement of workers C- 190/98 *Volker Graf v. Filzmoser Maschinenbau GmbH.* [2000] ECR I-493.

[52] C-258/99 [2001] ECR I-3643.

[53] C-412/93 *Societe d'Importation Edouard Leclerc-Siplec v TF1 Publicite SA and M6 Publicite SA.* [1995] ECR I-179, para.45

based on the "blanket" assumption that the above domestic rules may create throughout Europe different sale conditions that have a substantial impact on trade[54].

In addition, from the point of view of consumers and consumers' choice, it is still to be demonstrated that different contract or tort rules in different States would make certain products less competitive: reinforcement of competition does not necessarily point towards uniformity of law. Regulatory competition can assist both price and product competition, and if a consumer is seeking to buy a certain good, difference in contract regulation in his home country and another member States where he may wish to purchase the good may provide a greater choice: for example, different domestic rules on warranty, combined with different prices, may influence his decision to buy the product in one or another country[55]. And ultimately, there would be no reason for a consumer to be "active" and shop across borders if products and related sale conditions were the same throughout Europe.

An important conclusion can be inferred from such a contradictory background: that "the shakiness of the factual assumptions and reasoning behind the EC focus on consumer contracts both alerts us to the possibility of an expansion of the province of EC contract law, and leads us to look for more contingent political explanations of the scope of the Directive. Such explanations may take the form that a consumerist movement has percolated into the organs of the EC, particularly the Commission, so that whilst the professed objectives of this regulation are couched in terms of improving the competitiveness of the single market and expanding consumer choice,

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[54] The attitude of the ECJ, however, seems to change radically in areas where measures of harmonisation are already in place. In three judgments delivered on 25/4/2002 (C-52/00 *Commission v. France,* C-183/00 *Gonzales Sanchez v. Medicina Asturiana SA*, C-154/00 *Commission v. Greece,* all available at www.curia.eu.int) the ECJ tackled the issue of the relationship between Directive 85/374 on liability for defective products and the French, Spanish and Greek implementing measures. In all cases, the issue was that national pre-existing or implementing measures ensured a higher level of consumer protection than the one granted by the Directive. Unlike Directive 93/13, Directive 85/374 is based on art.94 [100] and, unlike Directive 93/13, it contains no general provisions expressly authorising Member States to adopt more stringent provisions to ensure a higher level of consumer protection (even though it contains specific possibilities of derogation in certain matters). Accordingly, the Court ruled without any hesitation that no possibility existed for Member States to establish or maintain provisions departing from Community harmonising measures: the aim pursued by the Directive was a total, not a minimal harmonisation in the field of product liability, irrespective of whether the effect was to decrease the level of protection ensured by domestic laws. Advocate General pointed out that "the Directive aims at creating a regime of strict liability for defective products in order to eliminate obstacle to the unity of the internal market that can derive from the co-existence of different national regimes, with different contents. In addition, a uniform regime should be able to avoid distortions of competition due to the disparity of national laws."
It is self evident, on the one hand, that there is no point in introducing measures of total harmonisation if their provisions can then be frustrated by Member States' independent action; on the other hand, according to the case law above examined, it is not clear in what respect different rules on product liability can act as an obstacle to trade or a distortion of competition.

[55] H. Collins 'Good faith in European Contract Law' (1994) OJLS 232.

the real agenda for many participants has been consumer protection as an end in itself" [56]. In other words, harmonisation of consumer contracts is not necessarily functional to other Community targets. But beyond this, Community policy appears pervaded by the feeling that a degree of harmonisation of the law of obligations is a necessary and inevitable part of the irreversible process of integration started many decades ago. Uniform market condition would certainly bring down the psychological, if not practical, barriers that prevent the creation of a truly common market and ultimately of a common feeling of European citizenship.

5. Adoption of the Directive

The culmination of the many years' work in the Commission is to be found in the first proposal for a Directive on Unfair Terms in Consumer Contracts submitted by the Commission on 24 July 1990[57]. In October 1991 the Parliament did the first reading of the Commission's proposal, after which the Commission submitted an amended proposal. This was adopted by the Commission on 4th March 1992[58] and was a complete reformulation of the original text: on this completely re-formulated basis discussions in the Council started again.

Four months later, on 29 June 1992, the Council adopted an agreement in principle on a common position: it was during this period that the amended proposal of the Commission was transformed in the text finally approved on 5 April 1993. The final text of the Directive takes up without major modifications the text adopted in June 1992 as the Council did not place heavy emphasis on the opinion of the Parliament on second reading nor on the re-examined proposal of the Commission[59].

The Directive as it is today may be subject to future amendments: art.9 provides that after no more than five years from the deadline for the implementation of the Directive the Commission shall present a report to the Parliament and the Council. Accordingly, in 1999 the Commission invited lawyers, representatives from the Member States, of consumer organisations and of the industry to a conference where the need for changes in the Directive was discussed. From these discussions the Commission drew suggestions and conclusions for its report, which has been published

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[56] *ibidem,* 237.
[57] Proposal for a Council Directive on Unfair Terms in Consumer Contracts COM/90/322Final.
[58] Amended proposal for a Council Directive on Unfair Terms in Consumer Contracts COM/92/66Final OJ C73, 1992
[59] M. Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems' (1995) ERPL 273-274.

on 27.4.2000[60] and not only gives a useful overview on the problems met by the Member States in the implementation of the Directive but also puts forward a few proposals for amendment. In addition, the Commission has created a database accessible via Internet (CLAB)[61] which collects all the existing case law in the Member States concerning unfair terms and is continuously updated. The aims pursued by this project are two: first, the Commission wanted to create a tool for the systematic monitoring of practical enforcement of the Directive in the Member States, with a view also to preparing its report; second, it wanted to provide this information to the public with a view to promoting the harmonious and consistent enforcement of the Directive in the Member States.

In brief, the Directive applies to all terms contained in contracts with consumers which have not been individually negotiated and introduces a requirement of fairness against which such terms are to be tested. The requirement is based on two main criteria, that the term is not "contrary to the requirement of good faith" and that it does not cause "a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (art.3). Unfairness must be assessed in relation to the time of conclusion of the contract and to all circumstances surrounding the conclusion, including the nature of the goods or services provided. Terms relating to the definition of the main subject matter of the contract or the adequacy of the price or remuneration are excluded from control as long as they are in plain intelligible language.

Due to the concern that the notion of unfairness expressed by general clauses would lack sufficient accuracy and precision to be applied in a uniform way throughout the Member States, an annex was attached to the Directive providing an "indicative and non-exhaustive list" of unfair terms[62].

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[60] Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(2000) 248 Final .

[61] CLAB can be viewed at: europa.eu.int/clab/index.htm

[62] The Annex contains a list of seventeen clauses which may be regarded as unfair. Roughly, those clauses can be classified according to the following four criteria (see R. Brownsword G. Howells T. Wilhelmsson 'The EC Unfair Contract Terms Directive and Welfarism' in *Welfarism in Contract Law* Dartmouth: Aldershot, 1994, 275-284):

1) terms giving a party the control on the terms of the contract or the performance of the contract (e.g. point j of the Annex, terms which enable the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; see also points i, k, l, m, p);

2) terms determining the duration of the contract (e.g. point g, terms enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice; see also point h);

The Directive additionally introduces a general transparency requirement by imposing that terms offered to consumers are expressed in plain intelligible language. Where terms are subject to different interpretations, the one which is most favourable to the consumer must prevail.

At the level of enforcement, the Directive provides that terms which do not comply with the requirement of fairness will not be enforceable against the consumer. In combination with this sanction, the Directive requires Member States to introduce "adequate and effective means" to prevent the use of unfair terms. For this purpose, Member States must ensure that persons or organisations having a legitimate interest according to national law to protect consumers can take action in national courts or administrative bodies for a decisions that contract terms drawn or recommended by sellers, suppliers or their associations are unfair.

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3) terms restraining a party to have the same rights as the other (e.g. point c, terms making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone, see also points d, f, o);
4) exemption and limitations clauses (e.g. point a, terms excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier, see also points b, e, n, q).

Chapter 4. Directive 93/13 and its implementation in England and Italy: Scope and rationale of unfair terms control.

1. Introduction.

The present chapter, on the model of chapter one, looks at the scope and rationale of the Directive and provides a general description of its implementing measures in Italy and in the UK.

After a brief analysis of the difficulties involved in implementation, the chapter investigates the types of contracts and the type of terms to which control applies and examines the more problematic aspects of implementation, such as the definition of the "subject matter" of the contract and application to public services. This analysis will reveal that, in most cases, such matters are not only differently defined and dealt with by domestic laws; they often raise confusion and uncertainty within each individual Member State.

2. Implementation of Directive 93/13 in United Kingdom[1] and in Italy. General overview.

The UK Government chose to implement the Directive by making separate regulations, the Unfair Contract Terms Regulation 1994[2], later replaced by the Unfair Contract Terms Regulations 1999[3] (hereinafter 'UTCCR'), and leaving in place all of the pre-existing controls on contract terms.

The choice to create two separate statutory regimes for unfair terms, rather than to amend the 1977 Act, was justified by the Government on grounds that 'the test of fairness in the Directive has similarities to the test of reasonableness to which a majority of the terms within the scope of the Act are subject. The existence of this similarity should reduce any problems arising from the overlap between the two measures'[4].

Similarity between the two tests would sound like a good reason to merge them into one, rather than to keep them separate. The words of DTI, in charge of drafting the

[1] It must be noted that, although UCTA contained separate provisions for England (together with Wales and Northern Ireland) and Scotland, the Government has decided that the Regulations (both the 1994 and the 1999 edition) apply to the UK as a whole. It is therefore correct to speak about 'implementation in the UK'.
[2] SI 1994, N.3159
[3] SI 1999, N.2083
[4] DTI, *Implementation of the EC Directive on unfair terms in Consumer contracts (93/13/EEC). A Consultation document* DTI, London, 1993, 1.

implementing measure, actually reveal different reasons for a cautious approach to implementation: 'Community legislation derives from a number of jurisdictions which have very different legal systems, and embodies linguistic and legal concepts which are not always easy to translate into UK law. The Department considered implementing Regulations which would clarify the Directive or align certain concepts more closely with those familiar to UK lawyers. However, having regard to the case-law of the European Court, the Department has concluded that to attempt this would be unlikely to be helpful'[5].

These words reflect the Government's anxiety that any attempts at implementing differently the Directive and at substantially co-ordinate it with the previous law would open the UK to an action for infringement, especially having considered the lack of time[6] and the complex issues that surrounded the process of implementation[7].

Nevertheless, some provisions of the 1994 Regulations appeared not to be in perfect conformity with the Directive. In response to legal proceedings brought by the Consumers' Association for judicial review of the Regulations[8], and in order to ensure faithful transposition of the Directive, the Government adopted the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), which repealed the 1994 Regulations. The main innovation of the 1999 Regulations is to include consumers associations among the entities which, with the DGTF, are entitled to bring preventive actions against traders who use or recommend unfair terms. Other changes include: 1) amending the definition of 'seller' and 'supplier' so as to extend the scope of the Regulations to contracts which are not sale or supply of goods[9]; 2) eliminating Schedules 1 and 2[10] to the 1994 Regulations which 'embody material coming from the

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[5] DTI, *The Unfair Terms in Consumer Contracts Regulation 1994. Guidance Notes* DTI, London, 1995, para.2.3.

[6] The UK failed to implement the Directive by the stipulated deadline. This has been, however, a widespread feature of the transposition of Directive 93/13: the Commission actually planned infringement procedures against several Member States that failed to meet the deadline of 31 Dicember 1994 (Denmark, UK, Spain, Italy, Luxembourg and Portugal). Denmark, France and Ireland notified the transposition measures with a few weeks' or days' delay.

[7] H. Collins 'Le clausole vessatorie nel Regno Unito' Riv. Trim. Dir. Proc. Civ. 1997, 455.

[8] Case C-82/96 Reference for a preliminary ruling by the High Court of Justice, Queen's Bench Division, by order of that court of 28 February 1996, in the case of T*he Queen against Secretary of State for Trade and Industry, ex parte Consumers' Association and Which (?) Ltd.* OJ C 145, 18/05/1996 p. 3. Following the enactment of the new Regulations the action was abandoned.

[9] DTI had understood that the Directive 'can apply only to contracts for sale of goods or services' and had therefore drafted the 1994 Regulations accordingly: DTI *Implementation of the EC Directive on unfair terms in Consumer contracts (93/13/EEC). A Consultation document* op. cit.n.4, 4.

[10] Schedule 1 contained a list of contracts and particular terms excluded from the scope of the Regulations; Schedule 2 a list of factors to be taken into account in making the assessment of good faith.

recitals to the Directive, not its main text'[11] (the practical impact of the amendment, however, is minimal since, as OFT acknowledged, 'regard must still be made to the Recitals in interpreting the 1999 Regulations'[12]); 3) make the *contra proferentem* rule inapplicable to proceedings brought for an injunction.

The Government recently admitted that the dual regime of the 1977 Act and the 1999 Regulations has become most intricate and incomprehensible and is therefore considering 'the feasibility of a single, unified regime to replace UCTA and UTCCR'[13], which should not however involve any significant increase in the extent of controls over terms in consumer contracts nor any significant reduction in consumer protection. The changes proposed by the new regime will be duly taken into account in the course of this work.

The measure implementing Directive 93/13 in Italy, Legge 6 February 1996 n.52, inserted at the end of Title II (Book IV) of the Civil Code five articles, from art.1469-bis to art.1469-sexies.

Implementation of Community law into the Italian legal system is usually made through delegated legislation, the so-called 'Decreto Legge', which is free standing in the sense that it is independent and separate from the legislation contained in the codes. This type of legislation is adopted through a faster procedure than the one required for Leggi (acts of Parliament) and is expressly recognised as a tool of implementation by the so-called 'Legge La Pergola' of 1989[14] which lays down general provisions about fulfilment of Community obligations[15]. It the case of Directive 93/13, however, the implementation was made through an amendment to the Civil Code and therefore required the adoption of a Legge, a hierarchically higher form of legislation than a Decreto legge.

The first draft implementing measure, elaborated by a commission of experts ('Commissione Contri')[16] was a valuable attempt at combining European terminology

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[11] OFT *Unfair Contract Terms Bulletin* n.8 (London: OFT, December 1999) 3. Interestingly, DTI previously emphasised that 'recent case-law of the European has confirmed the importance of the recitals or 'whereas' clauses of a Directive in interpreting the articles of the text' The Unfair Terms in Consumer Contract Regulations 1994 –Guidance notes- op. cit. n.5,1

[12] Unfair Contract Terms Bulletin n.8, op. cit. n.11, 3.

[13] The Law Commission and the Scottish Law Commission *Unfair Terms in Contracts. A consultation paper* London, TSO, 2002, 2.

[14] L. 9 marzo 1989, n. 86.

[15] For a survey on the implementation of Directives in Italy see s. Cotterli, P. Martinello, 'Implementation of EEC Consumer Protection Directives in Italy' (1994) JCP 63-82.

[16] An account of the work carried out by the Contri Commission can be found in F. Contri 'Presentazione della proposta ministeriale di attuazione della direttiva comunitaria' in M. Bianca G.Alpa (ed.) *Le clausole abusive nei contratti con i consumatori* Cedam, Padova, 1996, 297-303.

and concepts with the terminology and concepts of the Code: unfortunately, the expiry of the deadline for implementation and changes in the political situation increased the pressure for adoption and did not allow a careful consideration of the Contri document. This was deeply re-formulated in a state of confusion originated by the fact that discussions were still going on concerning whether a separate piece of legislation, in the usual form of a *decreto-legge*, would not be a better solution.

In the end, debate in the two Camere (Houses) of the Parliament led to the insertion, by means of art. 25 of law n. 52 of 6/2/1996, of Chapter XIV-bis ('Dei contratti del consumatore', contracts with consumers) in Title II ('Dei contratti in generale', contracts in general) of Book IV ('Le obbligazioni', obligations) of the Code, just after art.1469 ('Eccessiva onerosità sopravvenuta', undue hardship) of Chapter XIV ('Risoluzione del contratto', termination of contract).

The choice of inserting the new provisions in the Code rather than adopting a *decreto-legge* can be explained by the wish to maintain the primacy of the Code as focal point and primary instrument of the contract law system over the increasing amount of free standing legislation, and, at the same time, by the desire to highlight the innovative importance of the Directive within the Italian law of contract; at the same time, the choice of Title II (contracts in general) for the insertion of the new law emphasises its nature as a law of general application in contract law:

> 'the Directive introduces *general principles* which are applicable to an indefinite number of adhesion contracts for the simple fact that those are made between the consumer and the professional'[17].

Nevertheless, the text finally adopted does not appear to make any attempts to adapt the new law to the framework of the law of contract, but merely reproduces the text of the directive, thus appearing very much as a free-standing piece of legislation 'inside the tortured body of our old civil Code(...)'.[18]

The Italian implementation was subject to an infringement procedure, at the end of which Italy was condemned for not having included, among those against whom action can be taken, sellers, suppliers or their associations which *recommend* the use (as

[17] Presentation to the Camera dei Deputati of the 1994 bill, Camera internal paper n.1882 of 16/1/1995 in E. Cesaro 'La Direttiva CEE n.93/13 del 5/4/1993 in materia di clausole abusive. Raccolta di documenti' Riv. Dir. dell'impresa, 1995, II, 323 ff.

[18] L. Bigliazzi Geri 'Commento sub.art.1469-bis comma I' in M. Bianca F. Busnelli (ed.) *Capo XIV bis c.c.:dei contratti del consumatore* Cedam, Padova, 1999, 793.

opposed to use) of unfair terms. As yet, however, Italy has not remedied the infringement[19].

In conclusion, rush and uncertainty were bad advisors to both the Italian and the English legislator, which, like those of many other European countries[20], encountered considerable difficulties in introducing the European provisions within their legal systems.

3. Subjective limits to the scope of application of the Directive: consumers.

According to art.1, the application of the Directive is limited to contracts concluded between a seller or supplier and a consumer, further defined by art.2 as 'any natural person who....is acting for purposes which are outside his trade, business and profession'.

The formula is reproduced rather faithfully in both the Italian and the English implementation.

The notion of 'purpose' in the Directive must be understood not as referring to the inner motives of the party, but to the objective destination of the good or service acquired[21]; the scope of such notion is therefore clear in several cases, where the nature of the goods or services purchased (e.g. a kitchen or a health insurance policy) or the status of the customer (e.g. a student, a retired or a housewife) may leave small room to doubt that a transaction has destinations other than 'consumption', i.e. satisfaction of

[19] C-372/99 *Commission v. Italy* [2002] ECR I-819. The other grounds of infringement were: 1) The Italian legislator had limited the scope of application of art.1469-bis ff. to "contracts for the supply of goods or services", while the Directive targets all types of consumer contracts; 2) art.6.2 of the Directive (which prevents parties from opting for a less favourable *régime* than that of the Directive) was implemented by art.1469-quinquies so as to mean that parties cannot choose a law that deprives the consumer of the protection granted by that "article" - instead of that "chapter"; 3) art.1469-quater did not reproduce the co-ordination between art.5 and art.7.2 of the Directive, with the result that the principle of interpretation in favour of the consumer would also apply to preventive actions. Following the opening of the infringement procedure, the Italian Government agreed to amend the articles related to the above three infringements by Legge n.526 of 21/12/1999, but refused to remedy to the fourth infringement.

[20] Implementation of the Directive has triggered infringement procedures for failure to meet the prescribed deadline not only against Italy and United Kingdom, but also against Denmark, Spain, Luxembourg and Portugal. In all cases, though, transposition occurred before the ECJ had occasion to hand down a judgment. Originally, infringement procedures for incorrect implementation were mounted against all the Member States; many of those were then abandoned, but Italy and the Netherlands have recently been condemned. In this respect, see the Commission of the European Communities *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* COM(2000) 248 final, 7-8.

[21] G. Cian 'Il nuovo capo XIV-bis del codice civile, sulla disciplina dei contratti dei consumatori' Studium Juris 1996, 414; U. Ruffolo 'Le clausole "vessatorie", "abusive", "inique" e la ricodificazione negli artt.1469-bis-1469sexies c.c. in Ruffolo (ed.) *Clausole vessatorie e abusive Gli artt.1469-bis e seguenti del codice civile e i contratti del consumatore* Giuffré, Milano, 1997, 29.

family needs[22]. The formula used by the Directive, however, leaves several "grey areas": those are, for example, cases where the type of the goods or services purchased (e.g. cars, computers) or the status of the customer (e.g. a lawyer, a doctor) is not a definitive indicator of the nature of the transaction, or cases where goods or services are purchased by traders or professionals who intend to use them for both family and business purposes.

[22] F. Astone 'Commento all'art.1469-bis 2° comma' in G. Alpa S. Patti (ed.) *Le clausole vessatorie nei contratti con i consumatori* vol.I, Giuffre', Milano, 1997, 108.

a) Competence and function based approaches

The definition of consumer used in Directive 93/13 is commonly found in consumer protection Directives[23], and accordingly the ECJ has already had more than one chance to define its exact scope when requested by national courts.

In the best know decision on the issue, Di Pinto[24], the ECJ had to adjudicate upon the status of traders in respect of contracts where they agreed to advertise on a periodical published by Di Pinto the sale of their business.

The Court rejected the argument that such traders could be considered as consumers within the meaning of the Doorstep Selling Directive. The Court established a close connection between the act performed and the subjective state of the person involved: acts which are preparatory to the sale of a business are managerial acts performed for the purpose of satisfying needs other than the family or personal ones; in relation to such acts, a normal well-informed trader cannot be under the influence of surprise as he would be would aware of the value of his business.

A similar attitude was adopted by the Court in Benincasa[25] and Dietzinger[26]. In the latter case focus on the objective element of the transaction is particularly evident since a guarantee given by Mr.Dietzinger for the repayment of his father's business debt was considered as made 'in the course of his business'. Mr. Dietzinger, nevertheless, had provided the guarantee outside his business or profession: he did not run a financing company, nor did the guarantee fall in any other way within his trade or profession: the guarantee was provided *una tantum* to support his father. The Court emphasised the objective elements related to the contract itself and concluded that a contract of guarantee made by a natural person who is not acting in the course of his trade or profession does not come within the scope of the Directive where it guarantees repayment of a debt contracted by another who, for his part, is acting within the course of his trade or profession.

This type of approach restricts the area of consumer contracts to purchases which are exclusively aimed at satisfying personal needs: a consumer is only a person, who actually consumes the good or service bought, i.e. he does not use any further the

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[23] The formula was actually first used in the Brussels Convention (see also case 150/77 *Bertrand v. Paul Ott* [1978] ECR 1431) and later adopted in Community secondary legislation.

[24] C-361/89 *Criminal proceedings against Di Pinto* [1991] ECR I-1189

[25] C-269/95 *Francesco Benincasa v. Dentalikit Srl* [1997] ECR I-3767, concerning the definition of consumer in the Brussels Convention.

[26] C- 45/96 *Bayerische Hypotheken und Wechselbank AG v. Edgar Dietzinger* [1998] ECR I-1199

goods or services for the purpose of producing or distributing other goods or services[27]. Under this perspective (the so-called 'function-based approach'), the purpose of the law is not necessarily to protect the weak party as such, but to protect the weak party who satisfies family and personal needs. As to cases where goods are purchased both for professional and personal needs, there is large room for discussing whether the purpose should be exclusively that of consumption in order to consider a transaction a 'consumer contract'[28].

The function-based approach of the ECJ has in general been followed by the Italian Corte di Cassazione[29] in relation not only to the unfair terms directive but to other consumer directives[30] that adopt a similar definition of consumer.

A different approach, advocated by Mischo AG in Di Pinto[31] but rejected by the ECJ, suggests that a consumer is anyone who is in a position of technical inferiority compared to the counterpart, who, because of his/her business, is an expert in that field (the so-called 'competence-based approach'). On these grounds, one acts for purposes which are within his trade or profession only when making a contract which is an immediate and direct expression of his/her trade, where he or she has technical knowledge and competence; the fact that goods may be instrumental to the profession

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[27] G. Stella Richter 'Il tramonto di un mito: la legge uguale per tutti (dal diritto comune dei contratti al contratto dei consumatori)' Giust. Civ. 1997, II, 202.

[28] P. Rossi 'Il concetto di consumatore e l' ambito di tutela della disciplina dei contratti del consumatore' Rass.giur. energia elett. 1998, 459-460. In favour of the criterion of prevalence to be assessed on a case-by-case analysis is the Law Commission, see *Unfair Terms in Contract* Consultation Paper No116, TSO, London, 2002, par.4.155.

[29] Cass. 25/7/2001 n.10127 I Contratti 2002, 338. See also eg. Cass. 14/4/2000 n.4843 (Corr. Giur.2001, 524) in a case concerning doorstep sales.

[30] Stella Richter 'Il tramonto di un mito: la legge uguale per tutti (dal diritto comune dei contratti al contratto dei consumatori)' op. cit.n.27, 203 suggests that the notion of consumer should be interpreted in the narrowest possible sense. This solution is based on the idea that art.1469bis ff. are a *lex specialis* in relation to the general law of contract, comparable to the already existing special laws on tenancy or employment. A traditional principle of interpretation prescribes that, since a *lex specialis* is derogates from more general principles, in case of doubt its application should be limited to the narrowest range of cases and no attempt must be made at extending its scope: hence, the notion 'consumer' in art.1469bis ff. should be restricted as much as possible. This 'blanket' solution to the question fails to grasp the essence of the novelty, i.e. that 'consumer law' is simply not comparable to a 'special law', and that the choice of the legislator to insert the new law in the Code is a clear sign of the desire to put it in a central place within the framework of Italian contract law and of expresses the desire to found a new general doctrine of contract' based on the achievement of a substantial, rather than formal, equality: this entails 'duplicating' the category of 'contract' into 'consumer contracts' and 'traditional' contracts (see U. Ruffolo *Clausole "vessatorie" e "abusive"* op. cit. n.21, 28 and A. Barenghi 'Commento sub art.1469-bis' in A. Barenghi (ed.) *La nuova disciplina della clausole vessatorie nel codice civile* Jovene, Napoli, 1996, 36; see also E. Cesaro *Relazione introduttiva' Condizioni generali di contratto e direttiva CEE n.93/13 del 5 Aprile 1993*, Cedam, Padova, 1994, 13). The argument, however, was worth mentioning rather than for its intrinsic value for the insight it gives of a certain formalism on which Italian legal reasoning is based.

[31] [1990] ECR I-1189

does not exclude the status of consumer and protection should be extended to the professional whenever he is acting outside his field of competence[32].

This solution has been particularly successful in Italian lower courts[33]; English and French courts, in interpreting domestic law, have also accepted to extend protection to legal persons in a certain number of cases[34] such as the previously discussed *R&B Customs Brokers*[35]. Accordingly, in England, a sole trader buying a car in the name of the business might well deal as a consumer under the Unfair Contract Terms Act 1977[36] but would not be a consumer for the purposes of the Regulations if courts were to follow the guidelines of the ECJ.

In the UK, the only instance of judicial application of the definition of consumer in the 1994 (or 1999) Regulations does not point clearly towards any of the two directions. In *Standard Bank London Ltd. v. Dimitrios and Styliani Apostolakis* [37] the Queen's Bench Division faced the question of whether the defendants, a couple who had made substantial investments in foreign exchange transactions through the plaintiff bank, fell within the notion of consumer in the Brussels Convention as well as in the Unfair Contract Terms Regulations 1994 and 1999.

Even though the purpose of the contract with the bank was not to further produce or sell any goods or services, it could not be denied that Mr and Mrs Apostolakis had made the contract for profit. The bank sought to rely on *Benincasa v. Dentalkit*[38] where the ECJ stated that, for the purpose of identifying consumers, enquiry should focus on

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[32] See, e.g. V. Roppo 'La nuova disciplina delle clausole abusive nei contratti tra imprese e consumatori' Riv. Dir. Civ. 1993, I 283; L. Gatt 'Ambito soggettivo di applicazione della disciplina. Il consumatore ed il professionista' in Bianca-Busnelli (ed.) *Commentario al capo XIV bis del Codice Civile: dei contratti del consumatore* Cedam, Padova, 1999 150-151 and L. Gatt, 'L'ambito soggettivo di applicazione della normativa sulle clausole vessatorie (nota all'ordinanza di rimessione)'Giust. Civ. 1998, 2341-2358. This view is also inspired by the case law developed in other countries, like France and England. In particular, courts in the neighbouring France have often held that the professional acting outside his sphere of competence is a consumer, see e.g Cass. Civ.1er, 20.10.1992 JCP 1993, Jurisprudence. French courts actually tend to use the formula 'act having a direct relationship with the professional activity of the party', see J. Ghestin I. Marchessaux, 'L'evolution du droit des clauses abusives en France' in G. Alpa S.Patti (ed.) *Le Clausole vessatorie nei contratti con i consumatori* op.cit.n.22, 1997, 1352.

[33]See for example Tribunale Roma 20/10/1999 *Patané c. Soc. DHL Int.* Foro It., 2000, I, 646, concerning a professional sculptor who sued the courier company for the recovery of damages due to the loss by the company of one of his sculptures. See also Trib. Ivrea 5/10/1999 *Bellis c. Soc. CMA Sales Production* and Trib. Terni 13/7/1999 *Bianchini c. Soc. System Card* (in relation to d.lgs.50/1992, doorstep sales), both briefly reported in Foro It. Rep. 2000, Item *Contratto in genere.*

[34] See for example Cass. 6 Jan 1993, in Dalloz, 1993, c.237. It is worth mentioning that the draft elaborated by the Contri Commission actually envisaged application of the new law to family business and craftsmen on grounds that their position was comparable to that of a consumer.

[35] [1988] 1WLR 321.

[36] DTI *The Unfair Terms in Consumer Contracts Regulation 1994 -Guidance notes-* op. cit. n.5, 10.

[37] [2000] I.L.Pr. 766.

[38] C-269/95 [1997] ECR-I 3767.

whether contracts were concluded for the purposes of satisfying an individual's own need in terms of private consumption. The solution adopted by the English court is subject to two different interpretations. On the one hand, the Court appears to point towards the adoption of a competence-based approach when stating: 'it is certainly not part of a person's trade as a civil engineer or as a lawyer to enter into foreign exchange contracts. The only question is whether Mr. and Mrs. Apostolakis were engaging in the trade of foreign exchange contracts as such. I do not consider that they were'. This statement clearly opens the way to considerations on the fact that the contract was not 'one of the profession'. On the other hand, the judgment seeks to re-interpret the *Benincasa* decision, where it defines a consumer contract as one made for the purpose of satisfying the needs in terms of private consumption. This, the English court reasoned, cannot be taken as indicating that 'consuming' ought to be literally understood as 'destroying' rather than using or enjoying the relevant product. Accordingly, even though the contract made was aimed at profit-making, the court considered that merely to use the money in a way one hopes would be profitable is not enough to be engaging in trade.

The solution given by the English court is consistent with the framework of European legislation in terms of understanding 'private needs': the recent Directive on financial services[39], applicable only to consumer contracts, covers all types of financial services, including investment funds and pension and insurance plans: accordingly, it self evident that even transactions aimed at profit making can be consumer contracts.

b) Extending protection to business

The text of the Directive itself and the fact that it is formally included in the Community programme of consumer protection make it clear that protection against unfair terms is reserved to consumers only[40].

The ECJ has recently confirmed upon reference by an Italian court that "the term 'consumer', as defined in Article 2(b) of Directive 93/13 must be interpreted as

[39] Directive 2002/65/EC of the European Parliament and the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EC and Directives 97/7/EC and 98/27/EC (OJ 2002 L271/16).

[40] Certainly, the lobbying from bigger enterprises, reluctant to see themselves bound to respect the provisions of the Directive in their dealing with smaller enterprises, played a remarkable role in bringing the scope of the Directive down to the lowest possible level.

referring solely to natural persons", thus expressly excluding legal persons from any protection[41].

The choice, however, has not been easily accepted in all Member States: in Italy, where courts and lawyers are still unfamiliar with the idea of a law that applies *ad personam,* the limitation to physical persons has been perceived in terms of possible violation of the principle of equality embedded in art.3 of the Constitution.

In a case between ENEL ('Ente Nazionale Energia Elettrica') and a small company the *Giudice di pace*[42] in charge of the case made a reference to the *Corte Costituzionale* asking whether the choice to limit the scope to consumers was justifiable: if the new law was meant to apply to cases where terms are unilaterally imposed by the seller, and the buyer has no chance to discuss or change them, limiting its scope to natural persons would result: 1) in a failure to protect work in all its forms: craftsmen and small business that produce goods or services are subject to unfair terms in the same way as those who consume such goods or services; 2) in a violation of the principle of equality since a different treatment is given without a valuable constitutional reason and is therefore unreasonable[43].

The Constitutional Court did not attempt to give a response on the merits but simply rejected the reference by stating that the question was not well founded and did not sufficiently explain how the new law could possibly violate constitutional principles.[44]

Had the issue of unconstitutionality been accepted, the subjective limit of the scope of application of the new law would fall, and the only requirement for its application would be the absence of any negotiation on the contract terms. The more dramatic effects of a decision of this type, however, would be felt at the level of the relationship between national and EC law: while, in general, it can be excluded that Community law of secondary level can be subject to the domestic systems of hierarchy of rules and accordingly to the review of constitutionality, the Italian Constitutional Court has made it clear that they intend to retain the possibility to review the constitutionality of an EC measure in the case of a conflict between the latter and the fundament rights of the

[41] C-541and 542/99 *Idealservice Srl and Idealservice MN RE Sas v. OMAI Srl* [2001] ECR I-9049.
[42] Giudice di Pace is at the lowest level of judicial hierarchy and is appointed by a different procedure than an ordinary judge, the only requirement for appointment being holding a law degree, see P. Nebbia '*Judex ex machina*: the Justice of the Peace in the Tragedy of the Italian Civil Process' (1998) CJQ 164.
[43] Giudice di Pace dell'Aquila 3.11.1997 *Soc. Lido di Calsolaro c. Enel* Giust. Civ. 1998, I, 2431.
[44] Corte Cost. 30.6.1999 Foro It, 1999, 3118.

person and the fundamental principles of the constitutional order[45]. The relationship of trust and co-operation developed between the European Court of Justice and national courts, however, would suggest that domestic courts put forward their doubts on the validity of a directive before the European Court, in the form of a possible violation of the principles of the Treaty.

In *Idealservice*[46], Mischo AG noted that the system of protection introduced by the Directive is based on the idea that "the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms. The intention to protect a category of persons in a weak position, and only that category of persons, is confirmed in the twelfth recital and Article 3 of the Directive, under which only contractual terms which have not been individually negotiated are covered by the Directive (...). Legal persons and companies do not generally find themselves in that weaker position and there is therefore no reason to grant them protection which, as an exception to contractual freedom, must, moreover, be strictly interpreted."

The case-law of the ECJ itself in other areas of law, however, suggests that a presumption that businesses (at least individual businesses) are not comparable to consumers does not hold.

In the recent case of *Courage v. Crehan*[47] the ECJ decided that the full effectiveness of art.81 (85) of the Treaty requires that even an individual party to a contract that, as part of a network of similar contracts, restricts or distorts competition is entitled to claim damages for loss caused to him by the contract[48]. The possibility to claim damages is not unqualified, but account must be taken of the 'significant responsibility' of the claimant co-contractor for the breach, which will be assessed by taking into account the economic and legal context within which the parties found themselves, their respective bargaining power and the conduct of the parties. This suggests that both the bargaining position of the claimant and its conduct in negotiating the contract will be relevant to the determination of whether the claimant bears significant responsibility for the breach. In considering the relative bargaining position

[45] Corte Cost. 27/12/1973 n.183 Foro It. 1974, I, 314 and Corte Cost. 8/6/1984 n.170 in Foro It. 1984, I, 2062 with a useful comment by A. Tizzano *La Corte Costituzionale e il diritto comunitario: vent'anni dopo...*
[46] op. cit. n.41.
[47] C-453/99 [2001] ECR I-6297.

of the parties a national court should consider whether the claimant was in a markedly weaker position than the other, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him. The Court also dismissed as "formalistic" the view that being a party to an agreement automatically constitutes a wrong on grounds that one party may be too small to resist the economic pressure imposed on it by the more powerful undertaking.

Although it cannot be denied that the aim of art.81 (85) is to ensure the maintenance of a fully competitive market rather than protecting individual businesses or undertakings, by enabling the latter to recover damages the Court admitted that agreements restricting or distorting competition can harm the parties to the agreement themselves, and that such harm deserves compensation. The same Court, however, firmly rejected in *Idealservice* the proposition that a business can be entitled to any form of protection against unfair terms[49].

The question proposed by the Italian *giudice di pace* in terms of violation of art.3 of the Constitution can therefore be re-proposed, in a more European perspective, in terms of violation of the principle of equal treatment: has the Community legislator, in deciding to limit the protection of Directive 93/13 to natural persons, infringed the principle of equal treatment in cases where other categories of economic agents can be proven to be in the same situation?

To the extent that protection is limited to consumers who act outside their business or profession, there is no discrimination against legal persons since these always pursue their institutional, thus *lato sensu* professional purpose. It may be agued, however, that the limitation itself to consumers who act outside their business or profession is discriminatory, and that protection should be extended to all contracts (or, more correctly, terms) which have not been individually negotiated, independently of the *status* of the parties.

It is necessary, however, to take into account the nature of the process of harmonisation of national laws: 'An interesting issue is to what extent the principle of

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[48] See a comment in G. Monti 'Competition law. Anti competitive agreements: the innocent party's right to damages' (2002) ELRev. 284.

[49] Additionally, it is illusory to think that art.81 and 82 can provide a level of protection for business comparable to the one provided by Directive 93/13, see for example C-215-216/96 *Bagnasco and Others v.*

equality imposes limitations on the Community legislature with regard to the choice of harmonisation areas. The application of this principle in this context encounters certain fundamental obstacles. In co-ordinating national laws, partial, step-by-step, harmonisation is the preferred, indeed the only feasible, Community policy. Incremental harmonisation may lead to differences in treatment since certain legal relations may be subject to Community rules whereas other comparable relations remain subject to national laws'[50]: in other words, difficulties surrounding harmonisation may be an objective justification for a difference in treatment. Up to a certain point in the *iter* of the Directive some proposals actually envisaged a wider control: however, the 1990 Memorandum[51] and the current text of the Preamble[52] indicate that the difficulties involved in obtaining acceptance of common rules applicable to all contracts had made it necessary to limit the scope of the proposed Directive to consumer contracts. This provides sufficient evidence of the difficulty involved in maintaining such a broad scope of application.

The Italian legislator, nevertheless, chose to partially enlarge protection in favour of retailers: pursuant to art. 1469-quinquies, par.4, the retailer has the right to claim compensation from the supplier for the damages he may have suffered where terms in the retailer's contract have been declared unfair (the unspoken assumption of this badly formulated rule being, of course, that the retailer applies the standard terms imposed to him by the supplier -as in franchising contracts[53]).

Similarly, the Law Commission has indicated that, although they are willing to follow the European approach to the notion of consumer in their reform[54], they intend to extend protection, at least partially, to businesses: in a large number of past cases decided under UCTA, exemption clauses in business to business contracts on standard terms were found to be unreasonable: accordingly, in a limited number of cases, all business that deal on the other party's standard terms will enjoy the same protection as consumers.

The proposed extension of the scope of protection in England and the provision of art. 1469*quinquies* raise the question of the relationship between the European and the

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Banca Popolare di Novara soc. coop. arl and Cassa di Risparmio di Genova e Imperia SpA [1999] ECR I-135.

[50] T. Tridimas *The general principles of EC Law* (Oxford: OUP, 2000) 63.

[51] Explanatory Memorandum to the 1990 Proposal, COM(90) 322 final, 12

[52] See Recital 12: "Whereas, as they now stand, national laws allow only partial harmonisation to be envisaged".

[53] A. Di Marzio 'Clausole vessatorie nel contratto tra professionista e consumatore ' Giust. Civ., 1996, 518.

domestic notions of consumers. In particular, the question analysed in the next paragraph will be whether Member States are entitled to adopt a broader notion of consumer, based on "competence" rather than "function" and accordingly whether Member States can extend protection to legal persons.

c) A European consumer?

In the judgments on the implementation of the Directive on Liability for Defective Products[55], the ECJ was particularly severe in holding France and Greece in breach of their Community obligations for having gone too far in protecting consumers outside the scope indicated by the Directive. In those cases, the ECJ made it clear that the Directive at issue was aimed at total harmonization. Directive 93/13, on the other hand, only aims at 'partial harmonization' and, for this reason, allows Member States to afford consumers a higher level of protection: but does the argument of partial harmonization cover domestic measures which go further than the Directive in addressing also, for example, business to business contracts[56]? And, if it does not, would there be a possibility that such measures are held to be in breach of the relevant Member State's Community obligations in terms similar to the ones upon which France and Greece were condemned?

Prima facie, the solution seems to lie in the minimum harmonisation formula which, as emphasised by the ECJ, makes Directive 93/13 a "partial harmonisation" measure.

In *Di Pinto*, the Court argued that the minimum harmonisation formula contained in the Directive at issue in the case did not preclude national legislation on canvassing from extending the protection to cover traders acting with a view to the sale of their business. The potential or actual expansion of protection outside the scope of the Directive would accordingly fall under the umbrella of the minimum harmonization formula, which would provide a safe legal basis for Member States' action in the area. A similar reasoning can be found in relation to legal persons in the opinion of Mischo AG *in Idealservice*[57].

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[54] Law Commission *Unfair Terms in Contracts. A consultation paper*, op. cit.n.13, para. 5.12

[55] C-52/00 *Commission v. France* [2002] ECR I-3827; C-154/00 *Commission v. Greece* [2002] ECR I-3879. See also C-183/00 *Gonzales Sanchez v. Medicina Asturiana SA* [2002] ECR I-3901

[56] After the coming into force of the Directive Germany, the Netherlands and Portugal decided to maintain their pre-existing laws that applied to some business to business contracts.

[57] See in particular para. 19 of the judgment: "The Spanish and French Governments also refer to their national laws which, in certain circumstances, extend the protection given by the Directive to consumers, to legal

This solution is questionable. The minimum harmonisation formula allows States to adopt or maintain 'more stringent provisions' for the protection of consumers only within areas *already* covered by the Directive: but the extent to which Member States are allowed to subject contracts *other than* consumer contracts to control mechanisms cannot be determined by reference to the minimum harmonisation formula.

Once affirmed that expanding the notion of consumer does not fall under the minimum harmonisation formula, it remains to be established to what extent Member States' action can depart from Community action; viz., whether the enactment of Directive 93/13 pre-empts national legislation in the field.

The extent to which the exercise of Community powers via the adoption of acts of secondary law can determine the removal of Member States' regulatory jurisdiction is to be assessed by reference to whether Community regulation in the field is comprehensive and exhaustive[58]: the question is therefore to decide what the relevant "field" is[59].

Determining the "field" occupied by the Directive is not easy due to its ambiguous nature: being the result of as an uneasy compromise between different (and somehow incompatible) systems of protection against unfair terms already in place in several Member States[60], the Directive does not follow a clear rationale.

According to one school of thought, the reason for intervention against unfair terms lies in the use of standardised contract terms in market transactions. Although this facilitates market transactions by saving time and money, it presents the inherent danger of depriving one party of the possibility to revise the terms of the contract in detail, and thus requires some external control on the fairness of the transaction. This is the theoretical background underlying the German AGB-Gesetz, that covers all standard terms where there has been no individual negotiation

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persons or to traders. Essentially, they are calling on the Court to declare that the Directive does not preclude such extensions of protection. In fact that appears to be the situation if one considers the wording of Article 8 of the Directive".

[58] Case 222/82 *Apple and Pear Development Council* [1983] ECR 4121; Case 159/73 *Hannoversche Zucker* [1974] ECR 129. See also A. Goucha Soares 'Pre-emption, conflict of powers and subsidiarity' (1998) ELR 132; E. D. Cross 'Pre-emption of Member State law in the European Economic Community: a Framework for Analysis' (1992) 29 CMLR 447.

[59] So, for example, in case 16/83 *Criminal proceedings against Prantl* [1985] 2 CMLR 238 the Court held that the common organisation of the market in wine forms a complete system and thus excludes independent national legislation on matters covered by it. This did not, however, cover the shape of wine bottles, which remained within the competence of the Member States; in C-169/89 *Criminal Proceedings against Gourmetterie Van de Bourg* [1990] ECR I-2143 the Court held that Directive 79/409 had regulated exhaustively the Member States' powers with regard to the conservation of wild birds.

(*Individualvereinbarungen*) and only in a few cases subjects consumer contracts to a stricter control (see §§ 2,10,11, 12 AGBG).

A second school is biased in favour of the consumer as the potentially weaker side of the transaction, exploited by the superior economical power of the 'professional' side. The stronger market power in the form of superior negotiation and information power leads to one-sided use of both freedom of contract and freedom of choice in terms of choice of law rules. Contract terms that are so determined can be disadvantageous to one party to a contract and question the equilibrium paradigm of liberal market theory. From this perspective, the need for market control arises from the notion of abuse of economic power[61]. This is the approach adopted by the French legislator with the 1978 Loi Scrivener[62], concerned merely with consumer contracts and related contracts.

The Directive follows neither of the two approaches clearly. The 1990 Explanatory Memorandum[63] in recognising the existence of some terms in contracts that are unfair because they unreasonably impose a certain obligation on the consumer, points out that those terms are often contained in the seller's or supplier's standard terms of contract. Accordingly, the Memorandum seems to consider that standard term contracts are nothing but the most common case where consumers, due to their *per definitionem* weak position, are unable to assert their interests and make sure that they are reflected in the terms of the contract. This, together with the fact that the 1990 and 1992 Drafts Directives do not explicitly specify that the terms subject to the control are to be standard terms, thus limiting their application to consumer contracts only, brings perhaps the Directive closer to the Abuse of Power theory[64], but uncertainty between the two options is heavily reflected in the Directive which ends up limiting its application to both consumer contracts *and* standard term contracts[65], thus 'firing two shots at the same target: (...) if we, for example, understand the philosophy of the Directive primarily to offer protection to the party who has been deprived of his/her right to influence the contract, and therefore focus only on non-negotiated terms, then

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[60] see M. Tenreiro J. Karsten 'Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelties of a Directive' in *Rechsangleichung und nationale Privatrechte,* (Baden Baden: Nomos, 1999) 279.
[61] L. Krämer, *La CEE et la protection du consommateur* (Bruxelles: Bruylant 1988, 168).
[62] Loi Scrivener n.78-23 of 10/1/1978.
[63] Explanatory Memorandum to the 1990 Proposal, COM(90) 322Final, 2.
[64] As confirmed by K. Weil S. Puis 'Le droit allemand des conditions générales revu et corrigé per la directive communautaire relative aux clauses abusives' (1994) Revue Internationale de Droit Comparé 139-140.
[65] More exactly, the scope is limited to terms or aspects of terms which have not been individually negotiated. In practice, those are commonly standard form contracts.

we would not need to have the scope strictly limited to consumers. And, on the other hand, if the *ratio* is to protect the *per definitionem* weaker consumer, then the lack of protection against individual terms seems illogical' [66].

As a result, it appears that the field occupied by the Directive results from the combination of the "consumer contracts" criterion and the "standard term contracts" (or, more precisely, contracts on terms which have not been individually negotiated) criterion: in terms of Member States' competence, this allows wide room to introduce or retain different provisions in all areas which do not fall within the Community competence as above determined.

An alternative doctrine suggests that domestic action should be precluded to the extent that it may constitute an obstacle to the achievement of the objectives affirmed via adoption of Community rules; it does not seem, however, that expanding the scope of the Directive can be detrimental to the achievement of its objects: in the best case, it would help reduce differences among domestic laws -thus reinforcing the internal market- and may indirectly benefit consumers[67].

It therefore appears that states that wish to take a broader approach to unfair terms control are free to do so; so, for example, a domestic court would be able to adopt a broader understanding of "consumer" than the one adopted by the ECJ. It is interesting to note that in such cases if a reference for a preliminary ruling was to be made by a domestic court concerning the definition of consumer, this would no longer be aimed at establishing a common scope of application of the Directive, but rather at defining the "bottom line" above which domestic courts must understand that the Directive applies.

Nevertheless, the analysis carried out in the previous paragraphs shows some willingness of Member States to adopt an understanding of 'consumer' which is in line

[66] T. Wilhelmsson, Final Report of Workshop 1 in *The Unfair Terms Directive, Five Years On* Acts of the Brussels Conference, 1-3.7.1999 (Luxembourg: Office for Official Publications of the European Communities) 2000, 99

[67] It has actually been argued (V. Roppo 'La nuova disciplina delle clausole abusive nei contratti tra imprese e consumatori' Riv. Dir. Civ. 1994, I, p.282-283; see also E. Hondius, 'The reception of the Directive on Unfair Terms in Consumer Contracts by Member States' (1995) ERPL 243) that limiting the scope of the Directive to consumer contracts may be detrimental to consumers: if the retailer is not protected in his relationship with the manufacturer or the distributor, he will have to bear the burden of unfair terms imposed to him, which he will not be able to impose on the consumer. For example, a guarantee provision in the sale of a car may fail the fairness control at the retail level and therefore give rise to claims on the part of the consumer against the dealer; the latter, however, will have no possibility of recourse against the manufacturer or other intermediate suppliers because there will be no corresponding control at those higher levels, unless his contract with them expressly provides for a possibility of recourse. With regard to consumer guarantees, this is now partially remedied by

with the European one. This would certainly decrease the confusion and complexity generated by different interpretations at domestic level and ultimately contribute to the creation of a feeling of a common European citizenship.

4. Subjective limits to the scope of application of the directive: the business party.

There has been a lack of conformity between the language versions in the description of the business in art.1. The French version uses the word 'un professional' and the German the word 'Gewerbetreibende', but the English version speaks about 'seller' or 'supplier': however, it is clear that the scope of the Directive should not be limited to the provision of goods or services: the definition of seller or supplier in the Directive does not make any reference to selling goods or supplying services. Accordingly, a seller or supplier will be the person who, in contrast with consumers, is acting for purposes related to his trade, business or profession even if, for example, he is buying goods instead of selling (e.g. a garage that buys a car from an individual with a view to reselling it): in this case, words have to be interpreted on their own merits as examples of Community law even though their *prima facie* understanding may be different[68].

The lack of a general category, in the Italian private law, of economic agents that could correspond to the 'seller or supplier' has given rise to an imprecise implementation of the Directive in this respect. The Italian version of Directive borrowed the French terminology of the Loi Scrivener ('un professionel') and used the word 'professionista', which was then kept in art.1469-bis although the legislator itself was aware that it was 'inconsistent with the terminology of the Italian legal system'[69].

The reasons for such inconsistency are easy to explain. Although the word 'professionale' can be used to designate any type of activity which is run in an organised, non-occasional way[70], several articles of the Civil Code, by using the word "professionista", only refer to intellectual activities: accordingly, a trader would not

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Directive 1999/44 which specifically avoids this type of problem by giving to the final seller remedies against the person or persons liable in the contractual chain (art.4).

[68] C-283/81 *Srl CILFIT and Lanificio di Gavardo v. Ministero Italiano della Sanita*, [1982] ECR 3415.

[69] Commissione Giustizia della Camera in Atti Parlamentari CdD XII leg. 1882-A, 91.

[70] See art.2060 c.c.

commonly be understood as being a 'professionista'[71]. This is why the second part of para 2 of art.1469-bis attempts to clarify the meaning of "professionista" by adding that the professional acts 'within the framework of his profession or *trade*': the intention was to make it clear that the new law, in spite of its wording, applies to both trade and intellectual activities ('attività imprenditoriale o professionale').

'Imprenditore' is an extremely wide concept which covers every natural or legal person who carries out professionally an organised economic activity aimed at producing or exchanging goods or services (art.2082 c.c.): accordingly, in practice whoever carries out an economic activity on a non-occasional basis (e.g. a family business, a small craftsman, a farmer as well as a company) is included in such a definition and therefore subject to art.1469ff.[72]: even non-profit organisations are included since an activity is considered to be 'economic' simply when it is not meant to be run at loss (i.e. when, in abstract, costs of production are compensated by the profit made)[73].

Under English law, where the notion of 'seller or supplier' also covers a wide range of economic agents, the main issue has been to determine whether a seller or supplier who enters in a certain types of transaction only occasionally would be acting 'in the course of business'. Although *R&B Custom Brokers*[74] seems to exclude from this notion activities which are not carried out regularly, it is likely that for the purposes of defining a seller or supplier courts would rather resort to the criteria laid down in *Stevenson and Rogers*[75], thus ensuring the maximum degree of protection for the consumers.

Under the Directive and its implementing measures, it is also clear that government departments or public authorities are included in the definition of supplier; this issue, however, is strictly related to the exclusion of terms reflecting mandatory and regulatory provisions and because of its importance deserved separate consideration in the next sections.

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[71] The so-called "attività professionali" are also subject to more favourable provisions in the Civil Code than those addressed to business activities for the reason that they require intellectual efforts. For a criticism see F. Galgano 'Le professioni intellettuali e il concetto comunitario di impresa' Contratto e Impresa/Europa 1997, 1.

[72] L. Gatt 'L'ambito soggettivo di applicazione della disciplina' *op*.cit., 174; Sannia 'Commento sub art.1469-bis, comma 2' in Cesaro (ed.) *Clausole vessatorie e contratto del consumatore,* op.cit., 125.

[73] The notion of "impresa" is widely discussed in any commercial law book. Reference is made here to F. Galgano *L'imprenditore* Zanichelli, Bologna, 2000, 9-32.

[74] *R & B Customs Brokers v. United Dominion Trust* [1988] 1 WLR 321.

[75] [1999] 1 All ER 613.

5. Objective limitations: terms reflecting mandatory provisions and international conventions.

Art.1(2) of the Directive excludes from its scope 'contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions'[76].

The Italian implementing measure omits all reference to 'mandatory' and "regulatory" provisions and reads as follows: "Terms which reflect statutory provisions or the provisions of principles of international conventions to which all Member States or the EU are part are not unfair".

Omission of the word "mandatory" can be easily explained. The Italian legal tradition, like the French one, relies on a distinction between rules which are 'imperative' and 'suppletive'. Even thought 'imperative' is the literal translation of 'mandatory', it was pretty clear from the text of Recitals 13 and 14 to the Directive that "mandatory" also included default rules ("suppletive"). Accordingly, the Italian legislator omitted to refer to 'mandatory' provision, since by using the literal translation "imperative" they would exclude default rules; on the other hand, the current formulation makes it is clear to any Italian reader that both "imperative" and "suppletive" are included.

In England, the 1994 Regulation did not transpose the word 'mandatory' due to the concern that this would imply that default rules would not be covered by the exclusion. Once clarified that this was not what was meant under the Directive, the Government re-introduced the word "mandatory" in the 1999 Regulations, but in its response to the Commission's recent consultation, the UK Government expressed the view that the scope of the exclusion is not clear.

The view of the Government[77] is that the exclusion should be kept but redrafted in order to make clear that it applies to all terms which are required, expressly permitted by law or applicable where there is no express clause on the subject, but only to the extent that they do not go beyond what is required/permitted, and in this sense they 'reflect' such provisions[78].

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[76] This exclusion reproduces the one of § 8 AGB-Gesetz.

[77] See the UK Response to the European Commission Review of Directive 93/13/EEC on Unfair Terms in Consumer Contracts, DTI, 21 February 2001.

[78] The Law Commission, on the other hand, having considered the practical effects of the exclusion in the work of the OFT, appears to be convinced that 'the exemption (...) should not apply unless the terms are in plain language' Law Commission *Unfair Terms in Contracts. A Consultation Paper* op. cit.n.13, 4.73.

As to international conventions, UCTA and the Regulations in England contain comparable exclusions in this respect, except that UCTA refers to agreements to which the UK is a party, while UTCCR refer to agreements to which the Member States or the Community are party[79]. In Italy, on the other hand, the provision was not properly inserted. Once a convention is ratified and the execution order is issued, the convention becomes automatically law in Italy: thus, it would be included in the wider category of 'provisions which reflect provisions of the law'. If, on the other hand, the convention has not been ratified then there are serious doubts that it may and should have any effect at all in the Italian territory. Finally, the limit that the Member States or the EU must be parties to the convention makes no sense because of the situation above described: any convention that has been ratified becomes law in Italy, independently of the participation of the other Member States or the EU[80].

6. Application of the Directive to public services

a) Different frameworks for the provision of public services in Italy and England.

States, State bodies or local authorities may enter into a contractual relationship with private parties as sellers or, more frequently, suppliers, of goods or services which, being essential to civil life, are sold or supplied under public control and/or management: those are contracts for the supply of goods such as water, gas, electricity, etc.

Art 2(c) of the Directive makes it clear that the public nature of a seller or supplier does not exclude the application of the Directive, thus making those contracts subject to the fairness control.

A report compiled for the Commission by a French/English 'task force' on public services[81] has revealed a wide variety, throughout Europe, of frameworks establishing the nature of the provider and the classification of the relationship between the latter

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[79] The Law Commission is suggesting to exempt only terms reflecting rules (rather than principles) of international conventions to which the UK is a party, Law Commission *Unfair Terms in Contracts. A Consultation Paper* op. cit n.13, 4.74.

[80] In *Adiconsum c. Aeroviaggi* (Tribunale di Palermo 2/6/1998, Foro It. 1999, 358) the court rejected the argument that a term in a tourist travel contract reflected an international convention on grounds that it only reproduced one the part of it. The part which was not reproduced entitled the tourist to claim certain rights and accordingly 'the original balance pursued by the legislator (...) was not at all transferred in the contractual text...'.

[81] Institut National de la Consommation and National Consumer Council *Application de la Directive 93/13 aux prestations de service publique. Rapport final,* 1997, available only in French at www.europa.eu.int/comm/consumers/policy/developments/unfa_cont_term/uct02_fr.html

and the customer. The nature of the relationship between the providers of public services and their citizens recipients varies, sometimes without apparent justification, not only from State to State, but also from area to area: if it may appear rather natural that the relationship between a public hospital and its patients is considered as a matter of public law rather than a contract, the reasons why the consumer of energy or water in the same country has no contract with the supplier, and the consumer of gas does, are not clear[82].

In the UK, relationships concerning water, electricity, post and health service are excluded from any contractual control since they are considered to be of non-contractual nature; they are therefore equally excluded from UTCCR, which only deals with contractual relations.

As long as other public services are concerned, s.29(1)(a) of UCTA exempts from control terms which are authorised, required or anyway permitted by the law by providing that 1) UCTA does not remove or restrict the effect of, or prevent reliance upon, provisions which are authorised or required by the express terms or necessary implication of any enactment, and provisions which are made with a view to compliance with an international agreement to which the UK is party; 2) the reasonableness test will be taken to be satisfied where the relevant term is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function, provided that that authority is not itself a party to the contract[83]. The only relevant legal application of this principle seems to be *Timeload v. British Telecommunications plc*[84], where the Court of Appeal expressed 'grave doubts' as to whether OFTEL, who had seen and approved a contract at dispute used by BT, could be said to have approved the terms in the exercise of any statutory function or jurisdiction: OFTEL had not such jurisdiction or function to approve the terms.

In Italy, terms included in contracts for the supply of public services (where those are provided on a contractual basis, such as water, electricity, gas) are usually contained in *leggi* (such as in the field of transport or post services) or in *regolamenti*. The latter form a rather heterogeneous group made up, *inter alia,* of governmental

[82] S. Whittaker 'Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract' (2000) LQR 96.

[83] In addition to this, s.151 of the Road Traffic Act 1960 and s.29 of the Public Passenger Vehicles Act 1981 invalidate exemptions and limitations of liability for death or personal injury to passengers in a public service vehicle.

regulations, ministerial regulations which approve the so-called 'regolamenti di servizio'[85], and *regolamenti* issued by local authorities. Those rules are then reproduced in the contracts which are signed by the customer.

At a theoretical level, the answer to the question whether art.1341 c.c. was applicable to such contracts was positive in all cases where contract terms had a 'truly contractual nature'[86]. In other words, in contracts containing terms that merely reflected norms that had general application, art.1341 c.c. would not bite; where, on the other hand, contract terms were determined or simply authorised by provisions of administrative rather than normative nature, such terms would still be subject to art.1341[87]. In practice, however, the distinction is difficult to draw and the rule is inconsistently applied: so, for example, in a case concerning standard terms in an air transport contract with Alitalia, the *Tribunale di Cagliari* held that the mere fact that the contract had been approved by an administrative authority made art.1341 c.c. inapplicable[88].

The fact that some standard contract terms are entitled to escape the scope of application of art.1341 c.c., however, does not exclude all forms of control on them: but, instead of the contract terms, the rules themselves, as reproduced in the contracts, are under investigation. In a long series of judgements that started in 1988, the Constitutional Court declared inconstitutional several rules contained in Decree 29/3/1973 on post, banking[89], and telecommunications services which introduced restrictions and exemptions of liability in all contracts made with the customers of such services (at the time entirely run by the State)[90]. Such exemptions and restrictions,

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[84] [1995] European Market Law Review 459.

[85] The general conditions under which goods or services are supplied, adopted by the managing board of the seller or supplier.

[86] M. Nuzzo 'Contratto e servizi pubblici' in E. Cesaro (ed) *Clausole abusive e direttiva comunitaria* Cedam, Padove, 1994, 147. As mentioned, the view of courts has not been consistent: in *Alfa Centuari c. Alitalia* (of 9/1/1991, Riv. Giur. Sarda, 1993, 347) the *Tribunale di Cagliari* held that the standard terms of a contract of air transportation are not subject to art.1341 since they are approved by an administrative authority.

[87] See for example Cass. Civ. 12 /7/1001 n. 7763 Giur. It 1992, I, 496 concerning the alleged unfair nature of some rules regulating a lottery (the so-called 'Totocalcio') run by CONI (the Italian National Olympic Committe), where the *Corte di Cassazione* stated that participation in the lottery created between the participant and CONI a relationship of contractual nature, in spite of the fact that the rules of the game (i.e. the standard terms of such contract) had been approved by a ministerial decree.

[88] Tribunale di Cagliari 9/1/1991 *Alfa Centauri c. Cos. Alitalia* op. cit n.86, 347.

[89] Post offices have the power to supply, to a limited extent, banking services.

[90]The trend started with Corte Cost. 17/3/1988 n.303 Foro It. 1989, I, 56 which declared unconstitutional some exemptions of liability for the loss or interference with registered letters containing certain items; it then continued with Corte Cost 20/12/1988 n.1104 Foro It. 1989, I, 1 which declared unconstitutional the exemption of SIP (at the time the telecommunications services provider) in some cases of interruptions of the telephone service due to its fault; then Corte Cost. 30/12/1994 n.456 Giust.Civ.1995, I, 1157 declared unconstitutional the exemption of liability of SIP for wrong information supplied in their phone book; Corte

reasoned the court, were among the privileges awarded at the beginning of the XVII century by the king to those who were supplying such services to him and who were then entitled to supply the same services to the people. The privilege, however, could no longer be justified in the light of the current view that public services must be administered with ‚managerial criteria', and that relationships with the customers are to be considered as ordinary contracts subject to private law. Accordingly, any exception to the principles of contractual liability cannot be justified simply by reference to the public nature of the body involved: the only acceptable exceptions should relate to the objective nature of the service[91].

b) A European framework?

The above analysis not only emphasises the great variety of frameworks within which public services are provided in the different Member States; it also brings to light the great confusion surrounding, in both Italy and England, the relationship between public services and unfair terms control.

It has recently been suggested that the classification of a relationship as non-contractual by the law of a Member State should not be conclusive and that 'an autonomous European view should be taken as to what constitutes the 'contractual' provision of a service (...). According to this position, the European Court should contribute to the construction of a European conception of contract for the purposes of the Directive'[92]. A model can be offered by the case law developed by the European Court of Justice on the interpretation of art.5(1) of the Brussels Convention[93] where it provides that a person domiciled in a Contracting State may be sued in another Contracting State 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'. When deciding whether a certain claim was or not of contractual nature, the Court gave the formula 'matters relating to contract' an autonomous significance, and did not interpret it simply as referring to the national

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Cost. 30/12/1997 n.463 Giur. Cost. 1997, 4050 declared unconstitutional some exemptions of liability of the post for incorrect performance of some tasks related to the provision of banking services.

[91] The Court accepted such objective justifications in Corte Cost. 21/1/1999 n.4 Giust. Civ. 1999, 640.

[92] S. Whittaker 'Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract' 99-100.

[93] See, for example, C-34/82 *Martin Peeters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987; case 9/87 *Arcado SPRL v. Haviland SA* [1988] ECR 1539; C-26/91 *Jakob Handte v. Traitements Mechano-chimiques des Surfaces SA* [1992] ECR-I 3967.

law of one or other of the States concerned[94]. In doing this, the Court underlined that in deciding whether to give an independent meaning to the formula at issue it had to take into account the meaning which was likely to be more effective in enabling the Convention to achieve the objectives it pursues.

Although those remarks were done in the context of a convention which had harmonisation as its primary purpose, the case-law described above may support the proposition that the Court may take an autonomous view of 'contracts for the supply of public services'.

This would greatly decrease the level of confusion arising in each Member State as to the nature of a relationship for the provision of a public service.

Additionally, if the purpose of the Directive is to reduce distortions of competition, create effective protection for the consumers and enhance their confidence, it is likely that an autonomous view of 'contracts for the supply of public services' would help achieving such purposes: in particular, it would render Member States unable 'to protect the provision of a particular type of service from the requirements of the Directive simply according to whether or not they choose to classify the relationship under which they are provided as 'contractual'[95]. In other words, if the ECJ could lay down criteria according to which provision of a public service, independently of its "domestic" classification, was to be considered as "contractual", this would prevent Member States from distorting competition and in particular from protecting their own offshoots in a discriminatory manner from competition from other suppliers who might wish to supply services in that State.

There is, however, a further hurdle to harmonisation: art.1(2) of the Directive exempts from control terms which reflect "mandatory statutory or regulatory provisions". As earlier mentioned, public services provided on a contractual basis are subject to terms and conditions which have undergone some form of control or

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[94] Similarly, in C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH* (HWS) [2002] ECR I-7357 the Court found that an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention; in C-167/00 *Verein fur Konsumenteninformation v. Karl Heinz Henkel* [2002] ECR I-8111 the Court held that an action brought by a consumers' association under national consumer protection legislation to obtain an injunction prohibiting the use of unlawful or unconscionable general contractual terms and conditions is also a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention. In both cases, the concept of 'matters relating to tort, delict or quasi-delict in Article 5(3) of the Convention was interpreted autonomously and broadly, so as to encompass all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1) of the Convention.

[95] S. Whittaker 'Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract' op. cit. n.92, 104.

approval by a competent authority, and may therefore fall within the exemption of art.1(2) of the Directive: accordingly, the exact scope of the above exclusion should not only be clarified but also interpreted in a uniform way in all Member States.

c) "Statutory and regulatory provisions".

The Italian legislator did not include 'regulatory' provisions[96] within the exclusions, which are then limited to 'statutory provisions' ('disposizioni di legge') [97].

The word 'legge' has in Italian a wide meaning, perhaps comparable to the English word 'law', and a narrower, technical meaning that indicates primary sources of law such as 'leggi' (statutes) and legislation of comparable status ('decreti legge' and 'decreti legislativi')[98]. It is unclear which of the two meanings is envisaged in art.1469ter.

Some of the academic commentators understand 'disposizioni di legge' as referring only to primary sources of law, thus implying that terms which reflect secondary sources of law (*regolamenti*) are subject to the test of fairness[99]; according to some others,[100] art.1469-ter excludes from the fairness test all forms of law, including secondary sources of law, as long as they have normative character. Secondary sources of law constitute an extremely wide and varied category of norms, with different characteristics, different effect and different nature according to the body that issues them and to the status conferred to them by the law: included are also regulations that have no normative character but that are mere administrative acts or which have the limited aim of approving the conditions under which a public body supplies goods or services to the public. Accordingly, adoption of this view entails a case-by-case investigation as to the nature of the *regolamento* at issue, in order to understand whether it has normative or rather administrative nature.

Judicial divergence on the interpretation of art.1469ter has already been reported.

In the *Siremar* case, terms contained in a contract of transport by sea and approved by a specific ministerial order were held to be subject to control since art.1469-ter only

[96] 'Disposizioni regolamentari' in the Italian version of the Directive.
[97] The exclusion under Art 1(2) of the Directive is therefore reduced to the following text: 'Terms which reflect statutory provisions or the provisions or principles of international conventions to which all Member States or the EU are part are not unfair'.
[98] For a description of the different sources of law and their position within the hierarchy of norms see G. Zagrebelsky *Manuale di diritto costituzionale, vol. I: Il sistema delle fonti del diritto*, Utet, Torino, 1984.
[99] M. Sannia 'Commento all' art.1469-bis comma 2' in E. Cesaro (ed.) *Clausole vessatorie e contratto del consumatore* Cedam, Padova, 1998, 126-139.
[100] Supported for example by Nuzzo *Contratto e servizi pubblici* op. cit n.86, 152-154.

excludes terms which reflect *disposizioni di legge*...'while there is no reference, as opposed to the Directive, to terms that reflect „disposizioni regolamentari" (understood as secondary sources of law). As a consequence, interpreters have correctly drawn the inference that the Italian legislator chose to submit to the fairness test terms which reflect *regolamenti* of the p.A.'[101]. The Tribunale di Roma[102], on the other hand, has held that 'disposizioni di legge' is a broad term that includes *regolamenti.* In the specific case, however, the *regolamenti* concerning conditions to participate in a lottery, even though issued through ministerial decrees of the Ministry of Finance, could not enjoy a different status from any other common contract terms because the lottery was being run under Ministerial license and control: accordingly, the court introduced the requirement that a *regolamento* is issued by a body which is different from the one that applies it in its contracts if the contract is to fall within art.1469-ter par.3.

In England, the Law Commission has taken the view that 'regulatory' certainly includes 'secondary' legislation[103], but is in doubt whether it also includes terms imposed or approved by regulatory agencies, the force of whose rules derives ultimately from a provision in statute; DTI, on the other hand, seems to take the view[104] that Regulation 1(2) should be given a wide interpretation to encompass practices permitted by specific industry regulators, whose knowledge and experience of the industries concerned should put them in the best position to consider the fairness of particular terms in the round.

The attitude of the Law Commission and of DTI, in line with what previously provided for by UCTA, seem to point at such a broad interpretation of the exception that it would nullify the rationale of art.2(c) of the Directive.

The resulting scenario is rather chaotic: not only does art.1(2) allow wide differences between Member States in interpreting the "statutory or regulatory" exclusion and in determining the nature of acts that can escape control; the scope of art.1(2) is not even clear *within* each Member State, thus leaving it open to any interpreter to adopt one or another reading.

It is here argued that reducing the extent of discretion allowed by art.1(2) is possible by shifting focus from the "statutory or regulatory" formula to the much

[101] Tribunale di Palermo 3/2/1999 *Adiconsum c. Soc. Siremar* Foro It. 1999, I, 2085.
[102] Tribunale di Roma *Associazione consumatori ed ambiente c. CONI* ord.2/8/1997 in Foro It. 1997, 1, 3010.
[103] Law Commission *Unfair Terms in Contracts. A consultation paper* op. cit. n.13, 3.40.
[104] DTI *The Unfair Terms in Consumer Contracts Regulation 1994 -Guidance notes-* op. cit.n.5, 4.

neglected (often not even transposed) concept of "mandatory" provisions: rather then being interpreted in accordance with the meaning acquired in each national legal jargon, this word should be read in a new, European, perspective.

d) A new meaning for "mandatory statutory and regulatory exclusion"?

According to Recital 13 of the Directive, "statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms". The word "mandatory" does not appear in the Recital; however, reference is expressly made to "provisions...which directly of indirectly determine the terms...". It is therefore possible to imagine that "mandatory" encapsulates the idea that terms must be *determined* by provisions of the Member States in order to escape control.

Additionally, in Community language a "mandatory requirement" is a requirement which is imposed for an aim of general interest which, like in *Cassis de Dijon*[105], relates in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. The exclusion of art.1(2) is based on the assumption that terms which are determined by Member States themselves cannot be unfair, since they have been drafted to pursue an aim of general interest. Accordingly, the use of the word "mandatory" in art.1(2) may also reflect the idea that terms determined by Member States are presumed to pursue aims of general interest.

In conclusion, upon this new definition, the word "mandatory" acquires significant weight since it requires that, to escape control under the Directive, a term is determined by a Member State in pursuance of an aim of general interest.

The merit of this suggestion lies in the fact that it shifts focus away from the other part of art.1(2), ie. the requirement that terms reflect "statutory or regulatory" provisions: independently of the form (statutory or regulatory) of the provision they reflect, terms will be exempted from control only if such provisions are determined by the Member States in the general interest.

Of course, it is possible to argue that this solution does not guarantee any certainty, since the formula "determined by Member States in pursuance of an aim of general interest" it is still open to different judicial interpretations. The task of fleshing out these words with a precise meaning, however, could easily be performed by the ECJ: and, once defined, the art.1(2) exemption would be based on a common parameter throughout Europe. On the other hand, the task of determining the meaning of the formula "statutory or regulatory" provisions is much harder: the huge variety of types of secondary legislation existing in the Member States would make it difficult for the

European Court to find, among them, common features that could justify exclusion or inclusion within the art.1(2) exception.

In practice, the reading of the formula "mandatory requirements" here proposed would entail that Member States which, like Italy, have omitted to transpose the word "mandatory" would be found to be in breach of their obligations: because the word "mandatory" plays an important role in restricting the scope of the art.1(2) exemption, States who fail to introduce it potentially expand the application of the exemption to the detriment of consumers.

7. Individually negotiated terms.

According to art.3(1), application of the Directive is limited to terms which have not been individually negotiated.

The concept of 'not individually negotiated terms' is rather wide as it covers not only standard terms but all terms where there has been no preliminary negotiation[106]: this means that the control of the Directive will be triggered every time a contract (or some of its terms) has been unilaterally drafted by one party, no matter whether it has been drafted *ad hoc* in relation to a certain transaction or for general use.

This limitation is one of the most criticised points of the Directive both for its formulation and its substance[107]. In practice, however, the Commission has noted that 'the CLAB database ...shows that this exclusion has not had any practical effect in the

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[105] Case 120/78 *Rewe-Zentral v.Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649

[106] T. Wilhelmsson 'Clauses contractuelles abusives' *Acts of the Conference 'Consumer Protection in the European Community, session d'ete'*, Louvain La Neuve, 3-12 July 1996.

[107] The 1990 Proposal for a Directive on Unfair Terms was to be applied to all types of consumer contracts, independently of whether they were on standard or individually negotiated terms. Nevertheless, the first year of discussion in the Council exhibited a major division between the delegations which wanted to see the directive encompass all contracts (this was, for example, the position of the Scandinavian countries and of France, where such limitations are still not included in the implementing measures), and those which considered that only standard contractual terms should be covered because the control of the unfair nature of individually negotiated terms was perceived as contrary to private autonomy and to the proper functioning of market economies (the German delegation was particularly adamant on this point and enjoyed full support by the German legal doctrine, see e.g. H. E. Bradner P. Ulmer 'The Community Directive on Unfair Terms: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) CMLRev 652 ff.). The Parliament discussed the question at length and adopted an amendment that only excluded application to contracts in which all the terms were individually negotiated. The Commission decided in its amended proposal of March 1992 to divide art.2(1) of the original proposal into two articles: art.3(1), relating to contractual terms which had not been individually negotiated, and art.4(1), which was applicable to all types of terms (see the Explanatory Memorandum of the amended proposal, COM(92) 66 Final, 2). In practice, the basic difference would be that an extra condition would be required for a negotiated term to be considered as unfair: it would be necessary that the terms had been imposed on the consumer 'as a result of the economic power of the seller or supplier and/or the consumer's economic and/or intellectual weakness'. However, the Commission failed to convince the Council to accept the control of negotiated terms, even in more restricted circumstances, and the

Member States which transposed it, because none of the cases in the database concerns an individually negotiated contractual term. Indeed it is fanciful to think that contracts of adherence could truly contain individually negotiated terms other than those relating to the characteristics of the product (colour, model, etc.), the price or the date of delivery of the good or provision of the service -all terms which rarely give rise to problems concerning their potential unfairness.'[108]

According to art. 3(2) a term has not been individually negotiated when it has been drafted in advance, and the consumer has therefore not been able to influence the substance of the term (art.3(2)). The following paragraph of this article, however, raises some confusion where it states that the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of the directive if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. This provision would make clear sense in the context of the AGB-Gesetz, the scope of which is defined by reference to standard contracts: in this case, there is a risk that, if several terms of a standard contract have been, in a particular case, individually negotiated, the contract would lose his character of being a 'standard contract' and would therefore be subject to no control; on the other hand, the scope of the Directive is defined not by reference to standard contracts, but to consumer contracts, whether they are standard or not. The only limitation is that the Directive will not apply to the 'individually negotiated terms'. The provision in 3(2) second paragraph may give another impression, because it would allow *a contrario* that in some cases the Directive would not be applicable to some non-negotiated terms in consumer contracts. That was obviously not the intention of the legislator and therefore the article must be interpreted taking into account the other provisions and the rationale of the Directive.

Art. 3(2) introduces a irrebutable presumption of non-negotiation in the cases where the term has been drafted in advance; the Directive then gives as a typical example the case of standard form contracts[109].

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article disappeared in the final text. (a detail report on the *iter* of the Directive in this respect can be found in M. Tenreiro 'The Community Directive on Unfair Terms and National Legal Systems' (1995) 3 ERPL 273).

[108] Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contract, Brussels, 27.04.2000 COM(2000) 248 final.

[109] 'A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract'.

In the UK, Regulation 5(2) contains a definition of a non-negotiated term which is almost identical to the one in the Directive; however, it does not remedy the ambiguity generated by art.3(2) of the Directive which appeared to exclude control on terms which had not been individually negotiated where the contract had been in general negotiated. As with the Directive, the correct reading of the Regulation seems to be that it applies to any term which has not been individually negotiated, regardless of whether the overall contract could be described as a 'pre-formulated standard contract'[110], the reason supporting this view being that the rationale of the rule -the inability of consumer to influence the terms- can be invoked against all terms which have not been individually negotiated and not only against standard form contracts.

As previously described, although in general such a limitation did not apply to contracts under UCTA, in the only case where its scope was limited to 'written standard terms of business' those were understood to be contracts drafted for general use. In this respect the scope of application of UCTA comes close to that of articles 1341-1342 of the Italian civil code, which apply only to contracts on standard terms drafted for general use. As opposed to this, the Directive and the relevant implementation measures take into account whether single terms, rather than contracts as a whole, have or not been negotiated. In practice, however, the difference between the new and the old regimes in this respect would be smaller, since most contracts containing one or more terms which have not been individually negotiated are standard form contracts.

The formula adopted by the Italian legislator is less ambiguous than the one used in the Directive: the Italian art. 1469-ter para.4 just states that 'terms or parts of terms which have been individually negotiated are not unfair', thus making it possible to control all clauses which have not been individually negotiated even when the contract appears to have been in general negotiated.

The provisions proposes, in both countries, the question of what type of activity should there be for a term to be individually negotiated. Article 3(2) of the Directive appears to suggest that it is necessary to check whether the consumer has actually had the opportunity to influence the content of the term or not: this does not clarify whether, for example, effective amendments to the original contract are necessary in

[110] R. Brownsword G. Howells 'The Implementation of the EC Directive on Unfair Terms in Consumer Contracts-Some Unresolved Questions' (1995) JBL 246.

order to have 'negotiation'[111]. In Chapter 1 we have compared the different approaches of Italian and English courts to the definition of standard term contract and we have emphasised the more flexible English solution where considerations of inequality of bargaining power prevail over the exact legal form through which abuse takes place. The formalist approach of Italian courts raises concerns that a precise definition of 'negotiation' is also required. The *Tribunale di Bologna*[112], however, has already provided an example of 'critical use' of the rule: in dealing with a contract that included a declaration, signed by the consumer, that the terms had been previously negotiated, the court stated that 'effective protection of the weak party, together with a sound realism, (...) make it difficult to imagine that in mass contracts there is any room for any bargaining between the party who prepares the standard contract terms and the party who is called to accept them...'[113]. Accordingly, the court considered the contract as not negotiated.

The less formalistic English approach is reflected in the fact that the Law Commission is considering abolishing the limitation of individually negotiated terms in relation to consumer contracts. Their argument is that 'there are some obligations which business simply should not be able to evade or restrict, by whatever means'[114]. This argument reminds us of the hierarchy of values envisaged by UCTA when putting beyond the reasonableness test terms which would allow excluding liability for evens where human life and health was at stake or for failures to perform that would deprive the other party of the core of the contract.

The proposed English reform puts the finger on the underlying hypocrisy of the Directive: if its purpose is to protect the structurally weak party to the transaction, it is contradictory to imagine that a negotiation process which is based on the disparity of the parties can ensure a fair result. In many instances negotiation may take place and

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[111] see e.g. V. Roppo 'La nuova disciplina delle clausole abusive nei contratti fra imprese e consumatori' Riv. Dir. Civ. 1994, I, 281; E. Scarano 'Commento sub art.1469-ter, comma 4' in G. Alpa S. Patti (ed.) *Le clausole vessatorie nei contratti con i consumatori* op.cit.n.22, 1997, 612. Attention has also been devoted in Italy to the question whether contracts negotiated collectively by trade unions can be considered as 'individually negotiated': according to S. Troiano ('L'ambito oggettivo di applicazione della Direttiva Cee del 5/4/199; la nozione di 'clausola non oggetto di negoziato individuale' in G. Alpa M. Bianca (ed.) *Le clausole abusive nei contratti stipulati con i consumatori* Cedam, Padova, 1996, 647), for example, a collective contract ensures adequate protection of the weak party's interests and is therefore comparable to an individually negotiated contract; contra, F. Casola 'Commento sub art.1469-ter' in *A.* Barenghi (ed.) *La nuova disciplina delle clausole vessatorie nel codice civile*, op. cit.n.30, 111.

[112] 14/6/2000 *Florio c. Senlui s.r.l.* Corr. Giur. 2000, 527.

[113] Similarly, the Tribunale di Milano (27/1/1997 *Garisto c. Falanga* I Contratti, 1998, 48) in a case concerning doorstep sales disregarded a term of the contract where the customer declared that the good had been bought for a purpose which was related to the customer's business.

still bring no significant advantage to the consumer: the trader may explain the meaning of the contract terms to the consumer and reassure him that the possibility that they apply to his case is very remote (actually a rather common problem with unfair terms is the tendency to think that the event envisaged by such terms will never occur), or that they are common usage in the trade, so that the consumer agrees not to have them changed[115]; the trader may agree to change the terms indicated by the consumer but their effect is still unfair (e.g. accept to change an exemption clause into a limitation clause); the trader may change terms and re-draft them so that they have basically the same effect; the trader may finally agree to change terms and -why not?- make them more disadvantageous for the consumer.

8. 'Core' exclusions.

According to art. 4(2) of the Directive, the main subject matter of the contract and the relationship between the good or service purchased and the price paid are outside the scope of the Directive provided that these parts of the contract are spelled out in 'plain, intelligible language'. This principle, reproduced in art.1469-ter and in Regulation 6(2), was introduced at the end of the preparatory stage and was justified by the Council as due to the need to exclude from the scope of application of the Directive 'tout ce qui résulte directement de la liberté contractuelle des parties'[116]. In other words, the Directive does not aim at regulating the core of the contractual relationship, i.e. the balance between price and subject matter, as long as this is expressed in clear and comprehensible language. This is reiterated in the 19th Recital, but the Recital itself suggests that art.4(2) has to be interpreted in a restrictive way for at least two reasons.

In the first place, the Recital makes it clear that the exemption of price/quality *ratio* from the control of unfairness is limited to the *ratio* itself and not to any other term related to the price: terms determining how the price is to be calculated or how it can be changed are fully submitted to the control of the Directive.

Second, still according to Recital 19, the main subject matter of the contract and the price/quality *ratio* may be taken into account in assessing the fairness of other

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[114] Law Commission *Unfair Contract Terms. A consultation paper* op. cit. n. 13, 4.49

[115] It is debatable whether this can be considered as actual negotiation, see G. Cian 'Il nuovo capo XIV-bis del codice civile, sulla disciplina dei contratti dei consumatori' op. cit. n.21, 417. In this respect Italian law is more consumer-friendly than the Directive since the Directive refers to the 'possibility' of changing the terms while the Code requires that terms are subject to individual negotiation, thus requiring effective intervention.

terms. In that way, an indirect control of the price is admitted. So, for example, a clause fixing a price cannot be considered unfair just because the price fixed is too high; but it cannot be ruled out that a contract clause that gives rise to significant imbalance can in practice be deemed not to be unfair if the contract provides for a particularly advantageous price for the consumer.

In *DGFT v. First National Bank*[117] the Court of Appeal rejected the argument that in a loan agreement a term that the borrower in default with his payments should continue to pay interests at the contractual rate even after the judgement obtained against him had been discharged concerned the adequacy of the bank's remuneration as against the service supplied, i.e. the loan of money. The Court stated that the provision was a default provision 'dealing with a situation where there is a breach of contract; it is not there that one finds defined the main subject matter of the contract nor does it concern the adequacy of the price or remuneration'[118]. In addition, the term does not stipulate the rate at which interest is payable, but simply defines the circumstances in which the interest is and continues to be payable[119].

The exact scope of the subject matter exclusion is slightly more difficult to determine than the price exclusion, since it requires in the first place defining the "main subject matter of the contract". This evokes the notorious legal puzzle of the distinction between terms defining the contractual obligations and terms excluding or restricting liability for breach of obligations. Obviously, only a term that sets out the parties' obligations can possibly be a 'core term': a term excluding liability does not define the subject matter of the contract but rather restricts liability for a pre-existing obligation.

In Chapter 2 we saw that in the English pre-UCTA case-law the question of the identification of the fundamental elements of the contract had acquired some importance as one of the techniques through which courts limited the effect of

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[116] Common Position adopted on 22/9/92. The document with the justifications of the Council was later published in (1992) Journal des politiques de consommation 483-487. This provision, however, has its predecessor in § 8 AGB-Gesetz

[117] In the High Court: [2000] 1 WLR 98; in the Court of Appeal: [2000] 2 WLR 1353; in the House of Lords: [2001] 3 WLR 1297. The argument, however, was rejected at all three instances

[118] Ibidem, 1364.

[119] In this respect, OFT has taken the view that clauses related to the price agreed, such as price variations clauses, do not fall within the exclusion; in the case of a term providing for the rate of interest to be paid by a debtor to be increased on default, OFT considered that this could not be a core term'...regardless of how the term is drafted and whether the higher rate of interest is expressed to be the ordinary rate. The term providing for the higher rate of interest is in substance a term making provision for payment of compensation upon a breach of an obligation and not, therefore, a core term'. See OFT *Non Status Lending -Guidelines for lenders and Brokers* (London: OFT, 1997) 192.

potentially unfair terms: the doctrines of fundamental breach and breach of a fundamental term relied on the identification of terms which, if not complied with, would render performance completely different from the one which the contract contemplated; since liability for the breach of such terms could not be excluded, the more protective of consumer interest courts were, the more broadly such terms were defined. In the context of UCTA, on the other hand, courts have often rejected the definitional approach as an attempted evasion of legal control over unfair terms and have accordingly tried to restrict the category of terms defining the parties' obligations as much as possible[120]. These divergent approaches, both motivated by the desire to protect the weaker party, may provide an unstable background for the interpretation of the Regulations[121] and there is potential for some difficulties to arise[122].

In Italy, the case law concerning how to determine the "oggetto del contratto" has also given rise, as seen in Chapter 2, to a slightly confused set of cases[123]. Yet, the task of determining the main obligations attached to a contract is somehow easier for a continental lawyer: in Italian law, as well as in other codified systems, once parties have agreed upon what type of contract they intend to conclude, the law itself attaches to it a number of primary and ancillary obligations (*Obbligazioni principali* and *secondarie)*[124]. In the common law, on the other hand, the parties simply undertake all the liabilities which follow from the contract: it is therefore more difficult to justify a distinction between principal and subsidiary liabilities as all of them form an integral part of the bargain[125].

Chapter 2 indicated a certain level of convergence between English and Italian courts in the use of the "but for" approach: all exceptions to obligations laid down by

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[120] *See Phillips Products v. Hyland* [1987] 2 All ER 620 and *Smith v. Eric S Bush* [1989] 2 All ER 691.
[121] R. Brownsword G.Howells 'The Implementation of the EC Directive on Unfair Term in Consumer Contract-Some unresolved questions' (1995) JBL 243.
[122] E. MacDonald 'Mapping the unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts' (1994) JBL 462.
[123] A. Di Majo 'Clausole Vessatorie e rischi assicurati: un difficile confine' Corr. Giur. 2001, 3, 386. Gorla, a well known comparative lawyer, suggested that "oggetto" should not even be a requirement for the validity of the contract since its nature is so volatile that it does not provide any safe grounds for decision ('La teoria dell'oggetto del contratto nel diritto continentale' Jus 1953, 289).
[124] This is the principle of 'tipicita' contrattuale': most contracts fall within a 'type' which is regulated in detail by the Code (e.g. 'contratto di vendita', 'contratto di deposito', 'contratto di appalto'. Contracts which do not fall within the categories drawn by the Code are still valid and enforceable ('contratti atipici'), as long as they serve a socio-economical purpose.
[125] A. De Moor 'Common and Civil Law Conceptions of Contract and a European Law of Contract: the Case of the Directive on Unfair Terms in Consumer Contracts' (1995) ERPL 267.

law are exemption clauses and not terms defining parties' obligations[126]. For the reason stated in the above parargaph, however, the "but for" approach can help English courts in a limited number of cases. Accordingly, the Law Commission seems to favour a "reasonable expectation approach": 'whether a term is part of the definition of the main subject matter depends in part on how the 'deal' was presented to the consumer', and in this respect the question would be similar to 'whether the clause purports to permit a performance 'substantially different from that which was reasonably expected'[127]. The Law Commission therefore proposes to maintain the 'main subject matter' exclusion, but to further clarify part of its practical meaning by emphasising that a term does not define 'the main subject matter' if it is different from what the consumer reasonably expects'[128].

Similarly, the OFT's approach is to exclude from 'core provisions' terms which have not been brought to the consumer's attention. So, for example, in considering a term in a mechanical breakdown insurance which excluded liability unless the vehicle received a partial service every 3,000 miles, the OFT stated that 'The conditions of a warranty are likely to come within this exemption [Reg.3(2)] unless they have not been properly drawn to the consumer's attention. In our view, this exemption does not apply to terms which are hidden from the consumer's view or if he has no chance to get to know the terms.' The reason for this would be that 'a supplier would surely find it difficult to sustain the argument that a contract's main subject matter was defined by a term which a consumer had been given no real chance to see and read before signing'[129]. This reasoning must appear pretty obvious to English lawyers, used since the creation of the "red hand" rule to the idea that courts can refuse to enforce a term if reasonable steps had not been taken to draw the customer's attention to onerous terms[130].

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[126] In the case of *Movimento Federativo Democratico (MFD) c. ABI* (Tribunale di Roma 21/1/2000 Foro It. 2000, I, 2045) concerning the interpretation of the subject matter exclusion in art.1469-ter cc. the *Tribunale* re-affirmed the principle stated in its previous case law on art.1229 according to which the limitation of liability of the bank for the safe deposit box was not a provision that identified the subject matter of the contract: on the basis of that judgement, the court assessed a similar term recommended by ABI.

[127] Law Commission *Unfair Contract Terms. A Consultation paper* op. cit.n.13, 3.24.

[128] Law Commission, *Unfair Contract Terms. A Consultation paper* op. cit.n.13, 4.60.

[129] OFT *Unfair Terms Bulletin* n. 4 (London: OFT, 1998), 16.

[130] More explicitly: "We are satisfied that fairness under the Regulations demands this too, wherever a contract is too long and complex for consumers to be likely to notice what is especially important for their interests" Pat Edwards, *The Challenge of the Unfair Contract Terms Regulations* in OFT *Unfair Terms Bulletin* n.4 op. cit. n.129, 21.

In Italy, in absence of significant cases on art.1469-ter, one can assume on the basis of the previous case-law that attention would concentrate on the set of obligations which are related to a certain 'type' of contract, although courts may not completely disregard a "reasonable expectation" test, previously formulated by the *Cassazione* in terms of whether an obligation is "normally related" to the performance owned.

Although the outcome of the two criteria in practice may to a large extent be the same, it cannot be excluded that the "but for" approach and the "reasonable expectation" approach may bring to diverging results. For example, in a contract of insurance a term to the effect that the insurance does not cover the artistic or scientific value of the things insured would probably be, for an Italian judge, a term relating to the subject matter of the contract; while a term that excludes insurance cover for health problems caused by voluntary interruption of pregnancy would not. The reason for this is that the Code defines the insurance contract as one where "one party undertakes to compensate the other, within the limits agreed, for the loss suffered due to the occurrence of a certain event": while in the former example the term at issue aims to define the loss covered (and is therefore of definitional nature), in the latter case the term does not aim at defining the event covered but rather describes the reason why the event occurred (eg. death) would not be covered, and is therefore of exclusionary nature. On the other hand, upon a "reasonable expectation" approach one may easily come to the conclusion that the term one would not expect to find in an insurance contract is the one that excludes artistic or scientific value from compensation.

9. Contracts relating to land.

The fact that 'land' in English law is considered as neither goods nor services has raised the question of whether the new Regulations should also apply to contracts relating to land. At the level of the Directive, the question was not clarified after the only reference to immovable property -a term concerning purchase of time-share interests in land in the annex to the 1990 proposal- disappeared in the subsequent texts; failure of DTI to clearly address the issue[131] has perpetuated the problem. Accordingly,

[131] 'These are complex matters which reflect the host State's underlying heritage and system of property ownership. There must be doubt that transactions concerning land could be properly considered to be within the scope of the Directive. Following consultation as to the implementing Regulations, the Department was however persuaded by the views of a number of consultees that the matter is by no means free from doubt and that it would be prudent to assume that the Directive could extend to transactions in *land' DTI The Unfair Term is Consumer Contracts Regulations 1994 Guidance notes* op. cit. n.5, 7. UCTA expressly excluded such contracts from its application.

the answer to the question can be given only having regard to a wider range of considerations.

In the first place, it must be considered that interpretation of Community law 'involves a comparison of the different language versions. (...). Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of various member States. Finally, every provisions of Community law must be interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives therefore an to its state of evolution at the date on which the provisions in question is to be applied.'[132]

Accordingly, it must be first noted that in the Italian and French versions of the Directive reference is made to 'beni' or 'biens', both of which include immovable property. Since the meaning of 'good' differs so deeply in the different Member States, however, it is also necessary to find out whether the word 'good' has a different, special meaning in EC law. As opposed to services, which are defined at art.[60] 'goods' are nowhere defined in the Treaty, but clarifications can occasionally be found in the case law[133] and in a number of Directives that use that word[134]. The Sixth VAT Directive[135], for example, defines the 'supply of goods' as meaning 'the transfer of the right to dispose of tangible property as owner, including, inter alia, 'a) certain interests in immoveable property, b) *rights in rem* giving the holder thereof a right of user over immoveable property', thus making it clear that 'goods' is capable of a meaning going beyond the normal English language and usage; elsewhere, when the scope of a Directive applying to contracts for the supply of goods or services is meant not to extend to land-related contracts, a specific exclusion is normally set out.

In addition to this, it must be pointed out that it has now been firmly established that the manner in which immovable property is dealt with under national law can affect the internal market[136] -the full completion of which is one objective of the Directive: there would then be no reason to exclude land-related contracts from the

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[132] Case 283/81 *CILFIT Srl and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3430.
[133] See for example case 7/68 *Commission v. Italy* [1968] ECR 423 where goods are defined as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.
[134] In this respect, a careful and valuable analysis of the relevant law is carried out by S. Bright C. Bright 'Unfair Terms in Land Contracts: copy out or cop out?' (1995) LQR 655.
[135] Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes OJ L145/1, 17.5.1977.
[136] Case 182/83 *Fearon & Co. Ltd. v. Irish Land Commission* [1984] ECR 3677 and case 305/87 *Commission v. Hellenic Republic* [1989] ECR 1461.

scope of the Directive since effectiveness of EC law requires that preference should be given to the construction which gives full effect to the Directive.

Chapter 5. Formal and substantive controls in Directive 93/13 and in the implementing legislation.

1. Introduction

The aim of this chapter is to look at the implementation and application of the provisions of Directive 93/13 introducing new formal and substantive controls on contract terms in England and Italy.

The first part of this chapter focuses on the transparency and the *interpretatio contra proferentem* requirements and on the extent to which the existing ECJ case law can provide guidance as to their meaning and application; the second part concentrates on the fairness test and on the different facets it presents once analysed in the context of previously existing traditions and legal cultures. In England, attention has been mainly attracted by the introduction of the principle of good faith, previously unknown, as such, to English law; the discussion will emphasise, however, that the second limb of the fairness test, significant imbalance, also represents a concept which is foreign to the common law tradition. Against this background, it will be submitted that the House of Lords' judgment in *Director General of Fair trading v. First National Bank*[1], at present the most significant instance of judicial application of the UTCCR, not only fails to provide the necessary and much expected guidance as the practical meaning and implications of the fairness test; it also fails to remedy the shortcomings existing under the UCTA regime.

In Italy, on the other hand, lawyers have been forced to carry out philological investigations and hermeneutical struggles in order to bring into line with the Directive the clumsily formulated provision of art.1469-bis. At judicial level, the application of the new substantive control test does not reveal any surprises but rather brings to light courts' unwillingness to go beyond purely legal considerations or to systematise the criteria and guidelines to be followed in the application of the fairness test.

2. The Formal control.

a) Transparency

Art.5 of the Directive, by requiring that terms are drafted "in plain, intelligible language" introduces a transparency requirement[2]. "Plain and intelligible" are not tautological in that a term is in "plain" language when it is not surprising, it cannot be misunderstood and it does not give rise to any doubts; "intelligibility", on the other hand, encompasses both the style used and how a contract term is actually printed on paper[3].

While the Italian implementing measure, art. 1469-quarter, has remained rather faithful to the European formulation, Regulation 7 separates the transparency requirement and the rule of interpretation *contra proferentem* of art.5 in two paragraphs, thus putting more emphasis on each single requirement.

The transparency principle is deeply rooted in Community Law, both in secondary legislation and in the case law of the ECJ. The importance of informing and protecting the consumer has been stressed since the first two programmes for consumer protection and information policy of the Community; almost every consumer directive includes information duties: information should be given in a sufficient, precise and clear way[4]; "when a brochure is made available to the consumer it shall indicate in a legible, comprehensible and accurate manner both the price and the adequate information"[5]; it

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[1] [2001] 3 WLR 1297.

[2] The provision of the Directive, inspired by § 2 of the German AGB and artt. 4-4 of the Portuguese Decreto-Lei 446/85, was introduced by the Commission in its amended proposal of 1992 (Amended proposal for a Council Directive on Unfair Terms in Consumer Contracts COM/92/66 Final OJ C73, 1992). The 1992 proposal also specified that terms which had not been individually negotiated should be regarded as having been accepted by the consumer only where the latter had had a proper opportunity to examine the terms before the contract was concluded. In the legislative process, however, the Council chose to delete that provision because it thought that it went too far in the national rules about acceptance and conclusion of contract, which was not the subject matter of the Directive. Reference to this idea, however, remained in the 20th recital of the Directive which states that "whereas contracts should be drafted in plain, intelligible language, the consumer *should actually be given an opportunity to examine all the terms* and if in doubt, the interpretation most favourable to the consumer shall prevail". Another reference is made by letter 1.i of the Annex which considers as an example of unfair term one which has the object or effect of binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.

[3] See, among many, M. Herington S. Brothers 'Unfair Terms and Consumer Contract Regulations' (1995) Int. I LRev 263.

[4] Art.3.2 of Directive 90/314 on package travel, package holidays and package tours; see also art.4.2 of Directive 97/7 on distance contracts, according to which "..information...shall be provided in a clear and comprehensible manner"

[5] Art.3.2 of Directive 90/314 on package travel, package holidays and package tours.

should respect ethical principles, human dignity as well as political beliefs [6]; it must be easily accessible and it is often demanded that it is confirmed in writing[7].

These requirements aim at allowing the consumer to be "conscious of his rights and responsibilities"[8], to be able to make a rational choice between competing products and services and to know what to do if he thinks that some of the regulations have not been complied with[9].

As later described, the case-law of the European Court of Justice has often stressed the relationship between consumer protection and consumer information and has constantly considered the provision of full information to the consumer as the cornerstone of the consumer protection Community policy.

The fact that consumer choice and consumer information have become leading elements in EC legislation and case law, however, does not help to shed light on the practical application of transparency in the context of the Directive[10].

In Chapter 1 we have emphasised English Courts' dislike of small print and unclear drafting in standard forms contract. This has led to imposing transparency requirements such as the one that onerous terms must be brought to the attention of the customer with reasonable steps; or that the nature, size and location of terms and of their clarity and prolixity is relevant to their reasonableness under UCTA. In respect of the Regulations, the OFT has already indicated that they consider Regulation 7 as capable of biting not only as regards vocabulary but also structure of contracts: long sentences, cross references and statutory sentences are likely to be considered as unfair[11].

In Italy, on the other hand, the requirement of *conoscenza* and *conoscibilita'* under art.1341(1) is seldom translated into a duty to draft terms in plain, intelligible language and basically only when terms were not physically available did courts declare the contract in violation of art.1341(1): as described, specific written approval of a term is sufficient to sweep away any doubt that the terms was not *conosciuto* or *conoscibile* by the customer.

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[6] Annex, Commission Recommendation of 7 April 1992 on Codes of Practice for the protection of consumers in respect of contracts negotiated at a distance, O.J.L156/21 of 10.6.1992.

[7] See e.g. Art.6 of Directive 87/102 on consumer credit; art.4 of Directive 85/577 on doorstep selling; art. 5 of Directive 97/7 on distance contracts; art.3 of Directive 94/47 on timeshare property.

[8] Council Resolution of 14 April 1975 O.J. C92, 25.4.75, 1

[9] E.g. the directive on doorstep selling requires at art.4 that the name and address of a person against whom a right may be exercised should be mentioned

[10] A complete account of the problems raised by the transparency requirement is give by H. Micklitz 'Final Report from Workshop 4, Obligation of Clarity and Favourable Interpretation to the Consumer' *The Unfair Terms Directive, Five Years On* Acts of the Brussels Conference, 1-3.7.1999 (Luxembourg: Office for Official Publications of the European Communities, 2000) 147.

[11] P. Edwards 'The Challenge of Unfair Contract Terms Regulation' *Unfair Contract Terms Bulletin* n.4/1997,18; see also *Unfair Contract Terms Bulletin* May 1996, 16.

Under the Directive, several new issues need clarification.

In the first place, it is not clear whether "transparency" is limited to some sort of negative control which allows at most the elimination of unclear and incomprehensible contract terms or whether it might be understood as providing for positive information duties, i.e. explaining and summarising the implication of certain contractual terms: the principle of transparency may also be seen as a form of substantive control if read in the light of the criteria enshrined in art.3 (substantive transparency): transparency would mean, in this case, not only a duty to provide information before the conclusion of the contract, but also to point out its effects, including an active explanation and education concerning the content of the contract[12].

Second, the Directive fails to address the question of the language in which clauses should be presented to the consumer, problems which had been addressed at legislative level in matters of labelling[13], time-share, insurance contracts[14], in the recommendation on the payment systems[15] and at judicial level in a number of ECJ decisions[16].

Third, the sanctions for infringement of the transparency requirement are not clearly stated: art.5 only deals with the case where more than one meaning can be attributed to a certain term: "where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail"; it does not indicate, however, what the sanction is if a contract term not only is recognised not to be written in plain and intelligible language but does not appear to have a meaning, or has only one (unclear) meaning.

The question has, however, already found a practical response at domestic level: the view expressed by both the OFT and the Law Commission is that any term may be unfair simply by reason of not being in plain intelligible language[17]: the reason for this is that breach of the transparency requirement can still in itself harm consumers by misleading or

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[12] Commission of the European Communities *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* COM(2000) 248 final, 155

[13] So, for example, art.13a(2) of Directive 79/112 OJ 1979 L33/1 (now repealed by Directive 2000/13, OJ 2000 L129/29) prescribes that "the Member State in which the product is marketed may (...) stipulate that those labelling particulars shall be given in one or more languages".

[14] See art.38 Council Directive 92/96/EEC on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), OJ 1992 L360/1.

[15] Commission Recommendation 88/590 of 17.11.1988 concerning payment systems, OJ L 317 of 24.11.1988, pp.55-58

[16] See e.g. C-369/89 *ASBL Piageme v. BVBA Peeters* [1991] ECR I-2971; C-51/93 *Meyhui v. Schott ZwieselGlaswerke* ECR [1994] I-3879

[17] OFT *Unfair Contract Terms Bulletin* n.1/96(London: OFT, 1996), 13.

confusing them. In this respect, the Law Commission is going even further in proposing that the transparency factor is expressly taken into account in assessing fairness[18].

An application of the transparency requirement in this sense can be found in the Italian case *MFD c. ABI*[19] where the *Tribunale di Roma* held that a term which is not transparent can in itself be "a source of unfairness by increasing the asymmetry of information which already exists in adhesion contract": in other words, lack of transparency can automatically trigger a declaration of unfairness of the relevant term. This unusual decision, that makes of transparency the "third pillar" of the fairness test, certainly guarantees a better achievement of the target of avoiding ambiguous terms in standard contracts[20] and has probably been provoked by the legislator's failure to provide a specific sanction for lack of transparency, thus leaving large room for judges' own choices.

Finally, whether there is transparency or not largely depends on the consumer image that guides the interpretation of Art.5. At ECJ level, the issue has arisen particularly in the areas of misleading and unfair advertising and the conflict between differing consumer images and its dimensions has had wide echo: the case law of the ECJ in this respect deserves, for its importance and its potential to influence domestic approach to the matter, some investigation.

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[18] Law Commission *Unfair Terms in Contract: a Consultation Paper* Consultation Paper n.116, London: TSO, 2002, para.4.106. The proposal equates the concept of "substantive transparency" was elaborated by the German *Bundesgerichthof* in two leading cases, *Tilgungverrechnungsurteil* (BGH 24.11.1988, Wertpapier Mitteilungen, 1988, 1780) and *Werstellungsklauselurteil* (BGH 17.1.1989, Wertpapier Mitteilungen, 1989, 126). In those cases, the German court decided that some terms can be unfair on ground of para.9 AGBG (according to which "provisions in standard business conditions are invalid if they unreasonably disadvantage the party contracting with the supplier in contravention of the principle of good faith) because of their lack of transparency, independently of their being actually unfair or not, as if the lack of clarity *per se* could confer an unreasonable disadvantage to the consumer. In such cases, the lack of transparency prevents the client from comparing different offers, or from being clearly informed of his legal position, or from realising how much he is concretely paying for a certain service, even though the relevant terms in themselves cannot be criticised. When the true situation is not disclosed, this constitutes a violation of the principle of transparency which can be considered unreasonable, leading to the term being declared ineffective. Substantive transparency becomes in this way one of the criteria of the content control according to para.9 AGBG, as the lack of transparency can result in an unreasonable disadvantage according to para.9 AGBG. On the point, see F. Brunetta D'Usseaux, *Formal and substantive aspects of the transparency principle in European Private Law, (1998)* Cons.L.J. 320-339.

[19] Tribunale di Roma 21/1/2000 Foro It. 2000, I, 2045

[20] A. Orestano A. Di Majo 'Trasparenza e squilibrio nelle clausole vessatorie' Corr. Giur. 2000, 523 and 528.

b) Consumer images and transparency.

The ECJ has developed the concept of "informed consumer" or "average consumer" in a number of cases referred by national courts (mainly German courts) under art.234 Treaty[21].

In such cases national courts were faced with the question whether a domestic measure aimed at protecting consumer against a certain unfair trade practice could be justified and therefore maintained although it may have been contrary to art.28 Treaty. In deciding whether the measure could be justified or not, it was essential to determine which parameter of consumer should be adopted: would for example a domestic rule that prohibits the use of a certain misleading packaging be justified if it could be proven that it misleads only 10 to 15% of consumers (ie. the most vulnerable consumers only)? In other words, should the relationship between domestic measures of consumer protection and art.28 Treaty be assessed having the vulnerable consumer or rather mature and critical consumer? The rule developed by the ECJ is that such relationship is to be assessed on the grounds of the "average consumer, reasonably well informed and reasonably well observant and circumspect"[22].

If applied in the area of unfair terms, the notion of well-informed consumer, alert, keen in making use of better and greater choices, able to bring the necessary information together and difficult to deceive will entail that the standard of transparency required by the Directive will be to some extent brought down and the supplier would accordingly be released from his duty to provide clear and intelligible standards. On the other hand, reference to the weak consumer, unable to understand the law, needing information on his/her rights in simple and clear form would entail raising the transparency standards and placing the burden on the supplier.

The extent to which the "average consumer" criterion would be followed by the ECJ in interpreting art.5 of the Directive is not, however, entirely clear. The case law above referred to was aimed at striking down domestic measures which were incompatible with art.28 and was therefore primarily driven by the objective of market integration, in

[21] See e.g. C-220/98 *Estée Lauder v. Lancaster* [2000] ECR I-117; C-470/93 *Verein Gegen Unwesen in Handel und Gewerbe Köln e.V v. Mars GmbH* [1995] ECR I-1923: C-315/92 *Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* [1994] ECR I-317; C-313/94 *Fratelli Graffione v. Ditta Fransa* [1996] ECR I-6039; C-210/96 *Gut Springenheide GmbH v. Oberkreisdirektor des Kreises Steinfurt-Amt fur Lebensmilleluberwachung*, [1998] ECR I-4657.

[22] Opinion of Fennely AG in C-220/98 *Estée Lauder v. Lancaster* op. cit. n. 21, para.28.

conjunction with the ambition to open national markets to new products and de-crystallise consumer habits[23].

Similarly, in the *Nissan* case[24], the Court established that a claim is "misleading" according to Directive 84/450[25] if it can affect "the decision to buy on the part of a significant number of consumers to whom the advertising in question is addressed": reference to a "significant number" of consumers indicates that particularly vulnerable consumers would not enjoy protection under the Directive. It must be noted, however, that although Directive 84/450 is a measure of consumer protection, in that specific case the ECJ was once more not particularly concerned with defining a Community standard of consumer protection but rather with facilitating parallel imports: the assessment of the misleading nature of an advertisement was therefore strongly influenced by the desire to encourage cross border competition.

Finally, in *Sektellerei*[26], the ECJ had to interpret Regulation 2333/92[27] laying down general rules for the description and presentation of sparkling wines (in principle, a measure of consumer protection). In deciding whether certain brands would be misleading for consumers, the ECJ referred to "the presumed expectations (...) of an average consumer who is reasonably well informed and reasonably observant and circumspect".

On the other hand, Directive 93/13 may require to be interpreted from a different perspective: being a measure primarily aimed at consumer protection, it may have to be read having in mind consumer protection rather than market integration.

The *Buet*[28] case on Directive 85/577[29] (the "doorstep sales" Directive) suggests a different approach: the Court upheld a French measure totally forbidding doorstep sales of educational material although it provided a much higher level of protection compared to the Directive, that only regulated the modalities of doorstep sales: according to the Court, the potential purchaser of educational material would often belong to a category of people who, for one reason or another, are behind with their education and are "particularly vulnerable". Accordingly, the Court seemed prepared to accept that in some cases national courts adopt their own (higher) standard of consumer protection: in the context of Directive 93/13 national courts may therefore decide that "particularly vulnerable"

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[23] See in particular case 788/79 *Italian State v. Herbert Gilli and Paul Andres* [1981] 1 CMLR 146; case 178/84 *Commission v Germany (Beer purity)* [1987] ECR 1227.
[24] C-373/90 *Criminal Proceedings against X* [1992] ECR I-131
[25] OJ 1984 L250/17
[26] C-303/97 *Verbraucherschutzverein eV v. Sektellerei G.C. Kesler GmbH* [1999] ECR I-513.
[27] OJ 1992 L231/9
[28] Case 328/87 *Buet v. Ministère Public* [1989] ECR 1235.

consumers should be entitled to "particularly transparent" contract terms. On the other hand, the *Buet* decision seems to include, as part of its raionale, the fact that the French measure was not generally restrictive, but only applied to the sale of educational material for the reason that this was targeted at particularly vulnerable consumers. Accordingly, one may draw the inference that more restrictive measures are allowed only when aimed at protecting particularly vulnerable groups of consumer and not when they have general application.

Another point made in *Buet* was that the Directive at issue contained, like Directive 93/13, a minimum harmonisation formula entitling Member States to take more stringent measures for the protection of consumer: an interpretation by a national court that aims a protecting particularly vulnerable consumer would therefore still be allowed even if the ECJ had indicated, in its case law, a different parameter.

While the notion of consumer to adopt in respect of art.1496-quarter has not raised any reactions in Italy, comments in England indicate that the standard of intelligibility should be set by reference to the naïve and inexperienced consumer[30] or, alternatively, that of the "ordinary consumer without legal advice"[31]. As yet, courts have not had an opportunity to examine this issue.

c) *Interpretatio contra proferentem*

The principle stated in the second part of art.5 that an ambiguous term must be interpreted in favour of the consumer is known with small variations to several European legal systems as the *contra proferentem* rule[32].

In Italy, as previously explained, the hierarchy of rules of interpretation envisaged by the Code has privileged the use of subjective rules of interpretation to the detriment of art.1371. The *contra proferentem* rule is now re-stated in art.1469-quarter, para.2: the fact that it is located within Chapter XIV-bis of the Civil Code, containing the specific regulation of consumer contracts, entails that in this area this provision takes priority over all other rules of interpretation: accordingly, its weight and importance in judicial decision-making should remarkably increase.

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[29] OJ 1985 L372/31.
[30] H. Collins 'Good Faith in European Contract Law' (1994) OJLS 248.
[31] P. Edwards 'The Challenge of Unfair Contract Terms Regulation' *Unfair Contract Terms Bulletin* n.4/1997, 18.
[32] Art.5, however, is formulated so as to always favour a specific party, the consumer. The interpretation *contra proferentem* known to other legal systems (including Italy) often contains rules drafted in a general way

In England, the rule of *interpretatio contra proferentem* was widely used in the pre-UCTA case law, where the lack of any other remedy forced judges into adapting and stretching the existing rules and techniques to provide fair solutions; and, although this practice had received some judicial disapproval after the enactment of UCTA, rules of interpretation continue playing a role in cases which did not fall within the scope of UCTA. The Law Commission, however, takes the view that the test under art.5, which imposes to take into account the *most* favourable interpretation to the consumer, is more comparable to "the extreme way in which, before the advent of statutory controls over exemption clause, the courts sometimes applied the common law rule"[33]. It is evident, on the other hand, that such a rule alone is a weak weapon against clearly drafted terms, or terms which although capable of more than one meaning are still detrimental to the consumer.

In addition, an interpretation favourable to the consumer is not always desirable: in the interest of the best possible consumer protection, a disadvantageous interpretation of an individual clause may be, at the end of the day, more beneficial to the consumer if it renders the term unfair and therefore void: in that case, the remaining contract terms may put the consumer in a better position than with an unclear clause interpreted favourably. For this reason the rule does not apply to collective litigation: while in individual cases it could generate positive results for the consumer who may have an interest in the survival of the term, in the case of collective action it would ultimately rebound on him by preventing the prohibition, via collective actions, of obscure terms which, in a normal interpretation, would be deemed unfair.

3. The substantive control: the fairness test in the Directive.

According to art.3 of the Directive, a contract term is unfair if:

- it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer;

- the significant imbalance is contrary to the requirement of good faith.

The 1990 proposal of the Commission[34] started from a very different approach to the definition of unfair terms: in an attempt to ensure that all the criteria already used in

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which may, depending on the circumstances, work to the advantage of either contracting party, for example the party against whom it is relied upon –who may not necessarily be the consumer.

[33] Law Commission *Unfair Terms in Contract: a Consultation Paper* op. cit.n.18, para.3.74

[34] Proposal for a Council Directive on Unfair Terms in Consumer Contracts COM/90/322 Final OJ C 243, 28/09/1990, 2.

national systems are echoed in the Directive it contained four alternative criteria for the assessment of fairness of contractual terms; failure of a term to comply with just one of them could render it unfair and therefore unenforceable[35].

The inclusion of the requirement of good faith among the proposed criteria must be seen in the light of two factors[36]: first, the importance of such a principle within the framework of continental systems, in particular Germany; second, the fact that one Member State had already used good faith alone as a general criterion for the assessment of unfairness: the Portuguese law of 1985 on contract terms established, at art.16, that "general contractual terms which are contrary to good faith shall be prohibited". In addition, § 9 AGB-G includes the principle of good faith in the general criteria of control of unfair terms.

In the 1992 Proposal[37], however, the criteria of control were reduced to two; good faith lost its status as an independent criterion and was combined with the other two criteria. A term would then be considered as unfair when, contrary to the requirement of good faith,

- it causes to the detriment of the consumer a significant imbalance in the parties' rights and obligations arising under the contracts; or

- it causes the performance of the contract to be significantly different from what the consumer could legitimately expect.

The reason why good faith as an independent criterion was removed lies in the "visceral aversion"[38] of the representatives of certain Member States, such as the UK, to this principle. Accordingly, in order to "save" the principle, the Commission had to deprive it of its autonomy and to add a recital in order to clarify the values lying behind it. In spite of this, the continental origin of the fairness test under the Directive appears rather evident if we look at the German and French legislation. The French Loi Scrivener hinged the concept of unfairness upon the idea of "avantage excessif" deriving from a term imposed on the consumer through an "abus de puissance economique"[39] and in the *travaux*

[35] A term could be unfair in the following cases: 1) it caused, to the detriment of the consumer, a significant imbalance in the parties' rights and obligations arising under the contract; or 2) it caused the performance of the contract to be unduly detrimental to the consumer; or 3) it caused the performance of the contract to be significantly different from what the consumer could legitimately expect; or 4) it was incompatible with the requirement of good faith.

[36] M. Tenreiro 'The Community Directive on Unfair Terms and National Legal Systems' (1995) 3 ERPL 275.

[37] Amended proposal for a Council Directive on unfair terms in consumer contracts COM/92/66 Final OJ C 73, 24/03/1992, 7.

[38] Tenreiro 'The Community Directive on Unfair Terms and National Legal Systems' op.cit. n.36, 277-278.

[39] The French law seems to include a requirement of procedural fairness inherent in the exploitation of a better bargaining power. However, courts and doctrine have consistently held that the two criteria tend to overlap

préparatoirs explained it as an evident imbalance in parties' rights and obligations. The German AGB-G provided two lists of unfair terms, each of them having different effects, complemented by a general clause referring to the concepts of good faith (*Treu und Glauben*) and disproportionate disadvantage (*unangemessene Benachteilingung*)[40]. The two criteria appear to be parallel: what matters in both cases is the objective imbalance which needs to be out of proportion, "significant"; this equates to the criteria set out in the Directive.

Since the negotiations leading to the first proposal of Directive, there was concern that the notion of unfairness expressed by the general clause would lack sufficient accuracy and precision to be applied in a uniform way in all Member States. An Annex containing an indicative and non exhaustive "grey" list of terms that *may* be considered unfair was therefore added to the Directive with the purpose of providing a more detailed and practical elaboration of the notion of unfair term[41].

Judges (or any other national competent authority) have the possibility to assess the fairness of a clause corresponding to a model one in the Annex with full freedom (even

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since the term conferring an excessive advantage is deemed to have been imposed through the abuse of one party's bargaining strength, see J. Ghestin I. Marchessaux 'L'elimination des clauses abusives en droit francais, à l'epreuve du droit communautaire' (1993) *Revue Europeenne de droit de la consommation* 80

[40] According to K. Weil F. Puis ('Le droit allemand des conditions génèrales d'affaires revu et corrigé par la directive communautaire relative aux clauses abusives' (1994) Revue Internationale de Droit Comparé 1, 126) the Directive has been drafted "en des termes de plus en plus allemands"

[41] The Annex contains a list of seventeen clauses which may be regarded as unfair. Roughly, those clauses can be classified according to the following four criteria (see R. Brownsword G. Howells T. Wilhelmsson 'The EC Unfair Contract Terms Directive and Welfarism' in *Welfarism in Contract Law* Dartmouth: Aldershot, 1994, 275-284):

1) terms giving a party the control on the terms of the contract or the performance of the contract (e.g. point j of the Annex, terms which enable the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; see also points i, k, l, m, p);

2) terms determining the duration of the contract (e.g. point g, terms enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice; see also point h);

3) terms restraining a party to have the same rights as the other (e.g. point c, terms making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone, see also points d, f, o);

4) exemption and limitations clauses (e.g. point a, terms excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier, see also points b, e, n, q).

The content of the Annex varied remarkably from the first to the second proposal of the Commission. In 1990 the Commission not only wanted to add a list of unfair terms (the nature of which was not clear), but also wanted to force Member States to harmonise certain rules on contracts of sale by conferring certain rights on purchasers. This proposal required the achievement of a high level of harmonisation and therefore attracted criticism for "its rather unusual method to pursue private law harmonisation virtually through the backdoor of an Annex of a Directive that supposes to aim predominantly at controlling unfair contract terms" (M. Tenreiro J.Karsten ,Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelties of a Directive' in H. Schulte-Nölke R. Schulze (ed.) *Europäische Rechtsangleichung und nationale Privatrechte* Baden-Baden: Nomos, 1999, 284). In the 1992 version the Commission abandoned that proposal and presented a list similar to the one contained in the final text, but classified it as a "black list". Unfortunately, once adopted by the

thought it would be *a priori* considered with suspicion[42]) and in conjunction with the criteria laid down in art.3. Accordingly, a contractual term corresponding to one of the models in the Annex is not automatically unfair as well as a contractual term not included in the list is not automatically fair.

Although the formula "indicative and non exhaustive" does not say anything concerning the obligation to transpose it[43], both Italy and the UK have transposed it and left it as a "grey list". While in England Schedule 2 to the Regulations literally "copies" the Annex of the Directive, the Italian implementation has the originality of having split the terms there contained in two lists. The one in art.1469-quinquies contains terms which are ineffective even when individually negotiated[44]; art.1469-bis para.3 contains the remaining fourteen groups of terms, expanded to twenty, more detailed, sets of terms, which are "presumed" to be unfair[45]. If a term falls within this list, the burden of proving that it is not unfair will be reversed on the trader, with an inversion of the general rules of civil procedure (whereby the burden of proof is on the plaintiff).

Council, the list was not kept up with the expectations of the Commission and was defined "indicative and non-exhaustive".

[42] The "serious" character of the list is confirmed by n.2 of the Annex, which aims to soften, for financial services, some of the terms listed in n.1

[43] On this point see C-478/99 *Commission v. Sweden* [2002] ECR I-4147. Infringement proceedings for similar reasons have also been brought against Finland and Denmark, see Commission of the European Communities *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* Brussels, 27.04.2000, COM(2000) 248 final, 16.

[44] These are terms which have the object or effect of 1) excluding or limiting trader's liability in the event of death or personal injury to the consumer resulting from an act or omission of the trader; 2) excluding or limiting the rights of the consumer against the trader or another party in the event of total or partial non-performance or inexact performance; 3) extending the consent of the consumer to terms which in the practice the consumer had no opportunity to be aware of

[45] The word „presumption" is used by the legislator in an a-technical manner. "Presunzione" in Italian law is a reasoning according to which from a fact which is known the interpreter can draw the inference that another (unknown) fact has occurred, and this unknown fact produces legal effects (so, for example, a child born in the course of a marriage is presumed -unless the contrary is proven- to be the son of the spouses, fact which produces legal effects). This is clearly not the meaning of „presumption" in art.1469-bis, where it simply indicates a reversal of the burden of proof.

4. The fairness test: implementation.

a. General remarks.

The uncertainty and confusion that have surrounded the implementation of art.3 of the Directive in Italy are mainly due to the clumsy formulation of the corresponding art.1469bis para.1.

According to this provision, "Terms in a contract between a consumer and a professional are regarded as unfair (*vessatorie*)[46] when, in spite of good faith, they cause a significant imbalance in the rights and obligations arising out of the contract to the detriment of the consumer": this formula seems to be a servile reproduction of the text of the Directive but, in fact, it misinterprets the requirement envisaged by the Community legislator.

The version of the Directive in the other languages and Recital 16[47] make it clear that good faith must be understood in an objective and not a subjective sense. Untranslatable *nuances* of the Italian formula, on the other hand, suggest the adoption of a subjective meaning of good faith: a term will be considered as unfair if, in spite of the (good) intentions of the trader, it causes a significant imbalance in the rights and obligations arising out of the contract to the detriment of the consumer[48]. As a consequence, the question of the correct interpretation of art.1469bis para.1 occupied the greatest part of academic comments and concerns: however, there is currently widespread agreement that reference should be to objective good faith[49].

The fact that the misinterpretation already existed in the Italian version of the Directive is a sign of the dangers inherent in the multi-linguistic law making process at Community level; and the fact that the Government, aware of the mistake, maintained the wrong text is a worrying sign of carelessness in the implementation process.

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[46] It must be noted that art.1469-bis uses the word "vessatorio" (as in art.1341) rather than "abusivo", which was the term employed by the Italian version of the Directive. This is justified by the fact that the word "vessatorio" is already used in Italian contract law.

[47] According to Recital 16 good faith must be appreciated by reference to an "overall evaluation of the interests involved", including "the strength of the bargaining position of the parties...whether the consumer has received an inducement" and whether "the seller or supplier ...deals fairly and equitably with the other party whose legitimate interests he has to take into account".

[48] For a history of the mistake see U. Ruffolo *Clausole "vessatorie" e "abusive". Gli artt.1469-bis e seguenti del codice civile e i contratti del consumatore* Giuffré, Milano, 1997, 39-42.

[49] Few commentators (e.g. A. Rizzo 'Commento sub art.1469-bis, comma 1' in E. Cesaro (ed.) *Clausole vessatorie e contratto del consumatore* Cedam, Padova, 1998, 35) have been so daring as to argue that conscious failure of the legislator to amend the badly formulated text proves that the legislator actually meant what he wrote, i.e. that a term will be considered as unfair when it causes significant imbalance, even though the trader was unaware of the detriment to consumer (subjective good faith).

Art.1469-bis para.1 hides another ambiguity. "Malgrado la buona fede" is subject to two interpretations: first, the word "malgrado" may be interpreted as "in spite of", meaning that the behaviour of the trader is irrelevant: no matter whether he was or not in good faith, a term that causes a significant imbalance will be held to be unfair: the only requirement to fulfil in order to prove that a term is unfair would be the "significant imbalance", and one would therefore wonder why good faith is mentioned at all[50]; second, "malgrado" may be understood as "contrary", thus meaning that a term is unfair if it causes a significant imbalance and, in addition to this, is contrary to good faith, i.e. the professional did not deal fairly and equitably[51]; this interpretation is less favourable to the consumer but seems more compliant with the spirit of the Directive and with the other linguistic versions of the Directive, including the English one, which in this respect leaves no room for doubt. In Italy, however, this ambiguity gave rise to intense debate and discussions in the academic environments.

In England, the introduction of a fairness test containing the "good faith" criterion has revived the terms of the debate, started in the late 1950ies, on whether a concept of good faith should be adopted in English contract law[52].

To sum up briefly the terms of the debate, a negative, a neutral and a positive view can currently be identified[53]. The negative view, represented by Lord Ackener's statement in *Walford v. Miles*[54] is based on the argument that good faith is incompatible with the adversarial ethic underpinning English contract law and that the moral standards imposed by good faith are unclear and vague, threatening to import an uncertain discretion into English law. The neutral view holds that there is nothing objectionable about good faith

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[50] Hints for this reasoning are given by G. M. Uda 'Commento sub art.1469-bis, comma 1' in G. Alpa S.Patti (ed.) *Le clausole vessatorie nei contratti con i consumatori* Giuffré, Milano, 1997

[51] See F. Di Marzio 'Clausole vessatorie nel contratto tra professionista e consumatore' Giust Civ 1996, 522-524.

[52] Various texts in English language have been written on good faith in general and on good faith on English law. For the purposes of this work, useful sources have been found in the following recent texts: C. Willett (ed.) *Aspects of Fairness in Contract* (London: Blackstone, 1996); R. Brownsword N. Hird G. Howells (ed.) *Good faith in Contract* (Aldershot: Dartmouth, 1999); J. Beatson D. Friedmann (ed.) *Good Faith and Fault in Contract Law* Oxford: Clarendon Press, 1995); R. Brownsword 'Contract Law, Co-operation and Good Faith: the Movement from Static to Dynamic Market Individualism' in S. Deakin, J. Michie (ed.) *Contracts, Co-operation and Competition* Oxford: OUP, 1997); J.F. O' Connor *Good Faith in English Contract Law* (Aldershot: Dartmouth, 1989);

[53] For a useful overview of such doctrines see R. Browsword, *Positive, Negative, Neutral: the reception of Good faith in English Contract Law* in R. Brownsword N. Hird G. Howells (ed.) *Good faith in Contract*, op. cit.n.52, 13-40.

[54] "The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations... a duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of a negotiating party...", [1992] AC 138.

but the English law already has its doctrinal tools to achieve the results which are achieved via a good faith doctrine in other legal systems[55]. This view assumes that there is a strict equivalence between a general doctrine of good faith and the piecemeal provisions of English law. The positive view[56] argues that the adoption of a good faith doctrine would allow judges to give effect to their sense of justice and to avoid contortions and subterfuges.

The above views must be combined with a clarification of what exactly is meant by "good faith": "good faith" is, after all, an "empty shell", a mere formula that needs to be fleshed out with a precise meaning[57]. In principle, different conceptions of good faith in the context of academic debates oscillate between two poles, one of "procedural good faith" and one of "substantive good faith". Procedural good faith focuses on improprieties and defects in the negotiation and conclusion of the contract and would accordingly include, *inter alia,* all the techniques currently existing in English law to prevent dishonest and unfair behaviours. Substantive good faith, on the other hand, is independent from any procedural consideration and rather aims at imposing an abstract standard of contractual justice which is drawn from somewhere else[58].

The question of the meaning to be attributed to "good faith" can now be re-proposed in the context of Directive 93/13.

b) The fairness test: interpretation

In the context of the Directive, a term would be contrary to good faith (in a procedural sense) if the trader has dealt inequitably with the consumer (e.g. by not explaining him the consequences of the terms, by hiding the substance of the bargain, or by putting the consumer under pressure); thus, the requirement has to do mainly with the

[55] This view is associated with Lord Bingham's statement that English law has arrived to the same position as other countries that have a good faith doctrine by developing "piecemeal solutions in response to demonstrated problems of unfairness" *Interfoto Picture Library v. Stiletto Visual Programmes Ltd.* [1989] QB 439.
[56] Expressed by R. Powell in a seminal lecture on good faith, *Good Faith in Contracts* (1956) Current Legal Problems 16.
[57] An overview on how differently good faith operates in European countries that recognise this principle can be found in R. Zimmermann S. Whittaker (ed.) *Good faith in European Contract Law* (Cambridge: Cambridge University Press, 2000).
[58] Between procedural and substantive good faith, some also identify a "contextual good faith" (see e.g. Willett 'Good faith and Consumer Contract Terms' in Willett (ed.) *Good faith in Contract,* op. cit. n.52, 79-82 and J. Wightman 'Good faith and Pluralism in the Law of Contract' in Brownsword, Hird, Howells (ed.) *Good faith in Contract* op. cit. n.52, 42). Contextual good faith derives its content from the reasonable expectations of the parties, which are shaped by the norms observed in their contracting community. However, since such reasonable expectations are determined according to the standards of a certain contracting community and in this sense they are drawn from "somewhere else", it is here submitted that contextual good faith is a sub-species of substantive good faith rather than a category on its own.

trader's behaviour. Assessment of good faith would include verifying whether the consumer had an opportunity to influence the terms, whether he had been able to exercise any choice in agreeing to the terms, but also whether the trader dealt "fairly and equitably" by disclosing the content and implication of contractual terms. In this respect, procedural good faith appears to be aimed at remedying any possible market failure in the form of lack of information and lack of choice.

Substantive good faith, on the other hand, is related to the contractual terms themselves and focuses on whether and to what extent the term realises the interests of the consumer: so, for example, it has been suggested that good faith does more than exclude certain types of unacceptable conduct and includes terms causing such an *imbalance* that they should always be treated as being contrary to good faith and therefore unfair[59]; or that good faith encompasses all instances where one party has abused the social practice of making promises either by encouraging misplaced reliance or by securing *an unduly advantageous* transaction[60].

If the "good faith" has to do with "imbalance" or "unduly advantageous" transactions, however, it is difficult to understand how it differs from the second part of the fairness test: a term which does not realise the interests of the consumer is a term that creates a "significant imbalance", or anyway an "imbalance", between the parties' rights and obligations and therefore overlaps, partially or totally, with this second requirement[61]. It could be argued in this respect that good faith is "ancillary" to significant imbalance, and that the real test lies in the latter element. This view has received some support from the European Commission[62] with the "clearly political"[63] intention of avoiding the risk that good faith becomes a potentially harmful criterion for consumers. The Law Commission has also expressed its favour to this solution[64], although it is hardy compatible with the text of the Directive.

Difficulties arise, however, at the point of discussing the exact meaning and practical application of the "significant imbalance" test. It is evident that "significant

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[59] H. Beale 'Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts' in Beatson Friedmann *Good faith and Fault in Contract Law* op. cit. n.52, 245

[60] H. Collins 'Good Faith in European Contract Law' (1994) OJLS 251. Emphasis added.

[61] See also R. Browsword G. Howells 'The Implementation of the EC Directive on unfair term in consumer contracts –some unresolved questions' (1995) JBL 255.

[62] Law Commission *Unfair Terms in Contract: a Consultation Paper* op. cit.n.18, 3.60.

[63] V. Roppo, Final Report from Workshop 3, The definition of unfairness: the application of articles 3(1), 4(1) and of the annexes of the Directive *The Unfair Terms Directive, Five Years On* Acts of the Brussels Conference, 1-3.7.1999 op. cit. n.10, 132.

[64] M. Tenreiro E. Ferioli *Examen Comparatif des législations nationales transposant le Directive 93/13/CEE* in *The Unfair terms directive 5 years on*, Acts of the Brussels Conference, 1-3.7.1999 op. cit. n.10, 17

imbalance" involves a lack of symmetry in parties' rights and obligations or that the seller's or supplier's rights or remedies are excessive and disproportionate; and that, on the contrary, "balance" means that each risk placed on the consumer should be weighted against one placed on the business: "for instance, a customer may buy goods which appear to carry a full warranty but find that the clause make the supplier sole judge of whether or not the goods are defective. The imbalance is that the seller can invoke a legal remedy against the buyer if the latter does not pay, but the buyer has no legal redress against the seller if the seller denies that the goods are faulty" [65]. It is difficult, however, to understand how this reasoning would apply, for example, to a clause excluding liability for consequential loss: "since in the nature of things the seller cannot suffer consequential loss, the exclusion can only be balanced by adjustment in some other term in the buyer's favour"[66].

Brownsword, more recently echoed by Beale[67], proposed that a clause should be judged unfair if, although it is compensated by a lower price, it exposes the customer to an unacceptable degree of risk; and an "unacceptable" degree of risk is determined by reference to Rawl's "veil of ignorance". Applying this principle to 'significant imbalance' would mean that terms are fair when they could be accepted by rational agents who, without knowing on which side of the transaction they might stand, had to imagine themselves as parties to the transaction. Contracts which fail the test should not be upheld unless the losing party was consciously engaged in risk taking. Accordingly, it could be suggested that a term causes a "significant imbalance" when it involves a risk that not only one customer would be reluctant to take, but so would most customers be.

Finally, it is not clear what the relationship between significant imbalance and good faith is. There are several possible combinations between the two notions. The general view throughout Europe, supported by the wording of the Directive, is that the two requirements are cumulative[68], i.e. both must be satisfied for a term to be unfair. The same view, however, tends to confine the role of "good faith" to that of being a requirement ancillary to significant imbalance: such is, as previously described, the position of the Law Commission and of DG XXIV, but also of the majority of most Italian commentators[69],

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[65] H. Beale *Unfair Contracts in Britain and Europe* (1989) Current Legal Problems, 205
[66] *Ibidem,* 205.
[67] *Ibidem*, 206.
[68] See V. Roppo *Workshop 3, The definition of unfairness: the application of art.3(1), 4(1) and of the Annexes to the Directive* in The Unfair Terms Directive, 5 years on, op. cit.n.10, 125.
[69] See e.g V. Roppo *La nuova disciplina delle clausole abusive nei contratti fra imprese e consumatori* Rivista di Diritto Civile 1994, I, 284. The Contri document, on the other hand, had envisaged a formula that clearly

who find it difficult to accept that the validity of a clause can depend on a principle such as good faith, traditionally considered as undetermined, slippery and unreliable.

The Law Commission, however, additionally suggested that, if good faith was to be given a procedural meaning, it could work as an alternative criterion to significant imbalance: accordingly, a term drafted in an obscure way could for this simple reason be unfair[70].

In the end, however, "theories as to the exact roles to be played by good faith and substantive imbalance make very little difference in practice"[71]: in order to assess the actual impact of the new fairness test in the legal systems at issue, it is therefore necessary to proceed to the analysis of how the test has worked in reality.

5. Practical application of the fairness test.

a) The importance of the Annex

A common feature to the application of the fairness test in England and Italy is the importance of the grey list: correspondence with an item in the list, however, bears different consequences in the UK, where it raises a simple suspicion of unfairness, and in Italy, where it raises an actual presumption of unfairness. This is due to the different weight conferred to the list by the two legislators: according to art.1469-bis, terms are "presumed" to be unfair if their object or effect is among the ones included in the list; Regulation 5(5), on the other hand, defines Schedule 2 as "indicative and non-exhaustive list of the terms which *may* be regarded as unfair": accordingly, the OFT has undertaken the task of developing supplementary criteria that would help assess fairness[72].

Apart from terms that exclude liability for the customer's death or personal injury caused by negligence, the validity of which appears to be *a priori* excluded, all the other terms listed in Schedule 2 of the Regulations are examined by the OFT in combination with a number of factors. Those include an assessment of whether a term has the potential to upset the original legal balance of the contract; to leave a significant number of

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gave to good faith the status of general clause : „in any case they are considered as *vessatorie* if contrary to good faith", see G. Trovatore, *La definizione atipica delle clausole abusive tra controllo giudiziale e trattativa individuale* in Ric. Trim. Dir. Proc. Civ. 1997, 976.

[70] That the two limbs of the fairness test could work as alternative criteria was also envisaged by the Contri Bill in Italy, see Poddighe, op. cit., 108

[71] Law Commission *Unfair Terms in Contract: a Consultation Paper* op. cit.n.18, 3.69.

[72] In February 2001, OFT has produced an "Unfair Contract Terms Guidance" (London: OFT, 2001) which is arranged according to the categories of unfair terms listed in Schedule 2 to the Regulations (with two additional categories covering other types of unfairness); each category is then accompanied by a detailed explanation on why particular terms may or may not be held unfair.

consumers open to not getting what they were promised, paying more than what they bargained for, or obtaining no (or inadequate) redress for loss or damage caused by the trader's negligence. Whenever a term appears, on those grounds, suspicious, the OFT seeks to establish whether there are any other balancing provisions which, being detrimental to the supplier and linked to the term in question, tend to outweigh its effects: so, for example, a cancellation right for the trader might be considered fair if the consumer enjoys a right of equal extent and value (which does not necessarily mean a formal equivalence in rights to cancel). Alternatively, in the rest of the contract there may be qualifying provisions that remove the possibility of detriment in the term under suspicion. So, for example, terms that confer powers or safeguards to the supplier or subjecting the balance of the contract to changes to the detriment of the consumer are acceptable only 1) if narrow in effect; 2) if exercisable only for reasons stated in the contract which are clear and specific enough to ensure that the power of the trader cannot be used at will to suit the interests of the trader, or unexpectedly to the consumer; 3) if there is a duty on the supplier to give notice of any variation and the correspondent right of the consumer to cancel the contract.

The list of terms in Schedule 2 makes it also clear that the Regulations introduce control on several types of terms, which were not previously covered by UCTA, even within its extended understanding of "exemption clause" previously discussed. Whereas UCTA can certainly challenge limitation of damages clauses and provisions which place obstacles in the way of legal claims and defences, such as elimination of the right of set-off, it does not reach, for example, the whole range of terms concerning agreed remedies: for example, UCTA cannot tackle retention of deposits from the consumer in breach of contract without an equivalent right to compensation for the consumer if the trader breaches the contract; terms which require the consumer to pay a disproportionately high sum in compensation for the breach; terms which confer discretionary power upon one contracting party to redefine contractual obligations and to determine whether breach of contract has occurred.

In this respect, Schedule 2 and the OFT guidelines certainly represent a useful aid to English lawyers in that they provide several examples of the variety and different forms of potentially unfair terms, beyond the ones which are already known under the UCTA case-law.

In Italy, courts' dislike for the abstract formula of the fairness test and preference for the guidance provided by art.1469-bis par.3 and 1469-quinquies is evident. The lists

provided by the legislator are wide enough to cover several types of potentially unfair terms and what is left to courts is the task of examining the practical effects of an allegedly unfair term and to verify whether it falls or not within one of the listed groups. So, for example, in the *Siremar* case the Tribunale di Palermo stated that a term that excludes the company's liability for all damages to persons and goods transported unless the consumer proves that the damage is due to the company's fault has the effect of introducing "a reversal of the burden of proof (which) is *expressly forbidden* by art.1469-bis, para.3 n.18"[73]. Particular success has been gained by n.5 of art.1469-bis para.3 concerning terms that allow the professional to retain sums paid by the consumer where the latter does not conclude or cancels the contract without providing that the consumer receives from the trader twice that amount where the latter does not conclude or cancels the contract[74].

On the other hand, decisions are more carefully justified where courts reject the claim that a term is unfair: the same *Tribunale di Palermo*, for example, admitted that a term allowing Enel to modify the characteristics of the energy supplied with six months notice is covered by n.11 of art.1469-bis; however, the judge considered that Enel is already subject to the control of an Authority (*Autorita' per l'energia elettrica e il gas*) and cannot proceed to such a change without the latter's consent[75]. Accordingly, since existence of a public interest was guaranteed by the control of the Authority, it was evident that such an interest had to prevail over a private interest[76].

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[73] *Tribunale di Palermo* 3/2/1999 *Adiconsum c. Siremar* Foro It. 1999, I, 2085, at 2094. Similarly, the same court has held that a term that imposes to the consumer the payment of the deposit in case he withdraws from the contract without providing a similar obligation on the tour operator in case he cancels the contract was held contrary to art.1469-bis n. 5.

[74] Letter (d) of the annex mentions an amount which is equivalent, not double the amount paid by the consumer; the variation in the Italian implementation probably co-ordinates this provision with art.1385 c.c. on deposit which requires that the party who receives payment of a deposit pays twice that amount in the case where he cancels the contract.

[75] Tribunale di Palermo 7/4/1998 *Romano Benedetto c. Enel SpA* I Contratti 1998, 344

[76] *Ibidem*, 358

b) **Reasonable expectations and *tipicita' contrattuale***

A second feature common to the Italian and English application of the Directive is that the fairness test has, in cases where a certain term affects consumers' statutory rights, revolved around the contract model provided by the legislator. So, for example, the OFT has considered terms that deny buyers the right to full compensation where goods are misdescribed or defective as potentially unfair under the Regulations (as well as void and unenforceable under other legislation). Similarly, the *Corte d'Appello di Torino*[77] has held that a term that replaces the remedies for non-conformity of the goods granted to the buyer by art.1490 c.c. with less effective remedies is unfair.

Beyond this *prima facie* similarity, the different characteristics of English and Italian law have triggered different solutions: the detailed regulation in the Italian Code or in separate legislation of the content and of obligations attached to each type (*tipo*) of contract has allowed Italian courts to rely heavily on the balance envisaged by the legislator as the ideal point of reference of the fairness test (in particular the "significant imbalance"); the OFT, on the other hand, has been unable to find in the English law of contract such an extensive description of the parties' obligations and has therefore been forced to resort to additional criteria, similar to the ones described in section para.5a) above.

The main differences in approach between the two systems can be described as follows:

b(i) Significant imbalance

In Italy, the ideal point of convergence between the parties' interests as envisaged by the legislator itself has been considered as the "balance" with reference to which the "significant imbalance" must be measured. In other words, the "ideally balanced" contract is the one whose terms are established by the legislator itself by means of its "dispositive" provisions, i.e. provisions which set out parties' rights and obligations with reference to each type of contract[78], which can be derogated by the will of the parties and which

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[77] Appello Torino, 22/2/2000 in Giur. It. 2112, confirming Trib. Torino, 16/4/1999, *Comitato Difesa Consumatori c. Soc. Fiat, Soc. Progetto e Soc. Sogea* Foro It. 2000, I, 312t.

[78] The distinction between *contratti tipici* and *atipici* is fundamental to Italian (and continental) contract law. In Title III of Book IV of the Code (but also in separate laws) the legislator provides the legal framework for several types of contract (*contratti tipici*), ranging from sale to hire, from transport to agency, from banking to insurance contracts. Apart from some provisions which cannot be derogated by the parties, the rules provided for a certain type of contract are applicable to a transaction for all aspects which the parties do not choose to regulate themselves. However, parties are free to create *contratti atipici* i.e.contracts of a type which is not envisaged by the law (as long as such contracts have a socio-economical purpose) but in this case the legal framework of the contract will have to be laid down by the parties themselves. For all aspects which are not

therefore only apply where and when the contract does not envisage any different arrangements[79]; and the distance between the situation designed by the law and the one agreed upon by the parties, if not justified or elsewhere compensated, is the significant imbalance. So, for example, the *Tribunale di Roma* declared unfair a term establishing that where a certain loss was insured by different insurers, each of them was entitled to pay only a proportional share of the sum due. This, explained the court, reversed the rule of art.1910 c.c. according to which each insurer is liable for the whole sum (but after paying he will be entitled to claim a partial refund from the other insurers)[80].

Even in cases where the contract under dispute does not *prima facie* fall within one of the "tipi" regulated by the Code, courts would struggle to assimilate it to one of the models of the Code in order to extract from there the set of obligations that tie parties to each other: so, for example, the *Pretura di Bologna*[81] found that a contract for the supply of private tuition by a private educational institute did not *prima facie* fall within the types regulated by the Code but at a closer look had many features in common with the type of contract envisaged by art.2230 c.c. ("contratto d'opera intellettuale"); to assess the fairness on certain terms contained in the contract between the institute and its students the court therefore referred to the model regulated by the above provisions.

Since most decisions fall back on the model-contracts provided by the Code, little is left to more argumentative legal reasoning: the few decisions (or parts of decisions) that give a more original application to the "significant imbalance" criterion do not develop any systematic reasoning which could provide some enlightenment as to the criteria followed by courts. The *Tribunale di Roma*, for example, has held that a term that gives to both parties to an insurance the right to withdraw from the contract after the occurrence of the loss covered by the policy creates a dramatic imbalance in favour of the insurer by increasing to the maximum possible extent the profit obtained from mass contracts and of

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regulated by the parties' agreement, the applicable rules will be the ones provided by the Code (or other laws) for the type of contract which appears to be the closest to the one envisaged by the parties.

[79] Most of the rules of private law, as opposed to the rules of public law are „dispositive". Usually the wording of a provision itself makes it clear whether it is „dispositiva" or „imperativa": for example, e.g. art.1229 (any term that excludes liability for fraud of fault is void) is clearly *imperativa*. This basic distinction can be found in any textbook on obligations, such as Torrent Schlesinger Manuale di Diritto privato Giuffré, Milano, 1995, 18-20.

[80] 28/10/2000 *Movimento Federativo Democratico (MFD) c. ANIA* in Corr. Giur. 2001, 385. See also Trib. Roma, 21/1/2000 *Movimento Federativo Democratico (MFD) c. ABI,* op. cit., 2046 where the court declared unfair a term of a loan that allowed attachment of the insolvent debtor's assets to a larger extent than the one established by art.190 c.c.

[81] Pretura di Bologna 6/8/1998 *Visaggio c. Cos. Siter*, Foro It. 1999, I, 384. The case also applied art.1469-quinquies where it stated that the invalidity (inefficacia) of a term can be raised by the judge by his own

reducing to the minimum the risk which he is willing to bear. Similarly, the same court held that a term in a banking contract giving to both parties the right to withdraw from a contract of loan with one day notice was unfair due the unreasonably short notice[82].

Not always, however, are courts adequately prepared to carefully assess "significant imbalance": the Tribunale di Torino, for example, held that a term providing a manufacturer's six year guarantee against the rust of a car only if the owner took the car to periodical tests at the official Citroën dealer was not unfair, since the term was counter-balanced by the fact that the guarantee was given for a rather long lapse of time[83]. A more thoughtful answer, however, should have considered the extent to which the term allows the consumer to draw a clear picture of his/her position: the contract, for example, did not specify how often and at what charges the customer's car had to be taken for periodical tests –which is certainly an important element in determining whether the term gives rise to "significant imbalance".

As already discussed, the OFT has identified a number of guidelines to unfairness in connection both with the terms included in Schedule 2 to the Regulations and with terms which are not in the list[84]: this includes considering whether a term allows the supplier to impose an unexpected financial burden on the consumer (e.g. an explicit right to demand payment of an unspecified amount at supplier's discretion); or makes the consumer carry risks which the supplier is better able to bear, remove or at least reduce by taking reasonable care (e.g. the risk of encountering foreseeable structural problems in installation work); or entitles the supplier to impose disproportionately severe penalties on the other or misleadingly threaten sanctions over and above those that can be really imposed.

A central feature of these "indicators of unfairness" appears to be the concern that a significant number of consumers may be deprived of what they were promised, or would pay more than expected, or would obtain no (or inadequate) redress: in other words, all terms that render the consumer's position unforeseeable or that expose the consumer to unexpected disbursement appear to be regarded as potentially unfair. The leading rationale of the OFT's analysis appears therefore to be based on the idea that any term that deprives a consumer of what any reasonable consumer would expect from a certain contract is

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motion, since the claim had originally been brought under d.lgs 50/1992 (implementing the doorstep selling Directive), which the judge considered inapplicable to the case.

[82] *Movimento Federativo Democratico (MFD) c. ANIA* op. cit. n.80.

[83] Tribunale Torino 7/6/1999 Comitato Difesa Consumatori c. Soc. Citroen Italia e Soc. Auto Jet Foro It. 2000, 1, 298

likely to be unfair.

b(ii) Good faith[85].

In contrast to the (limited) use of the criterion of significant imbalance, the other element of fairness test, good faith, is hardly mentioned by Italian courts.

In cases where courts decide that certain terms do not pass the fairness test, one can sometimes find references to "a significant imbalance of contractual duties and rights *which* (...) *is sufficient to render the term unfair*"[86]: good faith is, thus, completely ignored.

The reason for this is firstly in the abstract nature of good faith, which, as in the past, makes it appear unreliable and scarcely appealing to judges. Second, the good faith test under the Directive has a different content from the good faith clause traditionally applied by Italian courts. In Chapter 2 we saw that the good faith criterion contained in the Italian Civil Code is mainly a tool of integration of contracts or of the law: so, for example, conduct that may in theory be allowed since it is not expressly forbidden by the contract or by the law, when assessed on grounds of good faith is no longer allowed; in the same way, conduct which is not strictly prescribed by the law or the contract may become compulsory in the light of good faith. In imposing duties or restrictions on parties' conduct, good faith takes as a point of reference the aim envisaged by the parties in making the contract and the conduct which is ideally instrumental to its achievement; in other words, good faith is understood as a means to guarantee that the economic and legal balance established by the parties is achieved in accordance with, and sometimes beyond, the provisions of the contract or of the law. The purpose of good faith is ultimately to ensure that parties' actions are always directed towards the achievement of the purpose for which the contract was originally made: in this sense, the parameters by reference to which good faith is assessed are "internal" to the contract.

The good faith clause contained in the Directive differs in two main respects: first, rather than a source of integration of the law or the contract, it provides a tool of control of the content itself of the contract: it does not aim to control the modality of exercise of

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[84] See terms listed in Group 18 of the OFT's *Unfair Contract Term Guidance*, op. cit.n.72, 41-51.

[85] Unfortunately, the case-law of the Court of Justice could provide only a small amount of assistance in the drafting of this recital. Indeed, the few references to good faith in judgements of the Court of Justice concern subjective good faith, a psychological condition, and not objective good faith, a standard of contract: see, e.g. C-251/00 *Ilumitrónica-Iluminação e Electrónica Lda and Chefe da Divisão de Procedimentos Aduaneiros e Fiscais/Direção das Alfândegas de Lisboa* [2002] ECR I-10433.

[86] Tribunale di Roma, 21/1/2000 *Movimento Federativo Democratico c. ABI* in Foro It., 2046. This is probably the most successful action brought by a consumers' association since the implementation of the Directive;

rights created by a contract or by the law, but rather aims to assess the content and effect of such rights; second, the values and standards by reference to which good faith is assessed are not to be found in the contract itself, but elsewhere, outside the contract: they are "external" to the contract.

Accordingly, the experience gained by Italian courts in the use of good faith is of little use for the purposes of unfair terms control.

In a few cases courts have refused to apply good faith criterion to preventive actions brought by consumers' associations[87] on grounds that "... good faith must be understood in an objective sense as loyalty and correctness during the bargaining stage, that impose to the trader a duty to inform the consumer in detail about the terms in order to allow him an easy reading of the contract. This criterion does not appear to be usable in the case of preventive action given their abstract nature, in the same way as the "circumstances at the moment of conclusion of the contract" (...) cannot be taken into account, since this must be attached to a practical case that does not exist in a preventive action". If the view that good faith has to do with the trader's behaviour reflects a common opinion in Italian courts it is not surprising that the criterion has been scarcely considered, since most of the claims brought until now are preventive actions.

In one case only[88] is it possible to report an attempt to provide logical and accurate criteria to assess good faith: in an individual action brought by a consumer against ENEL, the court had to examine, *inter alia*, the fairness of terms that: 1) allowed ENEL to temporarily interrupt supply of energy in a set of listed circumstances and "for any other needs"; 2) imposed on the customer the duty to pay any tax fee or any other fee related to the contract; 3) allowed termination of contract whenever the consumer failed to pay the bills within a very strict deadline and imposed on the consumer the duty to pay any expense incurred by Enel in terminating or re-activating the contract. The answer to the question of the alleged unfairness of those terms is based on their common feature of giving rise to uncertainty for the consumer: due to those terms, the consumer is unable to foresee the financial consequences or anyway the effects of the contract. This amounts, according to the court, to "a violation of objective good faith which imposes to each party, among other things, the duty to behave according to loyalty and clarity towards the other

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thirtytwo terms (out of seventy eight) in standard contracts recommended by ABI (and used by two banks) were declared unfair and therefore non binding on the consumer.

[87] Tribunale di Torino 7/6/1999 *Comitato Difesa Consumatori c. Soc. Citroen Italia e Soc. Auto Jet* in Foro It. 2000, I, 298; similar reasoning (by a different judge) can be found in Tribunale di Torino 16/4/1999 *Comitato Difesa Consumatori c. Soc. Fiat, Soc. Progetto e Soc. Sogea, ibidem*, 312.

party in order to protect, as much as possible, his or her legal position"[89]. The application of good faith made by the court concerns neither the intelligibility and transparency of the language used nor the behaviour of the trader: it concerns the possibility for an individual to assess in advance his or her financial and legal position after signing a contract; its weight is that of an indicator of significant imbalance since the court later states that "the imprecise and generic indication of the effects of a contract (...) gives rise to an unreasonable imbalance to the detriment of the consumer and accordingly the term must be considered unfair...". In the hands of the Palermo court, good faith becomes an indicator of significant imbalance and is therefore absorbed in this requirement, without being considered as a distinct and independent one: contrariety to good faith is just one of the possible forms that significant imbalance may take. The interpretation of good faith proposed by the Palermo court comes therefore close to the notion of "significant imbalance" adopted by the OFT, where it emphasised the importance of certainty and predictability of consumers' legal and financial situation: under both views, the aim of the fairness test in the Directive is to ensure that consumers' "reasonable expectations" (*in abstracto*) are not disappointed.

The OFT itself, on the other hand, does not appear to pay much attention to good faith when drawing up, in practice, the lists of various factors relevant to the fairness test. However, in their more theoretical explanations on the method of their work, they appear to favour a substantive approach to good faith: good faith does not "equate with absence of bad faith in the narrow English sense of dishonest or deceptive conduct, in the way a term is likely to be used (...) We cannot challenge a term only if we have evidence that the supplier is likely to use it in bad faith. As previously noted, the mere absence of bad faith does not suffice to comply with the requirement of good faith. The legislation is directed at preventing contractual detriment generally, not just detriment that is caused by conscious malpractice (...); the Directive, homing in as it does upon contractual "imbalance" is concerned with drafting issues, not directly with the conduct of traders (...). For that reason, we take action where we consider that, on the balance of probabilities, a term involves a risk of consumer detriment, not merely where it could be proved that the detriment is likely to occur. (...) The task of the Director General is not to prove

[88] Tribunale di Palermo, 7/4/1998 Romano Benedetto c. Enel SpA in I Contratti 1998, 344-363.
[89] *Ibidem,* 360.

malpractice, nor to seek to impose penalties, but to identify and eliminate risks of consumer detriment in contract drafting"[90].

That the OFT is not concerned with "procedural" fairness is confirmed by the fact that even inequality of bargaining power between the parties (Schedule 2 [3] to the Regulations) is understood at a more general and abstract level: rather that relating to the to the position of the individual consumer in a specific contract; the OFT understands this criterion as relating to the trader's position in the market: "we are not likely to accept unsupported professions of good faith from suppliers who are dominant in their markets and particularly those whom it is difficult for consumers to avoid continuing to deal with after an initial transaction".

English courts, however, seem to have taken a rather different approach to the fairness test. As the following paragraph will make clear, the abstract guidelines drawn by the OFT have been given little consideration by the House of Lords that, as below argued, has done little more than applying to the UTCCR the well known UCTA reasonableness test.

c) ***Director General of Fair Trading v. First National Bank***

In *Director General of Fair Trading v. First National Bank* the plaintiff Director General of Fair Trading sought an injunction pursuant to reg.8(2) of the Unfair Terms in Consumer Contracts Regulations 1994 restraining the defendant from:

1) including in any loan agreement a term making interest payable on the amount of any judgement obtained by the defendants for sums owed by the borrower under an agreement regulated by the Consumer Credit Act 1974;

2) enforcing or seeking to enforce any such term which had already been included in any existing agreement.

The reason for the existence of the term was that where a judgement is obtained under a contract for the loan of a principal sum owed by the borrower, the principal becomes due under the judgement and not under the contract: the contract merges in the judgement. If the contract contains a provision for the payment of an interest of the principal sum due, such term will merge in the judgement, which will accordingly govern also the entitlement of the creditor to claim interests. However, parties can expressly agree that a covenant to pay interests shall not merge in any judgement for the principal sum due, so that interests may still be charged under the contract.

[90] Edwards 'The Challenge of the Unfair Contract Terms Regulations' op. cit. n.11,17.

According to the General Director, such a term was unfair in that 1) it was unlikely to be noticed by the average borrower who, at the time of the judgement, would expect that if he discharged all the instalments under the judgement the debt would be cleared; 2) it deprived borrowers of the advantage afforded by the County Court (Interest on Judgment Debts) Order 1991, which excluded regulated agreements under the Consumer Credit Act 1974 from the imposition of interest on a judgment debt.

The application was rejected in the High Court[91], but later succeeded in the Court of Appeal[92]; upon further appeal, the House of Lords[93] gave judgment against the DGFT and refused the injunction on grounds that the term was not unfair for the following reasons.

First, the House of Lords noted that the Consumer Credit Act 1974, although adopted to protect consumers, does not prohibit terms providing for post-judgment interest: so it is unlikely that "the term can be stigmatised as unfair on the ground that it violates or undermines a statutory regime enacted for the protection of consumers". The argument can be far-reaching and potentially dangerous since it can reduce the role of the Regulations to invalidating only terms that violate, directly or indirectly, laws enacted for the protection of consumers. The work of the OFT seems to prove, on the other hand, that although it cannot be established as a rule that any default term is unfair, the fact that a term is not prohibited by the law is not a reason in favour of its fairness.

Second, according to the Court, the absence of a term such as the one at issue would unbalance the contract to the detriment of the lender, and the bank would not lend if they knew that no interests will be repaid on the money lent. The argument does not take into sufficient account that the money lending activity, by its own nature, involves an element of risk, due to the possibility that the borrower does not repay in full and in due time. This is one of the reasons why banks charge interest rates (and it may be interesting to note that the interest rate charged by First National was unusually high, that proved that the customers were sought at the bottom end of the market): because they need to cover the risk run in respect of those customers who are unable to meet their repayment obligations. Accordingly, the risk of a borrower being unable to pay back his or her debt should be borne by the bank. Besides, if the rationale of the court order is to enable borrowers to repay money in a way that suits their possibilities, the unexpected request to pay interests frustrates the purpose of court orders.

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[91] [2000] 1 WLR 98.
[92] [2000] 2 WLR 1353.
[93] [2001] 3 WLR 1297.

Third, the Court emphasised that the provisions of ss.129 and 136 of the Consumer Credit Act 1974 confer to County Courts, in case of debtor's default, the power to make time orders and amend the underlying agreement for the relief of borrowers who cannot easily pay. Those provisions could be invoked by defaulting customers, but since no notice is ever given of this opportunity customers do not take advantage of this potential ground for relief. The Court therefore expressed some doubts that the difficulties in the case at issue derive from the unfairness of the term; rather, difficulties derive from the absence of safeguards for the consumer at the stage of default: in other words, "Regulation 4 is directed to the unfairness of a contract term, not the use which a supplier may make of a term which is itself fair"[94]. In addition, although the borrower may be disagreeably surprised if he finds that his contractual interest obligations continue to mount "it appears that the bank seeks to prevent that surprise by sending what is described in the evidence as a standard form of letter"[95] alerting the borrower of the continuing interest.

It is not clear how this reasoning can support the view that the term is fair, especially since it is later admitted that the borrower may be "disagreeably surprised" by it. The argument made by Lord Bingham that the bank alerts the consumer of the interests continuing at the time when the court order is made is not sufficient to render the term acceptable for two reasons: in the first place, it appears to imply that information equates to fairness and that any term is fair as long as the consumer is aware of it. This does not seem to be the most widely accepted interpretation of the aim and spirit of the Directive. Second, the informational problem in the case at issue is not due to the consumer's lack of comprehension of the term, but rather on relating the term in a meaningful way to his personal circumstances. This type of information cannot be met by the lack of clarity of the term as such[96].

In addition, according to Regulation 6(1) the fairness of a term must be judged at the time when the contract is made and not at a later stage: on the contrary, the reasoning implies that subsequent behaviour may make the term fair. Additionally, shift of focus from the moment of incorporation of a clause to a later time has already been identified in Chapter 2 as one of the factors enhancing unpredictability of the reasonableness test under

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[94] *Ibidem, 1309*
[95] *Ibidem, 1310*
[96] E. McDonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulation: *Director General of Fair Trading v. First National Bank'* (2002) MLR 771.

UCTA[97]. Moreover, the fact that there would be an alternative relief to which customers may resort if they just were aware of it does not make the term at issue fair: the fairness judgement is attached to the actual, not to an ideal world; on the other hand, if a term alerting consumers of the potential relief of ss.129 and 136 was included in the contract, that could certainly be considered a balancing factor that would render the term at issue fair.

The issue of consumer information had been dealt with in a different way in the Court of Appeal. The fact that the term was not drawn to the borrower's attention increased, according to the Court of Appeal, the borrower's surprise; and it was the fact that the term creates an unfair surprise that made it contrary to good faith. In interpreting good faith, the Court focused attention on the question whether a term which is not drawn to the customer's attention but which may operate in a way which the consumer might reasonably not expect to his disadvantage may offend the requirement of good faith. The Court concluded that, in this respect, terms should not defeat the reasonable expectation of the consumer, who must be put in a position where he can make an informed choice.

The Court seemed *prima facie* to hint at a more procedural understanding of good faith, or reasonable expectations, where it suggested that "the bank could discharge the fairness requirement by warning the customer before the contract is made that the contract stipulates obligations that the customer might not otherwise expect and by ensuring that he understands and appreciates the effect of the term"[98]. This, however, did not seem to entail that if the bank had taken reasonable steps to bring it to the attention of the consumer the clause would be fair: "we do not see that these palliatives prevent the contractual terms from being unfair, if the relevant term can be so categorised".[99]

The different decisions reached given by the House of Lords and by the Court of Appeal well represent the two possible approaches to the fairness test: according to the more procedural approach of the House of Lords, the question is whether, in practice, the term has been brought to the attention of the customer at the moment of conclusion of the contract; the more substantive approach of the Court of Appeal, on the other hand, seems to imply that even if the requirement of procedural good faith is satisfied, the term will not necessarily be fair unless the requirement of significant imbalance (or substantive good

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[97] Compare, on this point, the statement of the OFT that "in no case has the argument that a term is intended to be applied in minor cases or as a shelter against unreasonable claims been accepted if the term at issue has the potential to upset the original legal balance of the contract" *Unfair Contract Terms Guidance* op. cit. n. 72, 16.
[98] Op. cit. n.92, 1365.
[99] *Ibidem*, 1366.

faith) is satisfied[100]. Any reference to "consumers' reasonable expectation" made by the Court of Appeal must therefore be read as implying that a term is unfair if, *in abstracto,* a consumer would not expect to find it in a contract: this is independent of the consumer's actual awareness of the term, but is rather related to its content, as compared with the expectation that the consumer has in relation to that type of contract[101].

Overall, in *DGFT v. FNB* English courts not only missed a perfect chance of calling the ECJ to flesh out the empty shells of the words "significant imbalance" and "good faith"; they themselves provides little enlightenment as to their understanding of the fairness test.

d) The fairness test: a comment

The case-law above examined provides a wide range of diverse instances of interpretation and application of the fairness test in the Directive.

In *DGFT v. FNB* Lord Bingham suggests that the good faith test is satisfied when two requirements are fulfilled: one has to do with the openness of the dealing and requires that terms are expressed fully, clearly and legibly; the other requires that the supplier, when dealing with the consumer, does not take advantage of the consumer's weak bargaining position, ignorance and lack of experience and thus refers to good standards of commercial morality and practice. In other words, good faith is a procedural requirement that has to do with fair and equitable dealing and entails that the consumer should be made fully aware of the content and effects of the contract during the negotiation and conclusion of the contract.

A procedural approach to good faith has also been adopted, as earlier described, in a few Italian cases concerning preventive actions.

Arguments in favour of a procedural notion of good faith often rely, especially in England, on the fact that the guidelines of art. 4 and of Recital 16 of the Directive list several factors related to the negotiation and conclusion of the contract. Those strongly resemble the ones listed in relation to reasonableness in Schedule 2 of Unfair Contract

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[100] See Mitchell 'Unfair Terms in Consumer Contracts' (2001) Law Quarterly Review 560-562.

[101] That procedural fairness cannot justify substantive unfairness seem also to be the view of the European Commission: "Let us be clear: there is no way that a contractual term which causes 'a significant imbalance in parties' rights and duties arising under the contract to the detriment of the consumer' can confirm to the requirement of "good faith". Indeed, the opposite is true: a term is always regarded as contrary to the requirement of 'good faith' when it causes such an imbalance" M. Tenreiro 'The Community Directive on Unfair Terms and National Legal Systems' (1995) ERPL 273, 279; see also Tenreiro Ferioli 'Examen comparatif des legislations nationales transposant la Directive 93/13' in *The Unfair terms directive 5 years on,* Acts of the Brussels Conference, 1-3.7.1999 op. cit. n.10, 16. .

Terms Act 1977[102], thus suggesting a similarity with the (indirectly) procedural approach of UCTA. In addition, when the Common Position was agreed it was made clear that reasonableness should form part of the fairness test.[103]

On those grounds, DTI stated that "a similar result in most cases is likely to be achieved when applying the test of fairness in the Directive as when the term is considered to determine whether it is reasonable under [UCTA]" although there would be "no guarantee that this would be the case"[104].

Nevertheless, the similarity between the guidelines of the reasonableness test and the factors to be taken into account in assessing good faith is not as significant as it may *prima facie* appear. The good faith test as originally envisaged in the first draft of Recital 16 was based on ideas which included not only adoption of a fair and reasonable conduct, but also reference to values such as justice, balance, equity and fairness of the society[105]; as the history of the Directive suggests, the criteria which appear to be directly derived from UCTA were actually introduced later, after some contact with UK representatives, as a "compromise" between the position of common law and civil law countries; the Recital itself, formulated so as to suggest similarity with the reasonableness test, underwent several changes since it was first drafted with the intention of making it more acceptable the common lawyers[106].

It is also submitted here that adoption of a procedural approach to good faith on the model of the reasonableness test would fail to capture the fact that such a test is referred, in the text of the art.3 of the Directive, to contract terms themselves and not to the behaviour of the parties: "for this reason, it would be wrong to confine the requirement of good faith to defects in negotiating procedures which are already addressed in English law through the doctrines of misrepresentation, duress and undue influence."[107]

There are, however, more fundamental reasons why a procedural interpretation of good faith should be avoided.

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[102] See e.g. M. Bridge *Good Faith in Commercial Contracts* in *Good Faith in Contract*, op. cit.n.52, 162-163.
[103] The only difference between the list in Recital 16 and Schedule 2 of UCTA is that where UCTA mentions "the customer's knowledge of the existence and extent of the term" the Regulations refer to whether there has been fair and equitable dealing. On ground that this is wide enough to include the case where the seller has not properly disclosed the terms, there is wide room for the argument that the two tests largely overlap, M. Dean *Unfair Contract Terms: the European Approach* (1993) MLR 585.
[104] DTI *Implementation of the EC Directive on Unfair Terms in Consumer Contracts* (London: DTI, 1994).
[105] The content of the very first draft of the recital is revealed by Tenreiro 'The Community Directive on Unfair Terms and National Legal Systems' op. cit.n.101, 277-278.

[107] Collins *Good Faith in European Contract Law* op. cit.n.30, 250.

In Chapter two, we have emphasised that the shortcomings of UCTA in England in terms of legal certainty are due, *inter alia,* to the fact that the reasonableness test under the Act is strictly related to the circumstances surrounding the conclusion of the contract, rather then being attached to more abstract and objective criteria concerning the content and effect of terms. This, it was argued, makes it difficult for economic operators to assess "a priori" the fairness of the terms used in standard contracts and renders courts' decisions unpredictable, thus discouraging consumers' claims. In this respect, we spoke about "personalised justice" (as opposed to the abstract, equally, if not more unsatisfactory, Italian model of "impersonal justice").

A procedural approach to good faith would therefore mean perpetuating the problems arisen under UCTA of "personalised justice" and creating another set of *ex casu* judgments, based on their own particular facts and not amenable to judicial review. Under the Directive, on the other hand, "the legal situation resulting from national implementing measures must be sufficiently precise and clear"[108].

Additionally, it must be noted that the test of fairness introduced by the Directive is to be used both in individual and in preventive actions: it cannot therefore be interpreted so as to give weight to elements, such as the trader's behaviour, that cannot be assessed before the contract is made[109].

Furthermore, a procedural approach to good faith, based as it is on the idea of market failure, lack of information and a lack of choice, is incompatible with the reality of standard terms itself. In the world of standard form contracts and mass transactions choice and information are by definition excluded: therefore, the starting point of any measure which aims at protecting the weak party to a standard form contract should be that there has been no choice and/or insufficient information; and that market failure in this respect cannot be remedied.

Finally, as already discussed, a procedural approach to good faith would make application of the fairness test more burdensome and would unduly restrict the scope of protection of the consumer in the case where one considers, as it seems, that significant imbalance and good faith are cumulative, rather than alternative, requirements: a term which is significantly imbalanced in favour of the trader would not be unfair unless it can

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[108] C-478/99 *Commission v. Sweden* [2002] ECR I-4147 concerning the allegedly incorrect implementation by Sweden of Directive 93/13.

[109] See Brownsword, Howells, Wilhelmsson in *Between market and welfare: some reflections on art.3 of the EC Directive on unfair terms in consumer contracts* in Willet (ed.) Aspects of good faith, op. cit., 36-37.

be proven that this is due to defects in the process of conclusion or negotiation of the contract.

A procedural approach to good faith would also be detrimental to consumer protection in Italian courts. Apart from the issues above raised, one must recall the analysis carried out in Chapters 1 and 2. The Italian case law has revealed a rather formalistic attitude of courts towards the requirements of *conoscenza* or *conoscibilita'* and to the issue of how specific attention has been drawn on certain types of particularly burdensome term. The first requirement has been interpreted as meaning that terms must be know to a reasonable customer and this means simple physical availability of the terms, rather than comprehensibility or a "red ink" test on certain clauses. However, even where art.1341c.c. imposes to draw specific attention to some terms, this has been interpreted as meaning that the relevant terms simply has to be "specifically" signed.

A procedural interpretation of good faith would therefore make it possible to argue that such a requirement is satisfied whenever the term at issue is *conoscibile* and adequately drawn to the customer's attention in compliance with art.1341: this would reduce the impact of the new fairness test to simple re-stating the unsatisfactory test of art.1341.

Once established that courts should refrain from giving good faith a procedural connotation, it remains to be established how, once substantive good faith overlaps with 'contractual balance' the fairness test is supposed to operate.

The case-law of Italian courts does not provide much guidance.

It has previously been explained that Italian courts have clung tightly to the contract *tipi* provided by the Code, on the assumption that the model contract envisaged by the legislator offers the ideal balance between parties' interests; accordingly, any departure from that model is an indicator of unfairness.

As they did in the past with the general good faith clause, courts have refrained from systematising the criteria that may guide the application of the fairness test and from elaborating a doctrine of contract fairness: rather, they have sought refuge in the provisions of the Code that regulate contractual arrangements and have therefore avoided, once again, to take into any account the socio-economical reality of unfair terms. In this sense, legal thinking in Italian courts remains highly impersonal.

The idea of "contractual balance", on the other hand, is not very familiar to common lawyers. As already mentioned, the absence of any detailed regulation of the content of different types of contract makes it more difficult to assess what ideal balance contract

should achieve. Additionally, as Pollock's definition of contract as "a promise or a set of promises recognized by the law" shows, contracts are perceived as an exchange of two sets of obligations which are somehow independent from each other; the interrelationship between the parties' obligations is therefore less important than it is in civil law, and this is also why doctrines of the type of *force majeure* developed at a relatively late stage. As a consequence, assessing one party's obligations in relation to the other party's ones is not an operation which commonly made in the common law legal reasoning. To confirm this, it is sufficient to quote one comment made by a common lawyer to a decision of the OFT asking the amendment of a term that provided the possibility to get compensation in case of cancellation of the contract only in favour of one party: "what is noticeable about this approach is that the liability of the consumer in one scenario is looked at in conjunction with the liability of the seller or supplier in a different (but mirror image) scenario. This is a new development in English law. In the case of term (d) [of the annex] where the consumer forfeits sums to the seller or supplier where he (the consumer) does not conclude or perform the contract, English and Scots common law would focus on this side of the equation alone. Is the provision a deposit, and, if so, is it reasonable (...) In determining this sort of questions the liabilities of the supplier in a reverse situation are not relevant"[110].

Accordingly, while it has be accepted that significant imbalance entails in principle that "a term is weighted in favour of the supplier so as to tilt the parties' rights and obligations under the contract significantly in his favour"[111], it may be difficult to apply this criterion in practice.

An innovative contribution has been made, in this respect, by the OFT. In their accurate work of classification and systematisation of the "indicators of unfairness" the OFT provided a clear and well defined set of guidelines that allow, with a reasonable degree of certainty, to assess in advance the fairness of a term. The essence of the test lies in deciding whether a certain term deprives the consumer of what he would reasonably expect under a certain contract: such an assessment, however, in not made in relation to a specific context but it is made (due to the preventive nature of the actions brought by OFT) *in abstracto*, and for this reason it provides far more certainty than any other criteria previously used under UCTA.

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[110] C. Willett 'Good Faith and Consumer Contract Terms' in Brownsword Hird Howells (ed.) Good faith in Contract op. cit. n.52, 85.
[111] Lord Bingham in *DGFT v FNB* op. cit n.93, 1307.

It should not come as a surprise that the most enlightening guidelines on the fairness test come from a body of administrative, rather than judicial nature: it is exactly their non-judicial nature that makes OFT alien to the "personalised" notion of justice so deeply rooted in the common law legal thinking.

Chapter 6
Conclusion

1. The task set for this work

The task proposed for this work in the introduction consisted in assessing the impact of Directive 93/13 on the English and Italian legal systems in relation to two specific issues: first, whether and to what extent Directive 93/13 requires defining (or re-defining) concepts and notions which, while often already existing in the two national systems, are now embedded in the Directive; second, whether protection against unfair terms has, as result of the implementation of the Directive, been significantly improved; in other words, whether implementation of the Directive has triggered (or has the potential to trigger) an actual change in the concepts and principles according to which the legal material is currently shaped and systematised.

In order to answer those questions, this concluding chapter draws together the findings of Chapters 4 and 5 and compares them against those of Chapters 1 and 2 in the light of the information provided in Chapter 3: although the two questions raised in this work are given separate consideration, the conclusion reached in the following paragraphs will reveal that the question of the improvement of consumers' position largely depends on the issue of harmonisation.

2. "Europeanisation" of contract law

The analysis of the origin and history of the main provisions of the Directive (such as the one relating to the fairness test) carried out in Chapters 4 and 5 reveals that the adoption of certain notions and concepts in the Directive is the result of a negotiation process, in the course which one legal tradition succeeds in imposing upon the others its own regulatory choices.

This entails, sometimes, that countries that do not belong to the "winning" legal tradition are forced to adopt terminology, concepts and methods which do not belong to their own tradition: this is the case, for example, of the introduction of the notions of consumer and *professionista* in Italian law, previously unfamiliar with the idea that the general law of contract may apply *ratione personae* and still rather suspicious of categorisations that appear to conflict with principles of constitutional importance.

In most cases, however, the notions and concepts used in the Directive already have well-established meanings within each national legal system, which may differ dramatically from country to country since contract law terminology is highly specific and peculiar to each European legal system. The analysis carried out in Chapters 1 and 2 shows that such notions and concepts, like that of "unfair term" or "clausola vessatoria" hide, behind the apparent similarity in the translation, deep divergence in terms of legal techniques, legal thinking, policy choices and the relationship between courts and society.

In implementing and applying Directive 93/13, legislators and courts inevitably tend to understand the language of European legislation in the light of the concepts and notions already familiar to them: we have seen, for example, that the fairness test under the Directive has been perceived by many in England as overlapping to a large extent with the reasonableness test under UCTA; similarly, other formulas such as "mandatory statutory and regulatory provisions" or "subject matter" have been given, in both Italy and England, a meaning which is as close as possible to that retained under domestic law. It appears, therefore, that while Community intervention in the field of contract terms has achieved uniformity of language throughout Europe, it has not yet ensured uniformity of concepts.

Yet, it must be borne in mind when interpreting Community law that this 'is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied'[1].

[1] As first established in 283/81 CILFIT & Lanificio di Gavardo SpA v. Ministry of Health [1983] ECR 3415.

This requires that words and concepts used in the Directive are understood in a new, European perspective and in this respect a fundamental role will be played by the ECJ particularly *via* the preliminary ruling procedure.

For example, in the UK the notion of consumer already enjoyed a well-consolidated (although a bit confusing) meaning: following a number of ECJ judgements on the interpretation of "consumer" in several consumer directives, however, the Law Commission has expressed their willingness to take on board, in reforming the current law on unfair terms, the new definition proposed by the European Court.

The extent to which this process of "emptying" and re-defining words will take place, however, is not entirely clear. While one may expect that it will affect the "glamorously European" concepts, such as "good faith" and "fairness", which have been expressly introduced with the aim of creating a new and uniform standard of fairness throughout Europe, it appears that it may also touch more "unassuming" words used by the European legislator to express a "European" concept, but not meant to be "European" themselves, such as re-definition of the notion of "goods" so as to include land; it may require to re-define what the "subject matter of the contract" is, although this may already be reasonably clear within each national system; we have also seen that it can be convincingly argued that "an autonomous European view should be taken as to what constitutes the "contractual" provision of a service (...) The European Court should contribute to the construction of a European conception of contract for the purposes of the Directive"[2].

In Italy, for example, the question of the status of a *condominium* in respect of the definition of consumer in the Directive has been recently raised in the course of a proceeding in an Italian court[3]; the matter has then been passed on to the ECJ, to which

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[2] S. Whittaker "Unfair contract terms, public services and the construction of a European conception of contract" 116 LQR (2000), 95 at 99-100.

[3] Case C-129/01, reference for a preliminary ruling by the Tribunale di Bologna by order of that court of 20 February 2001 in the case of Condominio 'Facchini Orsini' against Kone Ascensori SpA OJ C173, 16/06/2001, 25. The question was formulated in the following terms: 'For the purposes of application of the provisions contained in Council Directive 93/13/EEC (...) can co-ownership of buildings referred to in artt.1117-1139 c.c. be regarded as a consumer where the individual owners are natural persons or are acting for purposes outside their trade, business or profession?'.
One case of this type has already been decided by the Tribunale di Bologna in CEAM c. Condominio Arcobaleno (sentenza of 3/10/2000 in Corr. Giur. 2001, 525). Following the more consolidated opinion, the court held that a condominium does not have any legal personality and the administrator who makes the contract does that as an agent of the people who live there: accordingly, the condominium can be considered a consumer. The decision was made certainly easier by the fact that the condominium was a block of family flats and did not contain any shops or offices.

the referring court has left the thorny task of answering, in practice, the question whether a *condominium* has or not legal personality[4]. The ECJ has declared the question inadmissible, but no explanation is available as to the grounds for their decision: this is regrettable since it may have brought some enlightenment on where the boundaries of harmonisation lie.

In a broader Community perspective, one may also wonder whether and to what extent harmonisation of the principles and notions contained in the Directive is needed in order to meet the demands of the internal market.

To answer this question, it is necessary to consider that art.8 of the Directive authorises Member States to introduce or maintain stricter protective measures than those provided by Community rules.

In principle, it has been noted that "the trite formulation of minimum harmonisation clauses generally found both in the Treaty and secondary legislation does not answer all the questions raised by multi-level regulation in a multi-faceted Community, questions which concern in particular the full impact of minimum harmonisation upon free movement and equal competition within the single market"[5]; the case of Directive 93/13, however, is a peculiar one since, as explained, this is primarily a consumer-oriented, rather than an internal-market oriented piece of legislation; it can therefore incorporate scope for persisting market divisions although it is based on art.95[6].

Accordingly, the fragmentation allowed by the minimum harmonisation formula in the Directive can justify differences in the understanding of its notions and concepts, provided that those do not entail a reduction in the level of consumer protection ensured by the Directive. The contribution of the ECJ to the harmonisation of the law on unfair terms is therefore limited to establishing a "bottom line" of protection, below which implementation and interpretation in the Member States cannot be pushed.

Finally, the potential of such a divergence to disrupt market-building must be assessed in the light of Keck and its subsequent case law. In Chapter 3 we saw that,

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[4] A similar question concerning the *status* of the administrator of a building in co-ownership was already answered by the ECJ in C-267/99 *Christiane Adam Urbing v. Administration de l'enregistrement des domains* Judgment of 11 October 2001.

[5] M. Dougan 'Minimum Harmonisation and the Internal Market' (2000) 37 CMLRev 853, 865.

[6] Weatherill 'Pre-emption, harmonisation and the distribution of competence' in C. Barnard and J. Scott *The Law of the Single European Market* (London: Hart, 2002), 60. The comment was made within a different context but can usefully be referred to here.

from the point of view of the internal market, the case for a Directive on unfair terms was not, at a closer scrutiny, very strong: the case for harmonising the concepts and notions used in the Directive is therefore at least equally weaker.

Nevertheless, it is submitted in the next paragraph that a stronger case for harmonisation can be made from the point of view of consumer protection.

3. Consumer protection

It was suggested at the very outset of this work that in every established legal system the legal past is central to the legal present: law, as a tradition, records and preserves belief, opinions, techniques, values and rituals; these give the past-in the present power over those who think and act in the present.

As already highlighted in the course of this work, Member States' legal tradition inevitably tends to play a dominant role in the application and interpretation of new law, with the effect that the shortcomings and weaknesses of a certain legal system may be perpetuated, in spite of legal reform.

The best example of this phenomenon is, once again, the Directive's fairness test: it has been argued in Chapter 5 that its current interpretation in England, which suggests a procedural understanding of good faith, comes dangerously close to reintroducing the personalised notion of justice rooted in the UCTA case-law; in Italy, on the other hand, one may expect that the fact that no comparable means of control existed before the Directive might encourage courts to perform a highly creative role. In practice, however, courts have followed in a rather uncritical manner the list of terms in the Annex; and when those were of no guidance, they have searched their solutions not in the analysis of the effects of the terms at issue on the consumer's legal position, but in the provisions of the Code: as in the pre-Directive case-law, their approach shows an understanding of the law as of a closed system, with little relation to the social reality which it is meant to regulate.

A real change in the legal thinking and in the principles guiding control of unfair terms can therefore only take place at European level. The ECJ has already played a relevant role in ensuring the effectiveness of the Directive at a procedural

level[7]: the same should now occur at substantive level, with the creation of a truly European notion of fairness.

Accordingly, the question whether the Directive has actually contributed to the improvement of consumer protection cannot, as such, be answered: the level of consumer protection afforded by it has not, as yet, really been established: 'significant imbalance' and 'good faith', as well as all the other notions which are functional to the definition of the scope of unfair terms control, are still 'empty shells'[8].

4. Closing comments

There will be, in practice, two main factors contributing to the harmonisation of unfair terms control: the coming up, in domestic courts, of suitable cases to refer; and domestic courts' willingness to refer relevant cases to the ECJ.

In this respect, the case of *DGFT v. FNB* certainly represents a missed chance to refer to the ECJ the 'perfect' case.

There is very little doubt that *DGFT v. FNB* represents, from the point of view of the relationship between national courts and the ECJ, a flagrant breach of domestic courts' duty of co-operation under ar.234; since the case required interpretation of a *communautaire* concept of unfairness, the House of Lords should have referred it to the ECJ under the preliminary reference procedure[9].

In justifying the House of Lords' refusal to refer the case to the ECJ, Lord Bingham relied on the *acte clair* doctrine and observed that "the language used in expressing the [fairness] test, so far as applicable in this case, is (...) clear and not reasonably capable of differing interpretations"[10]. It is evident, on the other hand, that the questions at issue in the case were far from being *acte clair.* First, it would be difficult to imagine a more "unclear" case than one where the decision of the House of Lords reverses an order of the Court of Appeal which had reversed a decision of the High Court -which had refused to award the injunction requested by the DGFT,

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[7] See cases C-240/98 to 244/98 *Océano Grupo Editorial SA v. Murciano Quintero* [2002] 1 C.M.L.R. 43; C-473/00 Cofidis SA v Jean- Louis Fredout judgment of 21 November 2002 available at www.curia.eu.int

[8] The recent work of Zimmermann and Whittaker *Good Faith in European Contract Law* (...) well shows, for example, that although several Member States are familiar with the notion of 'good faith' the way it is understood and used varies remarkably fro system to system.

[9] Dean, 'Defining Unfair Terms in Consumer Contracts – Crystal Ball Glazing? *Director General of Fair Trading* v. *First National Bank'* (2002) 65 MLR 776.On the contribution of the ECJ case-law to 'Europeanisation' of private law in general see van Gerven 'The case-law of the European Court of Justice and national courts as a contribution to the Europeanisation of private law' (1995) 3 ERPL 367.

[10] *ref,* 1307.

normally in charge of the enforcement of the Regulations. Second, although the judge denies that the meaning of the test is "doubtful, or vulnerable to the possibility of differing interpretations in differing Member States"[11], he then admits himself that "Member States have no common concept of fairness or good faith".

It is possible, however, that the scarce willingness to co-operate of the House of Lords is due, rather than to a misunderstanding of *acte clair,* to the lack of enthusiasm for the idea of taking part to a process of harmonisation the extent of which is, as yet, unpredictable and in which the European Court will certainly not act as a neutral arbiter: "it has a bias in favour of European integration (...). The strengthening of the EC legal system tends to advantage those who profit by dismantling national barriers, or by following European rules instead of national rules"[12]. Additionally, harmonisation through preliminary ruling has the potential to achieve outcomes that institutionally and politically the Community law-making bodies would have been unable to achieve, such as a common understanding of 'good faith': this is due to the fact that the ECJ operates within an institutional and political framework which is free from the restraints and hindrances to which the European legislator is subject.

Nevertheless, the coming up in domestic courts of suitable cases to refer remains an entirely accidental factor: obviously, in requesting a preliminary ruling from the ECJ litigants are not motivated by the desire to increase European integration but simply may plead in favour of an interpretation of EC law which favours them most.

A contribution to the enhancement and to the consistency of harmonisation may be given by the recent "Commission Action Plan on a more coherent contract law"[13].

In 2001, the Commission launched a consultation process about the way in which problems arising from divergence in domestic contract laws should be dealt with at European level[14]. The options for future initiatives in contract law suggested by the Commission ranged from taking no further action to developing a number of new initiatives to improve existing EC legislation in the area of contract law. In the recent Action Plan, issued as a conclusive step to the debate triggered by the 2001

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[11] *Ibid.*, 1307.
[12] Alter *Establishing the Supremacy of European Law* (Oxford: OUP, 2001) 53.
[13] "Communication from the Commission to the European Parliament and the Council. A more Coherent European Contract Law. An Action Plan" COM(2003) 68 Final.

Communication, the Commission confirms its determination to maintain the current sector-specific approach to contract law harmonisation. In combination with this, however, it also suggest the adoption of a common "frame of reference" establishing common principles and terminology in the area of contract law, as an important step towards the improvement of the contract *acquis*. The envisaged frame of reference "should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms such as 'contract' (...). The intention is to obtain, as far as possible, a coherent *acquis* in the area of European contract law based on common basic rules and terminology"[15].

Against the prospect that progress in legal harmonisation may otherwise be left in the hands of fate and of defiant courts, the Commission's Action Plan must certainly be greeted as a positive first step not only for the benefit of contract harmonisation but also of consumer protection.

[14] "Communication from the Commission to the Council and the European Parliament on European Contract Law" of 11.07.2001 COM(2001) 398 Final.
[15] Op. cit. n.13, 16.

Appendix I

Legislation

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
OJ L95/29

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 A thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas it is necessary to adopt measures with the aim of progressively establishing the internal market before 31 December 1992; whereas the internal market comprises an area without internal frontiers in which goods, persons, services and capital move freely;

Whereas the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States;

Whereas, in particular, the laws of Member States relating to unfair terms in consumer contracts show marked divergences;

Whereas it is the responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms;

Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts;

Whereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers;

Whereas the two Community programmes for a consumer protection and information policy (4) underlined the importance of safeguarding consumers in the matter of unfair

terms of contract; whereas this protection ought to be provided by laws and regulations which are either harmonized at Community level or adopted directly at that level;

Whereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the consumers', as stated in those programmes: 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts';

Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from this Directive;

Whereas the consumer must receive equal protection under contracts concluded by word of mouth and written contracts regardless, in the latter case, of whether the terms of the contract are contained in one or more documents;

Whereas, however, as they now stand, national laws allow only partial harmonization to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive;

Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording 'mandatory statutory or regulatory provisions' in Article 1 (2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

Whereas Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature;

Whereas it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms;

Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of

the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;

Whereas, for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws;

Whereas the nature of goods or services should have an influence on assessing the unfairness of contractual terms;

Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer;

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;

Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions;

Whereas there is a risk that, in certain cases, the consumer may be deprived of protection under this Directive by designating the law of a non-Member country as the law applicable to the contract; whereas provisions should therefore be included in this Directive designed to avert this risk;

Whereas persons or organizations, if regarded under the law of a Member State as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms of contract drawn up for general use in contracts concluded with consumers, and in particular unfair terms, either before a court or before an administrative authority competent to decide upon complaints or to initiate appropriate legal proceedings; whereas this possibility does not, however, entail prior verification of the general conditions obtaining in individual economic sectors;

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts,
had adopted this Directive:

Article 1
1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.

Article 2
For the purposes of this Directive:
(a) 'unfair terms' means the contractual terms defined in Article 3;
(b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
(c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

Article 3
1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 4
1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

Article 5
In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there

is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

Article 6
1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.
2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Article 7
1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

Article 8
Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.

Article 9
The Commission shall present a report to the European Parliament and to the Council concerning the application of this Directive five years at the latest after the date in Article 10 (1).

Article 10
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 1994. They shall forthwith inform the Commission thereof.
These provisions shall be applicable to all contracts concluded after 31 December 1994.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate the main provisions of national law which they adopt in the field covered by this Directive to the Commission.

Article 11
This Directive is addressed to the Member States.
Done at Luxembourg, 5 April 1993.
For the Council
The President
N. HELVEG PETERSEN

(1) OJ No C 73, 24. 3. 1992, p. 7.
(2) OJ No C 326, 16. 12. 1991, p. 108 and OJ No C 21, 25. 1. 1993.
(3) OJ No C 159, 17. 6. 1991, p. 34.
(4) OJ No C 92, 25. 4. 1975, p. 1 and OJ No C 133, 3. 6. 1981, p. 1.

Annex
Terms referred to in article (3) 1.
Terms which have the object or effect of:
(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
(l) providing for the price of goods to be determined at the time of delivery or allowing

a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.
2. Scope of subparagraphs (g), (j) and (l)
(a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.
Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
(c) Subparagraphs (g), (j) and (l) do not apply to:
- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

The Unfair Contract Terms Act 1977

Part I AMENDMENT OF LAW FOR ENGLAND AND WALES AND NORTHERN IRELAND

1 Scope of Part I

(1) For the purposes of this Part of this Act, "negligence" means the breach—

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);

(c) of the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957.

(2) This Part of this Act is subject to Part III; and in relation to contracts, the operation of sections 2 to 4 and 7 is subject to the exceptions made by Schedule 1.

(3) In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising—

(a) from things done or to be done by a person in the course of a business (whether his own business or another's); or

(b) from the occupation of premises used for business purposes of the occupier;

and references to liability are to be read accordingly but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier.

(4) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

2 Negligence liability

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

3 Liability arising in contract

(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled—

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

4 Unreasonable indemnity clauses

(1) A person dealing as consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness.

(2) This section applies whether the liability in question—

(a) is directly that of the person to be indemnified or is incurred by him vicariously;

(b) is to the person dealing as consumer or to someone else.

5 "Guarantee" of consumer goods

(1) In the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage—

(a) arises from the goods proving defective while in consumer use; and

(b) results from the negligence of a person concerned in the manufacture or distribution of the goods,

liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods.

(2) For these purposes—

(a) goods are to be regarded as "in consumer use" when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business; and

(b) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.

(3) This section does not apply as between the parties to a contract under or in pursuance of which possession or ownership of the goods passed.

6 Sale and hire-purchase

(1) Liability for breach of the obligations arising from—

(a) section 12 of the Sale of Goods Act 1979 (seller's implied undertakings as to title, etc);

(b) section 8 of the Supply of Goods (Implied Terms) Act 1973 (the corresponding thing in relation to hire-purchase),

cannot be excluded or restricted by reference to any contract term.

(2) As against a person dealing as consumer, liability for breach of the obligations arising from—

(a) section 13, 14 or 15 of the 1979 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);

(b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase),

cannot be excluded or restricted by reference to any contract term.

(3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.

(4) The liabilities referred to in this section are not only the business liabilities defined by section 1(3), but include those arising under any contract of sale of goods or hire-purchase agreement.

7 Miscellaneous contracts under which goods pass

(1) Where the possession or ownership of goods passes under or in pursuance of a contract not governed by the law of sale of goods or hire-purchase, subsections (2) to (4) below apply as regards the effect (if any) to be given to contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract.

(2) As against a person dealing as consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term.

(3) As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term, but only in so far as the term satisfies the requirement of reasonableness.

(3A) Liability for breach of the obligations arising under section 2 of the Supply of Goods and Services Act 1982 (implied terms about title etc in certain contracts for the transfer of the property in goods) cannot be excluded or restricted by references to any such term.

(4) Liability in respect of—

(a) the right to transfer ownership of the goods, or give possession; or

(b) the assurance of quiet possession to a person taking goods in pursuance of the contract,

cannot (in a case to which subsection (3A) above does not apply) be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness.

(5) This section does not apply in the case of goods passing on a redemption of trading stamps within the Trading Stamps Act 1964 or the Trading Stamps Act (Northern Ireland) 1965.

8 Misrepresentation

(This section substitutes the Misrepresentation Act 1967, s 3 and the Misrepresentation Act (Northern Ireland) 1967, s 3)

9 Effect of breach

(1) Where for reliance upon it a contract term has to satisfy the requirement of reasonableness, it may be found to do so and be given effect accordingly notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated.

(2) Where on a breach the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term.

10 Evasion by means of secondary contract

A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another's liability which this Part of this Act prevents that other from excluding or restricting.

11 The "reasonableness" test

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term

or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

12 "Dealing as consumer"

(1) A party to a contract "deals as consumer" in relation to another party if—

(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and

(b) the other party does make the contract in the course of a business; and

(c) in the case of a contract governed by the law of sale of goods or hire purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

(2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

13 Varieties of exemption clause

(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of evidence or procedure;

and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

(2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.

14 Interpretation of Part I

In this Part of this Act—

"business" includes a profession and the activities of any government department or local or public authority;

"goods" has the same meaning as in the Sale of Goods Act 1979:

"hire-purchase agreement" has the same meaning as in the Consumer Credit Act 1974;

"negligence" has the meaning given by section 1(1);

"notice" includes an announcement, whether or not in writing, and any other communication or pretended communication; and

"personal injury" includes any disease and any impairment of physical or mental condition.

Part II

(*omissis*)

Part III

PROVISIONS APPLYING TO WHOLE OF UNITED KINGDOM

26 International supply contracts

(1) The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (3) below.

(2) The terms of such a contract are not subject to any requirement of reasonableness under section 3 or 4: and nothing in Part II of this Act shall require the incorporation of the terms of such a contract to be fair and reasonable for them to have effect.

(3) Subject to subsection (4), that description of contract is one whose characteristics are the following—

(a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and

(b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom).

(4) A contract falls within subsection (3) above only if either—

(a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or

(b) the acts constituting the offer and acceptance have been done in the territories of different States; or

(c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.

27 Choice of law clauses

(1) Where the law applicable to a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the

United Kingdom) sections 2 to 7 and 16 to 21 of this Act do not operate as part of the law applicable to the contract.

(2) This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)—

(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

(3) In the application of subsection (2) above to Scotland, for paragraph (b) there shall be substituted—

"(b) the contract is a consumer contract as defined in Part II of this Act, and the consumer at the date when the contract was made was habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on
his behalf.".

(omissis)

SCHEDULE 1

SCOPE OF SECTIONS 2 TO 4 AND 7
Section 1(2)

1 Sections 2 to 4 of this Act do not extend to—

(a) any contract of insurance (including a contract to pay an annuity on human life);

(b) any contract so far as it relates to the creation or transfer of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise;

(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright [or design right], registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;

(d) any contract so far as it relates—

(i) to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership), or

(ii) to its constitution or the rights or obligations of its corporators or members;

(e) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.

2 Section 2(1) extends to—

(a) any contract of marine salvage or towage;

(b) any charterparty of a ship or hovercraft; and

(c) any contract for the carriage of goods by ship or hovercraft;

but subject to this sections 2 to 4 and 7 do not extend to any such contract except in favour of a person dealing as consumer.

3 Where goods are carried by ship or hovercraft in pursuance of a contract which either—

(a) specifies that as the means of carriage over part of the journey to be covered, or

(b) makes no provision as to the means of carriage and does not exclude that means,

then sections 2(2), 3 and 4 do not, except in favour of a person dealing as consumer, extend to the contract as it operates for and in relation to the carriage of the goods by that means.

4 Section 2(1) and (2) do not extend to a contract of employment, except in favour of the employee.

5 Section 2(1) does not affect the validity of any discharge and indemnity given by a person, on or in connection with an award to him of compensation for pneumoconiosis attributable to employment in the coal industry, in respect of any further claim arising from his contracting that disease.

SCHEDULE 2

"GUIDELINES" FOR APPLICATION OF REASONABLENESS TEST

Sections 11(2), 24(2)

The matters to which regard is to be had in particular for the purposes of sections 6(3), 7(3) and (4), 20 and 21 are any of the following which appear to be relevant—

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

(*omissis*)

The Unfair Terms in Consumer Contracts Regulations 1999

SI 1999 No.2083

Whereas the Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to consumer protection:

Now, the Secretary of State, in exercise of the powers conferred upon him by section 2(2) of that Act, hereby makes the following Regulations:-

Citation and commencement

1. These Regulations may be cited as the Unfair Terms in Consumer Contracts Regulations 1999 and shall come into force on 1st October 1999.

Revocation

2. The Unfair Terms in Consumer Contracts Regulations 1994 are hereby revoked.

Interpretation

3. - (1) In these Regulations-
"the Community" means the European Community;
"consumer" means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;
"court" in relation to England and Wales and Northern Ireland means a county court or the High Court, and in relation to Scotland, the Sheriff or the Court of Session;
"Director" means the Director General of Fair Trading;
"EEA Agreement" means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the protocol signed at Brussels on 17th March 1993;
"Member State" means a State which is a contracting party to the EEA Agreement;
"notified" means notified in writing;
"qualifying body" means a person specified in Schedule 1;
"seller or supplier" means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned;
"unfair terms" means the contractual terms referred to in regulation 5.

(2) In the application of these Regulations to Scotland for references to an "injunction" or an "interim injunction" there shall be substituted references to an "interdict" or "interim interdict" respectively.

Terms to which these Regulations apply

4. - (1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.

(2) These Regulations do not apply to contractual terms which reflect-
(a) mandatory statutory or regulatory provisions (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment);

(b) the provisions or principles of international conventions to which the Member States or the Community are party.

Unfair Terms

5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Assessment of unfair terms

6. - (1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-

(a) to the definition of the main subject matter of the contract, or

(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Written contracts

7. - (1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.

Effect of an unfair term

8. - (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Choice of law clauses

9. These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States.

Complaints - consideration by Director

10. - (1) It shall be the duty of the Director to consider any complaint made to him that any contract term drawn up for general use is unfair, unless-

(a) the complaint appears to the Director to be frivolous or vexatious; or

(b) a qualifying body has notified the Director that it agrees to consider the complaint.

(2) The Director shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction under regulation 12 in relation to any complaint which these Regulations require him to consider.

(3) In deciding whether or not to apply for an injunction in respect of a term which the Director considers to be unfair, he may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

Complaints - consideration by qualifying bodies

11. - (1) If a qualifying body specified in Part One of Schedule 1 notifies the Director that it agrees to consider a complaint that any contract term drawn up for general use is unfair, it shall be under a duty to consider that complaint.

(2) Regulation 10(2) and (3) shall apply to a qualifying body which is under a duty to consider a complaint as they apply to the Director.

Injunctions to prevent continued use of unfair terms

12. - (1) The Director or, subject to paragraph (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers.

(2) A qualifying body may apply for an injunction only where-

(a) it has notified the Director of its intention to apply at least fourteen days before the date on which the application is made, beginning with the date on which the notification was given; or

(b) the Director consents to the application being made within a shorter period.

(3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit.

(4) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.

Powers of the Director and qualifying bodies to obtain documents and information

13. - (1) The Director may exercise the power conferred by this regulation for the purpose of-

(a) facilitating his consideration of a complaint that a contract term drawn up for general use is unfair; or

(b) ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(2) A qualifying body specified in Part One of Schedule 1 may exercise the power conferred by this regulation for the purpose of-

(a) facilitating its consideration of a complaint that a contract term drawn up for general use is unfair; or

(b) ascertaining whether a person has complied with-

(i) an undertaking given to it or to the court following an application by that body, or

(ii) a court order made on an application by that body,

as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(3) The Director may require any person to supply to him, and a qualifying body specified in Part One of Schedule 1 may require any person to supply to it-
(a) a copy of any document which that person has used or recommended for use, at the time the notice referred to in paragraph (4) below is given, as a pre-formulated standard contract in dealings with consumers;

(b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.
(4) The power conferred by this regulation is to be exercised by a notice in writing which may-
(a) specify the way in which and the time within which it is to be complied with; and

(b) be varied or revoked by a subsequent notice.
(5) Nothing in this regulation compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the court.

(6) If a person makes default in complying with a notice under this regulation, the court may, on the application of the Director or of the qualifying body, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other association who are responsible for its default.

Notification of undertakings and orders to Director
14. A qualifying body shall notify the Director-
(a) of any undertaking given to it by or on behalf of any person as to the continued use of a term which that body considers to be unfair in contracts concluded with consumers;

(b) of the outcome of any application made by it under regulation 12, and of the terms of any undertaking given to, or order made by, the court;

(c) of the outcome of any application made by it to enforce a previous order of the court.
Publication, information and advice
15. - (1) The Director shall arrange for the publication in such form and manner as he considers appropriate, of-
(a) details of any undertaking or order notified to him under regulation 14;

(b) details of any undertaking given to him by or on behalf of any person as to the continued use of a term which the Director considers to be unfair in contracts concluded with consumers;

(c) details of any application made by him under regulation 12, and of the terms of any undertaking given to, or order made by, the court;

(d) details of any application made by the Director to enforce a previous order of the court.
(2) The Director shall inform any person on request whether a particular term to which these Regulations apply has been-
(a) the subject of an undertaking given to the Director or notified to him by a qualifying body; or

(b) the subject of an order of the court made upon application by him or notified to him by a qualifying body;
and shall give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question.

(3) The Director may arrange for the dissemination in such form and manner as he considers

appropriate of such information and advice concerning the operation of these Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by these Regulations.

Kim Howells
Parliamentary Under-Secretary of State for Competition and Consumer Affairs, Department of Trade and Industry.

22nd July 1999

SCHEDULE 1

(omissis)

SCHEDULE 2
Regulation 5(5)

INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR

1. Terms which have the object or effect of-
(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the

contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of paragraphs 1(g), (j) and (l)

(a) Paragraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Paragraphs 1(g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial

market rate that the seller or supplier does not control; - contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
(d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

Relevant provisions of the Italian Civil Code

Article 1229 Exemption clauses

Any agreement that excludes or restricts the liability for cases of fraud or gross negligence is void.

Any agreement exempting or limiting liability in cases where the act of the debtor or his auxiliaries constitutes a breach of duties arising from rules of public order is void.

Article 1341 Standard form contracts

Standard terms of contract prepared by one of the parties are effective as to the other, only if at the time of formation of the contract the latter knew of them, or should have known of them by using ordinary diligence.
In any case, some specific types of clauses are not effective unless specifically approved in writing. Such clauses are those which establish, in favour of him who has prepared them in advance, limitations on liability, the power of withdrawing from the contract or suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defences, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses, or derogations from the competence of courts.

Article 1342 Contract made by forms or formularies

In contracts made by subscribing to forms or formularies prepared for the purpose of regulating certain contractual relationships in a uniform manner, terms added to such forms or formularies prevail over the original terms of said forms or formularies when they are incompatible with them, even though the latter have not been struck out.
This does not affect the application of art.1341(2).

Article 1370 *Interpretatio contra proferentem*

Terms contained in standard terms contracts (1341) or in forms or formularies (1342) which have been prepared by one of the contracting parties must be interpreted, in case of doubt, in favour of the other party.

Italian Civil Code – Article 1469-bis to 1469-sexies

1469-bis Unfair terms in a contract between a professional and a consumer.

Terms in a contract between a consumer and a professional [for the sale of goods or the supply of services][1] are regarded as unfair when, in spite of the good faith, they cause a significant imbalance in the rights and obligation arising out of the contract to the detriment of the consumer.

In relation to the above paragraph, a consumer is the natural person who acts for purposes which are outside the business or professional activity that he may carry out. The professional is the natural or legal, public or private person who, within the framework of his business or professional activity, makes use of the contract of par.l above. Unless otherwise proved, terms will be presumed to be unfair when their object or effect is to:

1) Exclude or limit the liability of the professional in the event of death or personal injury to the consumer resulting from an act or omission of the professional;
2) Exclude or limit the actions or legal rights of the consumer vis-à-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional;
3) Exclude or limit the possibility for the consumer to offset a debt owed to the professional against any credit which the consumer may have against him;
4) Make an agreement binding on the consumer whereas performance by the professional is subject to a condition whose realisation depends on his own will alone;
5) Allow the professional to retain sums paid by the consumer where the latter does not conclude the contract or cancels it, without providing for the consumer to receive compensation of twice that amount from the professional where the latter does not conclude the contract or cancels it;
6) Require any consumer who fails to perform his obligation or does it with delay to pay a disproportionately high sum as agreed damage, penalty or as any other type of compensation;
7) Authorise the professional to cancel the contract where the same facility is not granted to the consumer, or permit the professional to retain, even in part, the sums paid for performance not yet carried out by him where it is the professional himself who dissolves the contract;
8) Enable the professional to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
9) Imposing a deadline to the consumer to express his desire not to extend the contract which is unreasonably early in respect of the expiry of the contract;
10) Bind the consumer to terms with which he had no opportunity of becoming acquainted before the conclusion of the contract;
11) Enable the professional to unilaterally alter the terms of the contract or any characteristics of the product or service to be provided without a valid reason specified in the contract;
12) Provide for the price of goods or services to be determined at the time of delivery or supply;
13) Allow the professional to increase the price of the goods or services without giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
14) Give the professional the right to determine whether the goods or services supplied are in conformity with the

[1] Eliminated by art.25, par. 1, ofl.2l/12/l999 n.526.

contract, or give him the exclusive right to interpret any term of the contract;
15) Limit the professional's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
16) Limit or exclude the possibility for the consumer to refuse to fulfil all his obligations where the professional does not perform his;
17) Give the professional the possibility of transferring his rights and obligations under the contract, even with the previous consent of the consumer, where this may reduce the guarantees for the consumer;
18) Restrict the consumer's right to take legal action by imposing time limitations, unconditioned duties to perform, derogation to the competence of courts prescribed by the law, restrictions on the evidence available to him, impositions on him of a burden of proof which, according to the applicable law, should lie with another party to the ontract, or restrictions to his freedom to contract with thirds;
19) Establishing as competent forum a court that sits in a place which is different from the consumer's place of residence or domicile;
20) Subject the transfer of a right or the acceptance of an obligation to a conditions whose realisation depends on the professional's own will alone while the consumer is immediately bound, save for the provision of art.1355C.c.

If the contracts concerns supply of financial services of indeterminate duration, the professional can, without prejudice to nn. 8) and 11) of this paragraph:
1) terminate unilaterally the contract without notice where there is a valid reason, provided that the supplier is required to inform the consumer immediately;
2) alter the conditions of the contract where there is a valid reason, provided that the supplier is required to inform the consumer with reasonable notice and that the consumer is free to cancel the contract.

If the contracts concerns supply of financial services, the professional can alter, without notice, as long as there is a valid reason, in derogation to nn.12) and 13) the interest rate or any other charge for the supply of the financial service agreed at the moment of conclusion of the contract, provided that the supplier is required to inform the consumer immediately and that the consumer is free to cancel the contract.

Nn. 8), 12), and 13) of par.3 do not apply to contract concerning securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control and do not apply to contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

Nn. 12) and 13) do not apply to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

1469-ter Assessment of the unfairness of terms.

The unfairness of a term is assessed by taking into account the nature of the goods or services for which the contract was concluded and by referring to the circumstances attending the conclusion of the contract and to the other terms of the contract or of another contract to which it is related or dependent.

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price of the goods or services as long

as these elements are identified in plain, intelligible language.

Terms which reproduce statutory provisions or provisions which reproduce provisions or implement principles contained in international conventions to which all EU Members States or the EU are part shall not be regarded as unfair.

Terms or parts of terms which have been individually negotiated shall not be regarded as unfair.
In contracts made by signing forms or contracts drafted in advance to regulate in a uniform way certain contractual relationships, the burden of proving that terms, or parts of terms, even though unilaterally drafted, have been individually negotiated with the consumer, lies on the professional.

1469-quater Form and interpretation

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.

Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. The above rule shall not apply in the cases regulated by art.1 469-sexies[2].

1469-quinquies Non binding nature of unfair terms.

Terms regarded as unfair under art.1469-bis and 1469-ter shall not be binding but the contract will continue to bind the parties for the rest.

Terms which, even though negotiated, have as their object to:
1) Exclude or limit the liability of the professional in the event of the death or personal injury to the consumer resulting from an act or omission of the professional;
2) Exclude or limit the actions or legal rights of the consumer vis-a -vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional;
3) Bind the consumer to terms with which he had no opportunity of becoming acquainted before the conclusion of the contract;
shall be regarded as unfair.

Terms will not be binding only to the advantage of the consumer and the issue can be raised by the judge by his own motion.

A retailer has the right to claim compensation from the supplier for the damages he may have suffered where terms in the retailer's contract have been declared unfair.

Terms according to which the law of a non-Member country is the law applicable to the contract are not binding if they have the effect of depriving the consumer of the protection ensured by the present chapter where the contract has a closer connection with the territory of a Member State of the European Union.

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[2] This paragraph was added by art.25, par.2, ofl.21/12/1999 n.526.

1469-sexies Preventive actions

Associations which are representative of consumers' or professionals' interests, Chambers of Commerce, Industry, Craftsmanship and Agriculture can bring legal actions against professionals or professional's associations who use standard contract terms and can apply to the competent court for interim relief measures in order to prevent them from using terms which have been declared unfair according to this chapter. The interim measure can be awarded, in case of fair and urgent reasons, in accordance with art.669-bis ff. of the code of civil procedure.

The court can order that the decision is published in one or more newspapers, of which at least one must have national circulation.

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