Unfair Terms In Consumer Contracts

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CONCLUSIONS

1. All member countries of the EC are now convinced of the necessity of specific legislation on general terms in consumer contracts.
2. There is now sufficient experience with national control systems to enable the Commission to make a choice of the best elements of these systems.
3. Legislation on unfair terms in consumer contracts should have two distinct objects: concrete disputes between two parties over a contract term and the use of unfair contract terms by a supplier in general.
4. As far as the concrete disputes between two parties are concerned, the introduction in the law of a general clause enabling the court to intervene is of the utmost importance.
5. The general clause should be supplemented by one or more lists of clauses which are held or presumed to be unfair.
6. Although less important, the codification of rules on the incorporation of general contract terms and on construction of unilaterally drafted terms is also useful.
7. With regard to the use of unfair contract terms in general, the object of the law should be twofold: negotiations between trade organizations and entities representing consumers should be promoted; these entities should also police existing contract terms.
8. The entity representing consumers may either be a governmental agency or a private organization, subsidized by the State.
9. The entity envisaged in point 8 should be empowered to request an injunction against any further use of unfair contract terms, to be heard by a specific court.
10. Experiments with negotiating contract terms on a nationwide, or perhaps even common market-wide level should be promoted.

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I. SCOPE OF THE REPORT

1. Introduction - 2. Substantive law and control procedures - 3. Standard contract terms and other terms - 4. Consumer transaction and other transactions - 5. Specific contracts - 6. Plan of this Report.

1. Introduction

Ten years ago, in 1977, I submitted to the European Commission a report on 'Administrative and judicial control of unfair terms in consumer transactions regarding goods or services'[1]. In the report, I described and discussed the control systems which were then in operation in Denmark, the German Federal Republic, Italy and the United Kingdom, and those which were envisaged in Belgium, France, Luxemburg and The Netherlands. I also described and discussed control systems in a number of non-EC-member countries, most notably those of Israel and Sweden.

In the decade which has since passed, much has happened. Denmark, the German Federal Republic and the United Kingdom now all have a ten-year experience with their control systems, which had only just been introduced in 1977. France, the Irish Republic, Luxemburg and The Netherlands have joined the countries with unfair contract terms legislation. Belgium seems to be on the verge of doing the same. Finally, there are the new member countries of the EC to consider: Greece, Portugal and Spain. Outside the European Community, the experiments in Austria, Finland, Norway, Sweden and Switzerland are worth mentioning. From other continents, the legislation of Australia, Canada, Israel and the United States should receive our attention.

The developments of the last ten years would already warrant the appropriateness of this supplementary report. There is, however, another reason why it may come at the right time. In 1977, I concluded my report with the observation that in the - then - short run the advantages of unification or harmonization on a European level of national control systems of unfair contract terms seemed to be outweighed by the disadvantages. At the time, there was little experience with the new control procedures, which

varied greatly in the various member countries. At present, there is a good deal of experience. It is therefore possible to select one or more control systems as the most appropriate ones. Moreover, the substantive law on unfair contract terms - which was not the subject of my 1977 Report[2] - has right from the start looked more appropriate for harmonization. This is apparent from the Council of Europe's Resolution (76)47 on Unfair terms in consumer contracts and an appropriate method of control[3], which lays down very specific rules as to substantive law but is far more abstract as to the control machinery.

There is also the added impetus of the Directives on products liability and consumer credit[4]. When it has been possible to arrive at a form of consensus[5] on such highly sensitive issues[6], why then should it be impossible to achieve the same in the area of unfair contract terms?

Acknowledgments

To write a report like this one, it is no use locking oneself in a library to look up all relevant legislation, case-law and legal writing. Rather, the materials one needs are often stored in semi-accessible annual reports, draft bills, etc. In order to find out about such materials, I have relied heavily on a number of persons whom I would like to thank for their co-operation. They are, listed by country:

AUSTRALIA : David J. Harland, Professor of Law at the University of Sydney;

CANADA : Nicole l'Heureux, Avocat and Professor of Law at the Université Laval, Québec
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Finally, I thank Peter Rodrigues, Research Officer in the Molengraaff Instituut voor Privaatrecht of Utrecht University for his help in the research and the Secretariat of the Netherlands Institute for Social and Economic law Research (NISER), more in particular Mrs. Willemien Vreekamp, for the typing of the manuscript.

2. Substantive law and control procedures

Legislation on unfair contract terms is not an entirely new phenomenon. In my 1977 Report, I have given a survey of the first legislative wave, which started in the 1930's. Its main proponent is Italy, the Civil Code of which contains three provisions aimed at general contract terms. Although such legislation may have served to protect consumers in individual cases, it did not serve - and was not meant to serve - as a means to improve the quality and the fairness of standard contract terms in general. This has been the main objective of a second wave of legislation, which started in Israel in the 1960's and had arrived in Europe in the early 1970's. General contract terms were now seen as a marketing practice and a new set of remedies (injunction) and enforcement agencies (Consumer Ombud, Market Court) was developed.
The most recent legislation on unfair contract terms shows a combination of the two approaches: the 'civil code' approach, directed mainly at individual conflicts, and the 'marketing practices' approach, directed mainly at the use of general contract terms in a large number of contracts. In Chapter III, I will go into this development in some more detail. It is mentioned here as a justification for dealing not only with the enforcement legislation in the Report, but also with substantive law.

3. Standard terms and individually negotiated terms

The use of unfair contract terms is a mass phenomenon. The new marketing practices legislation enables us to find a mass solution for a mass problem. The remedies offered are aimed at contract terms which are used in a number of contracts. It hardly is necessary to say so outright in legislation. Enforcement agencies would spend their time and money foolishly, when they would devote time to individual contract terms, unless such terms are used in other contracts as well (but then they will usually be considered to be standard contract terms). It therefore is sufficient to entrust enforcement agencies with the control over contract terms in general and they will themselves limit their control to standard contract terms. There is little against laying down such limitation in legislation, unless of course the proof that a clause is a standard contract terms would be made very difficult.

This is quite different on the individual level. Here, the fact that a contract term has been individually negotiated and then been typed separately on the contract makes the situation quite different from the more usual one of a printed reference to general conditions of contract which have been lodged with a Chamber of Commerce. It therefore is understandable that legislators have limited new remedies against unfair contract terms to standard terms. In this Report, most attention will be given to the standard contract terms and remedies against their use. Two objections may be raised against limiting our research to standard contract clauses, however. The first is that for a number of terms the question whether or not they have been negotiated individually hardly seems to matter as regards their fairness or unfairness. The second, more practical objection is that nowadays, with modern text writing equipment, it is hard to make a distinction between individual and standard terms. I shall therefore occasionally also look into such individual terms.

4. Consumer transactions and other transactions

This Report deals with unfair contract terms which are used in transaction between a professional supplier of goods or services on the one hand and a non-professional consumer on the other. Much has been written about the development of the consumer

concept. This issue will not be dealt with in this Report. Nor will attention be given to the question whether non-consumer transactions should be governed by the same rules which have been enacted to protect consumers. Extending consumer protection to non-consumers has the advantage of removing the demarcation problem. Another problem is raised however: commercial transactions are far less in need of government regulation than consumer contracts. Integration of regulation of purely commercial contracts and consumer contracts therefore entails a tension which often is resolved at the expense of consumer protection.

On the other hand, it has been pointed out that consumer protection against unfair contract terms may lead to a less than satisfactory position for some middlemen, who themselves are not protected against unfair terms used by their suppliers. As we shall see, some legislators have tried to solve this problem by extending the protection measures to such situations.

5. Specific contracts and specific clauses

This Report will not deal with specific contracts in general, nor with specific clauses. As we have seen earlier, legislation on unfair contract terms may be divided in two parts: there may be provisions of a civil law type and provisions of a marketing practices type. Provisions of the former category will mainly consist of substantive law, whereas the marketing practice provisions tend to phocus on procedural rules. As we shall see, the marketing practices rules are most characteristic for consumer protection. Their enactment illustrates the well known fact that good substantive law has no value without good enforcement.

Unfair contract terms legislation also shows the contrary, however. Enforcement rules without any substantive norms to enforce are of little value to consumers, if any. Such substantives rules may be laid down in two distinct forms. Either they deal with unfair contract terms in general, or they apply to specific contracts or specific clauses.

Some countries have enacted a number of new provisions on sale of goods, door-to-door sales, consumer credit, bank payments, etc. or

on arbitration clauses, penalty clauses, etc. It is submitted that even when such legislation has been enacted, there will still be a need for substantive law which is geared to unfair contract terms in general. The reason for this need is that it is becoming increasingly difficult to encompass all consumer transactions within a number of broad categories. Especially the fast growing consumer services market is hard to grasp from a legislative point of view.

Nonetheless, it cannot be denied that the need for a general clause and black lists will be less apparent, when a country already has in its statute books a modern consumer sales law and the like. It is therefore mainly for practical reasons, that I shall refrain from dealing with such legislation in this Report, other than in passing.

6. Plan of this Report

Updating the 1977 Report on unfair contract terms in consumer contracts has three objectives. First, it is aimed at providing information as to the legislation which the countries mentioned above in Nr 1 have adopted during the last decade. A second objective is to look into the effectiveness of this legislation. In the third place, I want to explore the possibility of a harmonization of legislation on unfair contract terms in the EC.

In accordance with these objectives, the report consists of three parts. In Chapter II, I shall give the text of the major legislation concerned, both in the original language - or as is the case in Belgium, Finland and Switzerland: one of the original languages - as well as in an English translation. In Chapter III, as many data as could be gathered will be given concerning the effectiveness of the new legislation. Both Chapters II and III are divided into three sections: EC member countries, other European countries, and non-European countries.

In Chapter IV, an analysis of the legislation mentioned in Chapters II and III will be offered. Also some observations with regard to the feasibility of a directive will be made.

My 1977 Report included data as to the historical development of standard contract terms, empirical research as to the present day use of such terms, advantages and disadvantages of standard contract terms, traditional judicial control and its inadequacies, and the historical development of control systems for specific contracts such as the insurance contracts. Nothing much can be added to these data, except for the fact that empirical data as to the use and abuse of (standard) contract terms are still rare[7].

The use of standard form contracts has a number of disadvantages from a consumer point of view. In short, they are the following:
(a) the consumer will usually not go into the trouble to look at standard contract terms which are lodged with a Court, a Chamber of Commerce or company headquarters and which have been incorporated into the contract by reference;
(b) even if he receives the full text of the general conditions, their length and their typography do not invite the consumer to read the small print;
(c) even if he reads the text, he often will not grasp its full meaning;
(d) even if he grasps the full meaning, the consumer may think that the event dealt with shall not take place or that the supplier will not invoke the terms in such case;
(e) the consumer may be under the false impression that the supplier's general conditions have been officially endorsed;
(f) the consumer will usually not succeed in altering the contract terms - the agent or employee of the supplier will usually lack the authorization to do so;
(g) this makes it possible for suppliers to derogate from the law to the detriment of consumers and to their own advantage[8].

However, it should be added that standard contract terms also have advantages. Long ago. these advantages have been set out by Llewellyn:
'They save trouble in bargaining. They save time in bargaining. They infinitely simplify the task of internal administration of a business unit, of keeping tabs on transactions, of knowing where one is at, of arranging orderly expectation, orderly fulfillment, orderly planning. They ease administration by concentrating the

need for discretion and decision in such personnel as can be trusted to be discreet. This reduces wear and tear, it cheapens administration, it serves the ultimate consumer'[9].

This may sound as if only suppliers benefit from the advantages of standard form contracts. This is not the case. Consumers may also profit from the use of standard form contracts. Two examples may illustrate this. In Sweden, the Consumer Ombudsman has invited the association of automobile driving instructors to draft standard conditions regulating among others back payments in case instructors show up late[10]. More in general, consumers' organizations have argued for harmonization of general insurance conditions, in order that a better comparison of insurance coverage and premiums - the essentials of the contract - be possible.

In the 1977 Report, I have set out three disadvantages of traditional judicial control of unfair contract terms:

(i) few consumers will address a court in a matter of standard contract terms;

(ii) judicial decisions only have a limited reach;

(iii) judicial control often comes very late.

These disadvantages are taken away when collective or group actions are allowed (i), when the use of specific general conditions may be forbidden (ii) and when a concrete conflict no longer is necessary for the introduction of a court action (iii).

1. ENV/223/74.D, Rev. 2, November 1977. A summary of the report has been published: Ewoud H. Hondius, Unfair contract terms: new control systems, 26 *American Journal of Comparative Law* 525-549 (1978).

2. This was treated by E. von Hippel, whose report was published in *Rabels Zeitschrift* 1977, p. 237 ff under the title "Der Schutz des Verbrauchers vor unlauteren allgemeinen Geschäftsbedingungen in den EG-Staaten/Bestandsaufnahmen und Überlegungen".

3. Reprinted, among others, by A.R. Bloembergen and W.M. Kleijn (eds.), Contractenrecht, Deventer 1972-(looseleaf), Nr. 133 (English text).

4. Directive 85/374, *Official Journal* 1985, Nr. L 210, and 87/102, *Official Journal* 1987, Nr. L 42.

5. A *form* of consensus: complete consensus was not reached, witness the various possibilities for Member States to deviate from the liability system set up under the directive (agricultural products, development risk, financial limits) - see L. Krämer, EEC Consumer Law, Brussels/Louvain-la-Neuve 1986, Nrs. 320-330.

6. When I visited a number of EC member countries in 1977 in order to prepare my report on unfair contract terms, I spoke with organizations of both consumers and suppliers. The representatives of the later showed some interest in the subject of my report but what they all really wanted to find out, mistaking me for someone with any influence in Brussels, was how the preparation of a draft directive on products liability was proceeding.

7. In my 1977 Report, I already referred to sociological research by Gras. To this may be added: F.A.J. Gras, De sociale werkelijkheid van het standaardkontrakt: een rechtssociologisch onderzoek, thesis Amsterdam, 1984.

8. See my paper Unfair contract terms and consumer protection, in: La protection du consommateur, Kortrijk etc. 1984, 23, 36-37.

9. K. Llewellyn, 52 *Harvard Law Review* 700, 701 (1939).

10. See my paper, mentioned in footnote 8. p. 37.

II. SURVEY OF LEGISLATION

7. Scope of this Chapter

A. Member countries of the European Communities

8. Belgium - 9. Denmark - 10. France - 11. German Federal Republic - 12. Greece - 13. Irish Republic - 14. Italy - 15. Luxemburg - 16. The Netherlands - 17. Portugal - 18. Spain - 19. United Kingdom

B. Other European countries

20. Austria - 21. Eastern Europe - 23. Norway - 24. Sweden - 25. Switzerland

C. Non-European countries

26. Australia - 27. Canada - 28. Israel - 29. United States

7. Scope of this Chapter

In this Chapter, I will set out the text of the legislation on unfair contract terms in consumer contracts in the countries mentioned in Nr 1 above. Included is the text of the bills (Belgium) and draft bills (France, Italy) which either have a good chance of being adopted or at least influence legal thinking in the countries concerned. Where necessary, I have added information as to the legislative history of the texts. Since the *travaux préparatoires* concerning the new legislation in most cases are very lengthy, these could only be mentioned without going into detail.

Every text is accompanied by its translation into English. In some cases, the official or semi-official translation is given, in others I have translated the text myself. These translations may not be considered to be faultless - they should be read together with the original. Where official texts were at hand, I have sometimes preferred my own translation. The only translation which I have not been able to check is the translation of the 1984 Israeli Standard Contracts Act.

A. MEMBER COUNTRIES OF THE EUROPEAN COMMUNITIES

8. Belgium

Belgium is one of the few remaining member countries of the EC, where no general legislation on standard contract terms has been introduced so far. On July 23, 1985, the Belgian government has proposed to Parliament to insert two general provisions on standard contract terms in the Trading Practices Act[1]. Although the proposed provisions show a resemblance to a 1977 draft bill, which never made it to Parliament[2], they are of a less comprehensive nature.

On March 20, 1987, a revised text was approved of by the Senate and was sent to the House of Representatives. The new text will add two articles on standard contract terms to Section 6. Article 27 of the bill contains a black list[3]:

Dans les ventes de produits et de services conclues entre un vendeur et un consommateur, sont abusives les clauses ou combinaisons de clauses qui ont pour objet de:	In contracts for the sale of goods or the supply of services concluded by a supplier and a consumer, are illegal the terms and combinations of terms which aim at:
(a) laisser au vendeur la liberté de ne pas conclure le contrat, alors que le consommateur est définitivement engagé;	(a) leaving the seller the liberty not to conclude the contract, while the consumer is bound definitely;
(b) faire varier le prix en fonction d'éléments dépendant de la seule volonté du vendeur;	(b) making the price vary depending wholly on elements which are at the seller's discretion;
(c) réserver au vendeur le droit de modifier unilatéralement les caractéristiques de la chose à livrer ou du service à prester;	(c) reserving for the seller the right to modify unilaterally the characteristics of the good to be delivered or the service to be rendered;
(d) accorder au vendeur le droit de déterminer unilatéralement si la chose livrée ou le service presté est conforme au contrat;	(d) according the seller the right to decide unilaterally whether the good delivered or the service rendered is in conformity with the contract;

(e) interdire au consommateur de demander la résolution du contrat dans le cas où le vendeur n'exécute pas ses obligations;

(e) prohibiting the consumer to demand the repudiation of the contract in case of non-performance by the seller;

(f) obliger le consommateur à exécuter ses obligations alors que le vendeur n'aurait pas exécuté les siennes, ou serait en défaut d'exécuter les siennes;

(f) obliging the consumer to perform, while the seller has not performed or is in default;

(g) autoriser le vendeur à rompre ou à modifier le contrat sans dédommagement pour le consommateur, hormis le cas de force majeure;

(g) authorizing the seller to repudiate or to modify the contract without providing damages to the consumer, except in case of an Act of God;

(h) malgré le cas de force majeure, n'autoriser le consommateur à rompre le contrat que moyennant le paiement de dommages et intérêts;

(h) not authorizing the consumer, not-withstanding the fact that there is an Act of God, to repudiate the contract unless he pays damages;

(i) exonérer le vendeur de sa responsabilité du fait de sa faute lourde, ou celle de ses préposés ou mandataires;

(i) disclaiming the seller's liability for gross negligence of himself, his employees or his agents;

(j) supprimer ou diminuer la garantie légale en matière de vices cachés prévue par le Code Civil;

(j) dismissing or deminishing the legal warranty for hidden defects under the Civil Code;

(k) interdire au consommateur de compenser une dette envers le vendeur avec une créance qu'il aurait sur lui;

(k) prohibiting the consumer from setting off his debt to the seller with a claim he has against the seller;

(l) déterminer le montant de l'indemnité due par le consommateur qui n'exécute pas ses obligations, sans prévoir une indemnité du même ordre à charge du vendeur qui n'exécute pas les siennes;

(l) establishing the amount of damages due by the consumer who does not fulfil his obligations, without providing for an indemnification of the same order by the seller who does not fulfil his obligations;

(m) engager le consommateur pour une durée indéterminée, sans spécification d'un délai raisonnable de résiliation;

(m) engaging the consumer for an undertermined period, without specifying a reasonable period for notice of termination;

(n) limiter les moyens de preuve que le consommateur peut utiliser;

(n) limiting the means of proof which the consumer may use;

(o) faire renoncer le consommateur en cas de conflit à tout moyen de recours contre le vendeur;	(o) making the consumer renounce every recourse against the seller in case of conflict;
(p) déroger aux règles de compétence prévues à l'article 624 du Code judiciaire.	(p) derogating from the rules on competence in article 624 of the Judicial Code.

Article 28 then provides the sanction:

Les clauses et les combinaisons de clauses visées à l'article 27 sont interdites; même si elles figurent dans un contrat, elles sont nulles.	The clauses and combinations of clauses mentioned in article 27 are prohibited; even when they are incorporated in a contract, they are null and void.
Le consommateur ne peut renoncer aux droits qui sont établis en sa faveur par la présente section.	A consumer may not renounce the rights established in his favour by this section.

Like the present Trading Practices Act, the new Act will empower consumers' organizations to institute civil actions for a cease-and desist order to be given by the President of the Commercial Court (*tribunal de commerce*). As is the case at present, under article 83, par. 1 under 4 of the present text of the bill, those consumers' organizations which are represented in the Consumer Council are empowered to institute a civil action. At the moment, these organizations are the following: *Verbruikersunie* (Consumers' Union), *Vivec*, *Bond van Grote en Jonge Gezinnen* (Large and Young Families' Union), *Socialistische Vooruitziende Vrouwen* (Socialist Provident Women), *Kristelijke Arbeiders Vrouwengilden* (Christian Labour Women Guilds), Ligue des Familles (Families League), *Coöperatieve vrouwenbeweging* (Co-operative Women Movement), *Vie Féminine* (Female Life), *Federatie van Belgische Coöperatieven* (Belgian Co-operations' Federation), *Landelijk Verbond der Christelijke Coöperatieven* (National Union of Christian Co-operations), *Algemene Centrale der Liberale Vakbonden van België* (General Central of Liberal Trade Unions of Belgium), *Algemeen Christelijk Vakverbond* (General Christian Trade Union), *Algemeen Belgisch Vakverbond* (General Belgian Trade Union), *Vereniging van Coöperatieve Apothekers van België* (Association of Co-operative Pharmacists of Belgium)[4]. Before the present Trading Practices Act was enacted a gentlemen's agreement was concluded within the Consumer Council, to the effect that before any civil action would be instituted a settlement

under the auspices of the Council would be sought[5].

In order to institute civil proceedings, any of the organizations mentioned above does not need to have an interest of its own: the interests of consumers in general suffice. This is not the case where a criminal sanction applies; there the consumers' organizations must have an interest of their own[6].

Apart from the bill mentioned above, private Members of Parliament (De Groeve, 1974, Olivier, 1977-1978) have introduced bills aimed at establishing a Consumer Ombud[7] - these attempts appear to have met with little success. On April 29, 1987, *Moniteur belge* May 16, 1987, a Royal Commission was set up under the direction of Th. Bourgoignie to study the reform of Belgian consumer law. The inspiration for this commission has largely been drawn from the French *Commission de la refonte du droit de la consommation* - see Nr 10 below. One of the subjects which the Commission is presently studying is the use of unfair contract terms. Since the members of the Commission have been appointed for a three-year term, it is not to be expected that the final report will be published shortly.

Ever since 1966, Belgian legal writers have urged for a re-codification of the civil law, but so far Belgian politicians have not been inclined to take up this idea seriously[8].

9. Denmark

Denmark already had a complete legislation on unfair contract terms in operation by 1975. I have described the Danish control system in some detail in my 1977 Report. For that reason, I shall limit myself in this Supplement to giving a brief summary of the main provisions of Danish legislation. I shall then provide some information concerning new legislative developments.

The Danish legislation on unfair contract terms is to be found in two Acts: the Marketing Practices Act and the Contracts Act. The Marketing Practices Act (*Markedsføringslov*: MFL) of June 14, 1974, No. 297, came into force on May 1, 1975[9]. Under the Act, an administrative agency, the Consumer Ombudsman (*Forbrugerombudsmand*:

FO), has been set up. It is the Consumer Ombudsman's duty to see to it that the provisions of the Marketing Practices Act as well as the regulations issued in pursuance of the Act are not contravened (par. 15, section 1). The Consumer Ombudsman shall seek to induce suppliers of goods and services to act in accordance with the law by negotiation (par. 15, section 2).

If the Consumer Ombudsman does not succeed in persuading suppliers to act in accordance with the law, he may go to court. The court is the Marketing Practices Division of the Copenhagen Maritime and Commercial Court (*Sø-og handelsretten*). This is a court of first instance with a number of special functions. The court may issue an injuction against any further use of the unfair contract term or terms concerned (par. 16). A supplier who is found guilty of breach of an injunction issued by the court, may be fined or imprisoned for a term not exceeding a period of 6 months (par. 19). The Act also lays down a duty to make available to the Consumer Ombudsman the information which he requests.

The main substantive provision (par. 1) of the Marketing Practices Act reads as follows:

Loven gaelder i privat erhvervsvirksomhed og offentlig virksomhed, som kan sidestilles hermed. Der må i sådan virksomhed ikke foretages handlinger, som strider mod god markedsføringsskik.	This Act applies to private business activities and to comparable public activities. With regard to such activities no acts may be undertaken which are contrary to proper marketing practices.

Although the text of this provison leaves some doubt, the explanatory memorandum is very clear in stating that the incorporation of (unfair) terms in contracts, and especially in consumer contracts, shall be considered an (unfair) marketing practice. Unfairness should be assumed sooner, when the supplier has dictated his terms to the consumer.

When deciding whether a contract term is unfair, non-mandatory law shall serve as a standard. The incorporation of contract terms which have been drafted in negotiations with the Consumer Ombudsman shall be considered a proper marketing practice.

Among the other substantive provisions of the Marketing Practices Act, paragraph 4 has also become of interest with regard to contract terms. This paragraph reads as follows:

Erklaering om ydelse af garanti eller lignende, må kun anvendes, såfremt erklaeringen giver modtageren en bedre retsstilling end den, han har efter lovgivningen.	A guarantee or similar declaration shall not be given, unless such declaration provides the recipient with a better legal position than he has under existing legislation.

The control system, which has now been in force for more than twelve years, has not yet been subjected to any change. What has changed, however, is the number of legislative provisions which may serve as standards. This number has increased considerably over the years.

An Act of December 21, 1977, Nr 638, as amended 1986, Nr 583 (*Renteloven*) provides for a maximum interest rate in case of late payments. In 1986, the interest rate was the official discount rate plus an additional 6%. The scope of application of this Act is not limited to standard contract terms and not even to consumer contracts. However, under par. 7 of the Act, the maximum interest rate provision may not be deviated from in consumer contracts. The Act of March 29, 1978, Nr 139 (*Forbrugeraftalelover*) introduced, among others, a cooling-off period.

Very important for the back-up of the control procedure has been the introduction, by Act of April 4, 1979, Nr 147, of a Chapter on Consumer sales in the Danish Sale of Goods Act (*Købelov*). The Act of April 10, 1979, Nr 150 established a travel guarantee fund for cases of bankruptcy of travel agents. The Act of June 9, 1982, Nr 275, on consumer credit (*kreditkøb*) and the Act of June 6, 1984, Nr 284 on payment cards (*betalingskort*) also contain some provisions which are relevant for consumer contract terms. Thus, the Payment Cards Act provides in par. 7 section 1 that a notification should comprise '... 4) Business conditions and agreement terms otherwise'. Under par 7 section 3, the Consumer Ombudsman may lay down provisions on notification (he has done so by decree of December 18, 1984, F 635). Finally, on May 14, 1986, a bill on products liability, based on the EC directive, has been introduced with Parliament[10].

Within the Justice Department, two committees have been set up to look into the desirability and possibility of legislation on consumer services and on the sale of real property[11]. The committee on consumer services is just about finishing its work - it will propose a Consumer Services Act, much like the one already in force in Sweden. The committee on the protection of house buyers has recently recommended the introduction of a right to cancel the contract for the buyers of houses and those who have entered into a contract for the construction of such house (*Betaenkning Nr 1110/1987 om tilbagetraedelsesret ved aftaler om køb af fast ejendom og opførelse af bygning*)[12].

The Marketing Practices Act has been supplemented by a general clause on contract terms. This clause has been introduced into the Contracts Act (*Lov nr 242 af 8. maj 1917 om aftaler og andre retshandler på formuerettens område*) by Act of June 12, 1975, Nr 250, which was the result of Nordic co-operation. The general clause, par. 36, reads:

1. En aftale kan tilsidesaettes helt eller delvis, hvis det vil vaere urimeligt eller in strid med redelig handlemåde at gøre den gaeldende. Det samme gaelder andre retshandler.	1. An agreement may be set aside, in whole or in part, if its enforcement would be unreasonable or contrary to practices of fair conduct. The same applies to other legal transactions.
2. Ved afgørelsen efter stk. 1 tages hensyn til forholdene ved aftalens indgåelse, aftalens indhold og senere indtrufne omstaendigheder.	2. In applying section 1 of this provision, consideration shall be given to the circumstances at the time of the conclusion of the agreement, the content of the agreement, and later developments.

Once again, the text itself does not make it clear that standard contract terms and more particularly standard terms in consumer contracts are a prime target of the law. It was not thought necessary to put this down in the Act itself. Nor was it thought necessary to provide a black list of clauses which should be considered unfair. In the *travaux préparatoires* a number of clauses were mentioned as such however: clauses which make a contract binding for one party, whereas the other party remains free; clauses stipulating that a consumer cannot invoke oral promises by the other party's agent; clauses which authorize one party to decide what

should be the consequence of an abnormal ending of the contract; the exclusion or limitation of liability, specially in case of a guarantee; rigid expiration clauses in credit agreements; clauses forbidding cancellation of a subscription; clauses on penalties; clauses on long-term agreements. Some of these clauses are at present covered by the substantive law provisions which were introduced into Danish legislation between 1975 and 1987.

10. France

The French legislation on unfair contract terms is quite different in structure from the legislation in other European countries. Recent proposals from a government commission might bring the French more in line with the others.

The present provisions on unfair contract terms are laid down in art. 35-38 of the Act 78-23 of January 10, 1978 on the protection and information of the consumers of products and services (*Loi sur la protection et l'information des consommateurs de produits et de services*). The Act is sometimes also called the Scrivener Act after the Secretary of State for Consumer Affairs at the time (but beware: the Consumer Credit Act of the same date is also referred to as the Scrivener Act).

The present text falls far short of the government proposal, set out in my 1977 Report. The government bill met with much opposition. In contrast with the bill, the present art. 35 no longer contains an overall definition of unfair contract terms and it gives no power to the judiciary. In the Senate it was argued that the present text does vest too much power in the regulatory authorities to the detriment of the courts. But the National Assembly was of a different opinion and this prevailed. The upcoming national elections and the ensuing rapidity with which the numerous amendments had to be examined[13] may provide a partial explanation why this part of the law will not win a Legislator's Beauty Contest. The text of art. 35 reads as follows:

Art. 35. - Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, peuvent être interdites, limitées ou réglementées, par des décrets en Conseil d'Etat pris après avis de la commission instituée par l'article 36, en distinguant éventuellement selon la nature des biens et des services concernés, les clauses relatives au caractère déterminé ou déterminable du prix ainsi qu'à son versement, à la consistance de la chose ou à sa livraison, à la charge des risques, à l'étendue des responsabilités et garanties, aux conditions d'exécution, de résiliation, résolution ou reconduction des conventions, lorsque de telles clauses apparaissent imposées aux non-professionnels ou consommateurs par un abus de la puissance économique de l'autre partie et confèrent à cette dernière un avantage excessif.

De telles clauses abusives, stipulées en contradiction avec les dispositions qui précèdent, sont réputées non écrites.
Ces dispositons sont applicables aux contrats quels que soient leur forme ou leur support. Il en est ainsi notamment des bons de commande, factures, bons de garantie, bordereaux ou bons de livraison, billets, tickets contenant des stipulations ou des références à des conditions générales préétablies.
Les décrets ci-dessus peuvent, en vue d'assurer l'information du contractant non professionnel ou consommateur, réglementer la présentation des écrits constatant les contrats visés au premier alinéa.

Art. 35. - In the contracts concluded between professionals and non-professionals or consumers may be prohibited, limited or regulated, by decree of the Council of State issued after consultation of the commission established under article 36, and distinguishing if necessary according to the nature of the goods or services concerned, the terms concerning the determined or determinable character of the price as well as its payment, the conformity of the goods or their delivery, the spreading of the risks, the containts of liabilities and guarantees, the conditions of execution, resiliation, cancelling or renewal of the contracts, when such terms appear to be imposed on the non-professionals or consumers by an abuse of economic power made by the other party and confer upon the latter an excessive advantage.

Such unfair terms, stipulated in violation of the preceding provisions, are held not to have been made.
These provisons are applicable to contracts, whatever be their form. This is notably the case with regard to order forms, invoices, warranties, delivery orders, forms and tickets which contain stipulations or refer to general contract terms which have been drafted in advance.
The decrees envisaged above, with a view of assuring that the non-professional contracting party or the consumer is informed, may regulate the presentation of the writing in which the contracts envisaged in the first section are laid down.

Compared with the general clause, the bill's provisions on the Commission on unfair contract terms remained relatively unscathed in Parliament, although also on this count the government proposals were somewhat watered down. The present text reads as follows:

Art. 36. - Une commission des clauses abusives est instituée auprès du ministre chargé de la consommation.
Elle est composée des quinze membres suivants:
- un magistrat de l'ordre judiciaire, président;
- deux magistrats de l'ordre judiciaire ou administratif ou membres du Conseil d'Etat;
- trois représentants de l'administration, choisis en raison de leurs compétences;
-trois jurisconsultes qualifiés en matière de droit ou de technique des contrats;
- trois représentants des associations représentatives et agrées de défense des consommateurs;
- trois représentants des professionnels.

Art. 36. - A Commission on unfair contract terms is established with the Minister charged with consumer affairs.
The Commission consists of the following fifteen members:
- one magistrate belonging to the judiciary, president;
- two magistrates belonging to the judiciary or the administration or members of the Council of State;
- three representatives of the administration chosen for their competence;
- three lawyers with expertise in contract law or techniques;
- three representatives of representative and recognized consumers' organizations;
- three representatives of suppliers.

Art. 37. - La commission connaît des modèles de conventions habituellement proposés par les professionnels à leurs contractants non professionnels ou consommateurs. Elle est chargée de rechercher si ces documents contiennent des clauses qui pourraient présenter un caractère abusif.
Elle peut être saisie à cet effet soit par le ministre chargé de la consommation, soit par les associations agréées de défense des consommateurs, soit par les professionnels intéressés. Elle peut également se saisir d'office.

Art. 37. - The Commission shall take knowledge of the contract models which customarily are proposed by suppliers to their non-professional customers or consumers. The Commission is charged with finding out whether these documents contain clauses which may be of an unfair nature. The Commission may be seized to this effect either by the Minister charged with consumer affairs, or by the recognized consumer protection organizations, or by the suppliers' organizations concerned. The Commission may also act on its own initiative.

Art. 38. - La commission recommande la suppression ou la modification des clauses qui présentent un caractère abusif. Le ministre chargé de la consommation peut, soit d'office, soit à la demande de la commission, rendre publiques ces recommandations, qui ne peuvent contenir aucune indication de nature à permettre l'identification de situations individuelles.
La commission établit chaque année un rapport de son activité et propose éventuellement les modifications législatives ou réglementaires qui lui paraissent souhaitables. Ce rapport est rendu public.

Art. 38. - The Commission recommends the suppression or the modification of the clauses which are of an unfair nature. The Minister charged with consumer affairs may, either on his own initiative or at the Commission's request, render public those recommendations, which may not contain any indication of a nature as to permit the identification of individual situations.
The Commission draws up an annual report of its activities and where necessary proposes the legislative or reglementary modifications which it deems desirable. This report is rendered public.

On February 25, 1982, Ms. Lalumière, Minister for consumer affairs, and Mr Badinter, Minister of Justice, established a commission to restructure consumer law - the *Commission de refonte du droit de la consommation*. Under the presidence of Professor Calais-Auloy, the Commission published a Final Report in 1985[14]. Several of the Commission's proposals are of interest in the area of unfair contract terms. First, the Commission proposes to provide a legal framework for collective agreements between organizations of consumers and of suppliers. Second, a comprehensive regulation of unfair contract terms is proposed. Third, an extension of collective actions to the area of unfair contract terms is envisaged. Fourth, substantive consumer law is codified and improved. Below, I shall set out the Commission's proposals as to the collective agreements and the unfair contract terms. As far as the collective action is concerned, I simply refer to the Explanatory Memorandum accompanying the Commission's proposals[15].

Section Trois

Accords collectifs de la consommation

Section Three

Collective consumer agreements

Article 9
Le présent chapitre s'applique aux accords collectifs de la consommation négociés entre:
- d'une part, une ou plusieurs organisations représentatives de consommateurs;
- d'autre part, un ou plusieurs professionnels, ou encore une ou plusieurs organisations de professionnels.

Article 10
Les accords collectifs de la consommation régissent les relations entre professionnels et consommateurs. Ils peuvent notamment déterminer les modèles de contrats qui seront proposés aux consommateurs, l'information qui leur sera donnée, la qualité des biens et services qui leur seront fournis.

Article 11
Toute personne habilitée à conclure un accord collectif peut prendre l'initiative de réunir les négociateurs. La réunion peut aussi être provoquée par le ministre chargé de la consommation.

Article 12
Les accords collectifs qui déterminent des modèles de contrat doivent, avant d'être conclus, être soumis pour avis à la commission des clauses abusives.Celle-ci doit répondre dans trois mois. Passé ce délai, l'accord peut être conclu.

Article 13
Toute organisation représentative de consommateurs, toute organisation de professionnels ou tout professionnel qui ne sont pas parties à un accord collectif peuvent y adhérer ultérieurement. L'adhésion doit être notifiée aux signataires. L'adhérent est assimilé à un signataire.

Article 9
This chapter applies to collective consumer agreements, which have been negotiated between:
- on the one hand, one or more representative consumer's organizations;
- on the other hand, one or more suppliers, or one or more suppliers' organizations.

Article 10
Collective consumer agreements are applicable to the relations between suppliers and consumers. In particular, they may lay down contract models which shall be proposed to consumers, the information which shall be supplied to them, the quality of goods and services which shall be supplied to them.

Article 11
Any person who is authorized to conclude a collective agreement may take the initiative to get together the negotiation parties. The rendez-vous may also be initiated by the Minister charged with consumer affairs.

Article 12
The collective agreements which lay down contract models shall be submitted to the Commission on unfair contract terms for advice, behore their conclusion. The Commission shall answer within three months. After this period, the agreement may be concluded.

Article 13
Any representative consumers' organization, any suppliers' organization or any supplier who are not a party to a collective agreement may adhere to such agreement later. The adhesion shall be notified to the signatories. The adherent is assimilated with a signatory.

Article 14
Un accord collectif ne peut comporter de dispositions moins favorables aux consommateurs que celles des lois et règlements en vigueur.

Article 15
L'accord collectif détermine son champ d'application professionnel et territorial.

Article 16
Si plusieurs accords collectifs sont concurremment applicables, entre dispositions traitant d'un même objet précis, les plus favorables aux consummateurs l'emportent sur les moins favorables.

Article 17
L'accord collectif prévoit les conditions dans lesquelles il pourra être dénoncé, renouvelé ou révisé. Il détermine notamment la durée du préavis qui doit précéder la dénonciation. En l'absence de stipulation expresse, cette durée est de trois mois.

Article 18
Lorsqu'un accord collectif a été dénoncé par l'ensemble des signataires consommateurs ou des signataires professionnels, il continue à produire ses effets jusqu'à l'entrée en vigueur de l'accord destiné à le remplacer. A défaut de conclusion d'un accord nouveau, l'accord dénoncé reste en vigueur pendant un an, sauf clause prévoyant une durée plus longue.

Article 14
A collective agreement cannot contain provisions which are less favourable to consumers than those of the laws and decrees in force.

Article 15
A collective agreement sets out its functional and territorial scope of application.

Article 16
If several collective agreements are concurrently applicable, as among provisons dealing with the same specific subject the most favourable provisions to consumers shall prevail over the less favourable ones.

Article 17
A collective agreement lays down the conditions under which it may be denounced, renewed or revised. In particular it establishes the length of the period which shall precede a denunciation. In the absence of an explicit provision, this period is three months.

Article 18
When a collective agreement has been denounced by all consumer consignatories or by all supplier signatories, it shall continue to be effective until an agreement aimed at replacing it shall enter into force. When no new collective agreement is concluded, the agreement which was denounced remains in force during a one year period, unless it provides for a longer period.

Lorsqu'un accord collectif a été dénoncé par une partie seulement des signataires consommateurs ou des signataires professionnels, les dispositions de l'alinéa précédent s'appliquent aux signataires qui ont dénoncé l'accord; les autres signataires restent liés par l'accord.
Dans les deux cas, la dénonciation n'a pas d'effet sur les contrats conclus à l'époque où l'accord était en vigueur.

Article 19
Les accords collectifs ayant une application nationale sont déposés au ministère chargé de la consommation qui les diffuse auprès de ses services départementaux et des greffes des tribunaux d'instance.
Les accords collectifs ayant une application régionale, départementale ou locale sont déposés aux services départementaux du ministère chargé de la consommation qui les diffusent auprès des greffes des tribunaux d'instance concernés.
Un fichier national de tous les accords collectifs est tenu au ministère chargé de la consommation.

Article 20
Le dépôt prévu à l'article 19 est effectué par l'un quelconque des signataires.
Les accords collectifs entrent en vigueur le lendemain du jour de leur dépôt sauf disposition fixant une date ultérieure.

Article 21
Les accords collectifs tiennent lieu de loi non seulement à ceux qui les ont signés, mais encore aux professionnels qui sont ou deviennent membres des organisations signataires.

When a collective agreement has been denounced by only one of the consumer signatories or the supplier signatories, the provisions of the preceding paragraph apply to the signatories who have denounced the agreement; the other signatories remain bound by the agreement.
In both cases, a denunciation does not affect the contracts concluded during the period when the agreement was still in force.

Article 19
The collective agreements which apply on a national level shall be lodged with the Ministry charged with consumer affairs, which shall distribute them to its departmental services and to the registrars of the county courts.
The collective agreements which apply on a national, departmental or local level shall be lodged with the departmental services of the Ministry charged with consumer affairs, which shall distribute them to the registrars of the county courts concerned.
A national record of all collective agreements is kept at the Ministry charged with consumer affairs.

Article 20
Filing the collective agreement in pursuance of article 19 shall be the task of any one of the signatories.
The collective agreements shall enter into force on the day following the day they have been lodged, unless a later date is provided.

Article 21
The collective agreements shall bind not only those who have signed them, but also the suppliers who are or who become members of the organizations which are signatories.

Article 22
Peuvent être étendus à l'ensemble de la profession les accords collectifs dont le champ d'application est national et qui ont été signés:
- d'un côté par la majorité des organisations nationales représentatives ayant pour objet la défense de l'ensemble des consommateurs,
- de l'autre côté par une ou plusieurs organisations nationales représentatives de professionnels.

Article 23
La représentativité des organisations de professionnels s'apprécie d'après les critères suivants:
- nombre d'adhérents,
- activité effective pour la défense des intérêts collectifs de la profession.

Article 24
L'extension résulte d'un arrêté pris par le ministre chargé de la consommation, après avis du Conseil national de la consommation, et, lorsque l'accord détermine un modèle de contrat, de la commission des clauses abusives. Le ministre peut en outre saisir pour avis la commission de la concurrence. L'arrêté ne peut intervenir que si l'accord est entré en vigueur depuis au moins deux ans.

Article 25
L'arrêté d'extension ne peut modifier les dispositions de l'accord collectif. Il devient caduc lorsque l'accord cesse de produire ses effets.

Article 26
Les accords collectifs qui ont été étendus sont publiés au *Journal officiel* de la République française.

Article 22
May be extended to an entire branch of trade the collective agreements which have a national scope of application and which have been signed:
- on the one hand by the majority of representative national consumers' organizations which aim at protecting all consumers,
- on the other hand by one or more representative national suppliers' organizations.

Article 23
The question whether a suppliers' organization is representative shall be answered under the following criteria:
- number of adherents,
- effective activities for the protection of the collective interests of the trade concerned.

Article 24
The extension results from a decision made by the Minister charged with consumer affairs, after consultation of the National Consumer Council and, in case the agreement establishes a contract model, the Commission on unfair contract terms. The Minister may also ask the Monopoly Council for its opinion. The decision shall only have effect when the agreement has entered into force at least two years earlier.

Article 25
The decision whereby the extension is laid down may not modify the provisions of the collective agreement. It becomes null when the agreement ceases to have effect.

Article 26
The collective agreements which are extended are published in the Official Journal of the French Republic.

Article 27
Les accords collectifs qui ont été étendus tiennent lieu de loi à tous les professionnels compris dans leur champ d'application, que ces professionnels soient ou non membres d'organisations signataires.

Article 28
Les professionnels liés par un accord collectif étendus ou non, le sont à l'égard de tous les consommateurs, que ces derniers soient ou non membres d'organisations signataires.
Les dispositions de cet accord se substituent de plein droit aux clauses moins favorables des contrats conclus avec les consommateurs.

Article 29
Les accords collectifs s'appliquent immédiatement, sauf disposition contraire, aux contrats en cours.

Article 30
Les professionnels liés par un accord collectif doivent en informer le public, notamment par affichage et par mention sur les documents remis aux consommateurs. Les modalités de cette information peuvent être précisées par décret.
Les professionnels liés par un accord collectif doivent en outre fournir gratuitement le texte de l'accord à toute personne qui en fait la demande.

Article 31
Les signataires d'un acoord collectif peuvent en leur nom propre agir en justice pour faire respecter les dispositions de cet accord.

Article 27
The collective agreements which have been extended apply to all suppliers within their scope of application, whether these suppliers are members of organizations which are signatories or not.

Article 28
The suppliers bound by a collective agreement, be it extended or not, are bound vis-à-vis all consumers, whether these are members of an organization which is a signatory or not.
The provisions of the agreement replace automatically the less favourable provisions in contracts concluded with consumers.

Article 29
The collective agreements apply immediately, unless it is provided otherwise, to ongoing contracts.

Article 30
Suppliers who are bound by a collective agreement shall inform the public, notably by posting it and by mentioning it on the documents which are handed to consumers. The modalities how to provide this information may be specified in a decree. Suppliers who are bound by a collective agreement shall also furnish the text of the agreement to any person who asks for it.

Article 31
The signatories of a collective agreement may in their own name file an action in court to have the agreement's provisions respected.

Article 32
Tout consommateur, s'il y a un intérêt personnel, peut intenter une action contre un professionnel qui, lié par l'accord collectif, n'en respecte pas les dispositions.

Article 33
Une organisation de consommateurs signataire d'un accord collectif peut exercer l'action qui naît de cet accord en faveur de chaque consommateur, sans avoir à justifier d'un mandat de l'intéressé, pourvu que ce dernier ait été averti et n'ait pas déclaré s'y opposer. L'intéressé peut toujours intervenir à l'instance engagée par l'organisation.

Article 34
Lorsqu'il est saisi par application des articles 31, 32 ou 33, le juge peut ordonner, même d'office, la diffusion et l'affichage aux frais de la personne condamnée d'un message informant le public de la décision rendue.

(...)

Chapitre Trois

Documents Contractuels

Article 95
Toute information ou publicité suffisamment précise engage le professionnel qui la fournit ou qui l'utilise.
Sont interdites les clauses qui ont pour objet ou pour effet de déroger à cette règle.

Article 32
Any consumer, in case of a personal interest, may file an action in court against a supplier who is bound by the collective agreement but does not respect its provisions.

Article 33
A consumers' organization which is signatory to a collective agreement may file an action resulting from this agreement on behalf of any consumer, without having to justify a mandate of the interested party, provided the latter has been informed and has not declared his opposition. The interested party may always intervene in the instance to which the organization has addressed itself.

Article 34
When a court is seized under articles 31, 32 or 33, it may order, even on its own initiative, the distribution and the posting at the expense of the person against whom judgement is rendered of a message informing the public of the judgement.

(...)

Chapter Three

Contractual Documents

Article 95
Any information or publicity which is sufficiently precise binds the supplier who furnishes it or who uses it.
Are forbidden terms which are aimed at or have the effect of derogating from this rule.

Article 96
Les documents contractuels ne sont opposables au consommateur que s'il a pu en prendre connaissance avant de s'engager et si ces documents sont rédigés et présentés de telle façon qu'il ait pu en comprendre le sens et la portée.

Article 97
Dans les contrats rédigés unilatéralement par un professionnel ou une organisation de professionnels et proposés au consommateur, les clauses peu lisibles en raison de leur présentation ou incompréhensibles en raison de leur rédaction sont inopposables au consommateur.

Article 98
Les contrats rédigés unilatéralement par un professionnel ou une organisation de professionnels et proposés au consommateur s'interprètent dans le doute en faveur du consommateur.

Article 99
Des décrets en Conseil d'Etat, pris après avis de la commission des clauses abusives,peuvent, en vue d'assurer l'information des consommateurs, réglementer la présentation des modèles de contrats proposés par les professionnels aux consommateurs et imposer des mentions informatives.

Article 96
A consumer is not bound by contractual documents unless he has been able to take notice of them before engaging himself and the documents are drafted and presented in such a way that he should have understood their meaning and their significance.

Article 97
In contracts which have been drafted unilaterally by a supplier or a suppliers' organization and which have been proposed to a consumer, the consumer will not be bound by clauses which are barely readable because of their presentation or incomprehensible because of their wording.

Article 98
Contracts which have been drafted unilaterally by a supplier or a suppliers' organization shall in case of doubt be constructed in favour of the consumer.

Article 99
By decrees in Council, issued after the Commission on unfair contract terms has given its advisory opinion, with a view of ensuring the information of consumers, the presentation of contract models proposed by suppliers to consumers may be regulated and compulsory information may be prescribed.

Article 100
Un exemplaire des modèles de contrat habituellement proposés aux consommateurs par un professionnel doit être fourni par celui-ci à toute personne qui en fait la demande, sans engagement de cette dernière.
Les dispositions de l'alinéa précédent doivent être affichées de façon très apparente dans les lieux de réception de la clientèle.
Le défaut d'affichage est puni d'une amende de 1200 à 3000 F.

Article 100
A copy of the contract models which are customarily proposed to consumers by a supplier shall be furnished by him to any person who asks for it, without engaging the latter person.
The provisions of the preceding paragraph shall be posted in a very apparent way on the premises where customers are received.
Not posting the provisions shall be punishable with a penalty of 1200 to 3000 francs.

Article 101
Dans les contrats conclus entre professionnels et consommateurs et dans les modèles de contrats proposés par les professionnels aux consommateurs, sont abusives: les clauses ou les combinaisons de clauses qui dérogent à des dispositions légales impératives.

Article 101
In the contracts concluded between suppliers and consumers and in the contract models proposed by suppliers to consumers are unfair the clauses or combinations of clauses which derogate from mandatory legal provisions.

Article 102
Dans les contrats et les modèles de contrats visés à l'article 101, sont abusives les clauses ou combinaisons de clauses qui ont pour objet ou pour effet de:

Article 102
In the contracts and the contract models referred to in article 101 are unfair the clauses or combinations of clauses which purport or have the effect:

1. laisser au professionnel la liberté de ne pas conclure le contrat, alors que le consommateur est définitivement engagé;

1. to leave to the supplier the liberty not to enter into the contract, while the consumer is definitely bound;

2. autoriser le professionnel à conserver des sommes versées par le consommateur lorsque celui-ci renonce à conclure ou à exécuter le contrat, sans prévoir que lesdites sommes seront restituées au double si le professionnel fait de même;

2. to authorize the supplier to keep the money already paid by the consumer when he renounces from concluding or executing the contract, without providing that such sums of money shall be restituted twofold if the supplier does so;

3. restreindre l'obligation pour le professionnel de respecter les engagements pris par ses préposés ou mandataires;

3. to limit the supplier's obligation to respect the engagements undertaken by his employees or agents;

4. faire varier le prix en fonction d'éléments dépendant directement ou indirectement de la volonté du professionnel contractant ou de celui qui a rédigé, diffusé ou utilisé de modèle de contrat;

4. to make the price vary depending wholly on elements which are at the discretion of the seller or of the one who has drafted, distributed or used the contract model;

5. réserver au professionnel le droit de modifier unilatéralement les caractéristiques de la chose à livrer ou du service à rendre; toutefois, il peut être stipulé que le professionnel peut apporter des modifications liées à l'évolution technique, à condition qu'il n'en résulte ni augmentation de prix, ni diminution de qualité;

5. to reserve for the seller the right to modify unilaterally the characteristics of the good to be delivered or the service to be rendered; nevertheless, it may be stipulated that the supplier shall make modifications linked to technical progress, on the condition that no price increase or quality decrease is the result;

6. accorder au professionnel le droit de déterminer si la chose livrée ou le service fourni est conforme aux stipulations du contrat;

6. to accord to the supplier the right to decide whether the good delivered or the service rendered is in conformity with the contract;

7. stipuler que la date de livraison de la chose ou de l'exécution du service est donnée à titre indicatif;

7. to stipulate that the date of delivery of the good or of the rendering of the service is given by way of indication;

8. obliger le consommateur à exécuter ses obligations lors même que le professionnel n'aurait pas exécuté les siennes;

8. to oblige the consumer to execute his obligations while the supplier has not executed his;

9. interdire au consommateur de demander la résolution du contrat dans le cas où le professionnel n'exécuté pas ses obligations;

9. to prohibit the consumer to demand the repudiation of the contract in case of non-performance by the seller;

10. autoriser le professionnel, en cas d'annulation ou de résolution du contrat de son fait, à conserver les sommes versées par le consommateur;

10. to authorize the supplier, in case he cancels or repudiates the contract, to keep the money already paid by the consumer;

11. exonérer le professionnel de sa responsabilité en cas d'inexécution, d'exécution défectueuse, partielle ou tardive;

11. to exempt the supplier from liability in case of non-performance, defective performance, partial performance or late performance;

12. limiter l'indemnité due par le professionnel en cas d'inexécution, d'exécution défectueuse, partielle ou tardive;

13. interdire au consommateur de compenser une dette envers le professionnel avec une créance qu'il aurait sur lui;

14. autoriser le professionnel à résilier le contrat de façon discrétionnaire sans accorder la même faculté au consommateur;

15. supprimer, réduire ou entraver l'exercice par le consommateur des actions en justice ou des voies de recours;

16. déroger aux règles légales de compétence;

17. imposer au consommateur la charge d'une preuve que la loi fait peser sur le professionnel;

18. obliger le consommateur à rembourser les frais et honoraires exposés par le professionnel pour le recouvrement de sa créance sans obliger réciproquement le professionnel à rembourser les frais et honoraires exposés par le consommateur pour obtenir l'exécution du contrat.

Article 103
Dans les contrats et les modèles de contrats visés à l'article 101, sont présumées abusives les clauses ou combinaisons de clauses qui dérogent à des dispositions légales supplétives ou à des recommandations de la commission instituée par l'article 107 sauf au professionnel à établir qu'elles ne lui procurent pas, de façon générale, un avantage excessif.

12. to limit the indemnity due by the supplier in case of non-performance, defective performance, partial performance or late performance;

13. to prohibit the consumer from setting off his debt to the supplier with a claim he has against the supplier;

14. to authorize the supplier to resiliate the contract in a discriminatory way without according the same possibility to the consumer;

15. to suppress, reduce or thwart the consumer's exercise of an action in court or a way of redress;

16. to derogate from the legal rules of jurisdiction;

17. to charge the consumer with providing evidence, which the law charges the supplier with;

18. to oblige the consumer to reimburse the costs and fees incurred by the supplier to collect his debt, without obliging the supplier reciprocally to reimburse the costs and fees incurred by the consumer to obtain the execution of the contract.

Article 103
In the contracts and the contract models referred to in article 101 are presumed to be unfair the clauses or combinations of clauses which derogate from non-mandatory law or from the recommendations of the commission established under article 107, unless the supplier proves that generally they do not procure him an excessive advantage.

Article 104
Dans les contrats et les modèles de contrats visés a l'article 101, sont présumées abusives, sauf au professionnel à établir qu'elles ne lui procurent pas de façon générale un avantage excessif, les clauses ou combinaisons de clauses ayant pour objet ou pour effet de:

1. stipuler que le consommateur a connaissance d'un fait ou d'un acte lorsque manifestement il n'en est rien;

2. constater l'adhésion du consommateur à des stipulations contractuelles dont il n'a pas eu effectivement connaissance;

3. faire augmenter le prix dans une période de trois mois suivant la conclusion du contrat;

4. faire augmenter le prix d'après des éléments que le consommateur ne peut aisément connaître;

5. permettre une augmentation de prix sans accorder au consommateur la faculté de renoncer au contrat si cette augmentation excède ce qu'un consommateur pouvait normalement prévoir;

6. laisser au professionnel, postérieurement à la conclusion du contrat, le choix du lieu de livraison de la chose ou d'exécution du service;

7. faire dépendre l'exécution du contrat par le professionnel d'une condition dont le consommateur ne peut aisément savoir si elle est, ou non, réalisée;

Article 104
In the contracts and the model contracts envisaged in article 101 are presumed to be unfair, unless the supplier establishes that generally they do not procure him an excessive advantage, the clauses or combinations of clauses which purport to or have the effect:

1. to stipulate that the consumer has knowledge of a fact or an act when this clearly is not the case;

2. to certify that the consumer has consented to contractual stipulations of which he has not had effective knowledge;

3. to raise the price within a period of three months following the conclusion of the contract;

4. to raise the price on the basis of elements which are not easily to be ascertained by the consumer;

5. to allow a price increase without according the consumer the right to cancel the contract if such increase exceeds what a consumer may normally expect;

6. to leave to the supplier, after the conclusion of the contract, the choice of the place of delivery of the good or of the rendering of the service;

7. to make the execution of the contract by the supplier dependent upon a condition of which the consumer may not readily know whether or not it has been met;

8. obliger le consommateur, sans motif valable, a payer une part trop importante du prix avant tout commencement d'exécution du contrat;

9. priver le consommateur de la possibilité de vérifier, avant d'exécuter ses obligations, que le professionnel a exécuté les siennes;

10. déterminer le montant de l'indemnité due par le professionnel en cas d'inexécution, ou d'exécution défectueuse, partielle ou tardive;

11. déterminer le montant de l'indemnité due par le consommateur qui n'exécute pas ses obligations sans prévoir une indemnité du même ordre à la charge du professionnel qui n'exécute pas les siennes;

12. engager le consommateur pour une période supérieure à trois ans, sans lui laisser, passé ce délai, une faculté de résiliation annuelle; celle-ci ne doit pas être subordonée à un délai de préavis supérieur à trois mois, ni donner lieu à une indemnité supérieure au préjudice causé par la résiliation;

13. permettre le renouvellement du contrat par tacite reconduction pour une période supérieure à un an;

14. permettre le renouvellement du contrat par tacite reconduction lorsque le délai de préavis de non-renouvellement est supérieur à trois mois;

15. limiter les moyens de preuve que le consommateur peut utiliser;

16. rendre une législation étrangère applicable à un contrat conclu et exécuté en France.

8. to oblige the consumer, without valid motive, to pay too important a part of the price before the execution of the contract has even started;

9. to deprive the consumer from the possibility to verify, before executing his obligations, that the supplier has executed his obligations;

10. to establish the amount of the indemnity due by the supplier in case of non-performance, or of defective, partial or late performance;

11. to establish the amount of damages due by the consumer who does not fulfil his obligations, without providing an indemnification of the same order by the supplier who does not fulfil his obligations;

12. to engage the consumer for a period which is longer than three years, without giving him the possibility to revoke the contract annually after this period; nofitication of the revocation shall not be subjected to a period exceeding three months, nor shall it give rise to an indemnification which is larger than the loss caused by the revocation.

13. to allow the renewal of the contract by tacit approval for a period which is longer than a year;

14. to allow the renewal of the contract by tacit approval when the periode for the notice of termination is longer than three months;

15. to limit the means of proof which the consumer may use;

16. to render applicable a foreign law to a contract concluded and executed in France.

Article 105
Dans les contrats et les modèles de contrats visés á l'article 101, toute clause ou combinaison de clauses entrant ou non dans les catégories des articles 102, 103 et 104 peut être jugée abusive s'il est prouvé que, de façon générale, elle procure un avantage manifestement excessif au professionnel.

Article 106
Les clauses abusives ou peu lisibles ou incompréhensibles qui figurent dans les contrats ou les modèles de contrats visés à l'article 101 sont réputées non écrites et doivent être supprimées.

Article 107
Une commission des clauses abusives est instituée auprès du ministre chargé de la Consommation.
Elle est composée d'un magistrat de l'ordre judiciaire, président, et en nombre égal:
- de personnes qualifiées en matière de droit,
- de magistrats,
- de personnes proposées par le collège consommateurs du Conseil national de la consommation,
- de personnes proposées par le collège professionnel du Conseil national de la consommation.
Un commissaire du gouvernement est placée auprès d'elle.

Article 105
In the contracts and contract models envisaged in article 101, any clause or combination of clauses whether or not it falls within the categories of articles 102, 103 or 104, may be held unfair if it is proved generally that it procures a clearly excessive advantage to the supplier.

Article 106
The unfair or barely readable or incomprehensible clauses which appear in contracts or contract models envisaged in article 101 are considered not to have been made and must be suppressed.

Article 107
A Commission on unfair contract terms is established with the Minister charged with consumer affairs.
It is composed of a magistrate belonging to the judiciary, president, and in equal numbers:
- persons qualified in the law,
- magistrates,
- persons nominated by the consumers in the National Consumer Council,
- persons nominated by the suppliers in the National Consumer Council.
A government representative assists the Commission's meetings.

Article 108
La commission connaît des modèles de contrats habituellement proposés par les professionnels aux consommateurs. Elle peut être saisie soit par le ministre chargé de la Consommation, soit par les tribunaux, soit par le ministère public, soit par les associations représentatives de consommateurs, soit par les professionnels intéressés. Elle peut également se saisir d'office.

Article 109
Le commission recommande:
- la suppression ou la modification des clauses qui lui paraissent conférer un avantage excessif au professionnel;
- l'insertion de mentions qui lui paraissent nécessaires pour l'information du consommateur ou dont l'absence lui paraît conférer un avantage excessif au professionnel;
- une présentation qui soit de nature à rendre le contrat intelligible pour les consommateur.

La commission peut désigner, si elle le juge utile, les professionnels ou les organisations à qui s'adressent ses recommandations.

Article 110
Les recommandations sont publiées au *Journal officiel*. Toutefois lorsque la commission a été saisie par un tribunal, la publication de la recommandation ne peut intervenir qu'après la décision sur le fond.

Article 111
La commission peut aussi donner son avis sur les projets de modèles de contrats qui lui sont soumis par les professionnels, les organisations de professionnels, ou les organisations représentatives de consommateurs.

Article 108
The Commission takes knowledge of the contract models which customarily are proposed by suppliers to consumers. The Commission may be seized either by the Minister charged with consumer affairs, by the courts, by the Public Ministry, by the representative consumers' organizations or by the suppliers concerned. It may also act on its own initiative.

Article 109
The Commission recommends:
- the suppression or the modification of the clauses which it deems to confer an excessive advantage to the supplier;
- the incorporation of messages which it deems necessary to inform the consumer or the absence of which confers an excessive advantage to the supplier;
- a presentation which is of a nature to render the contract understandable to consumers.

The Commission may designate, if it deems fit, the suppliers or the organizations to which the recommendations are addressed.

Article 110
The recommendations are published in the Official Journal. However, when the Commission has been seized by a court, the recommendation may not be published before the court's decision.

Article 111
The Commission may also give its opinion as to contract models which suppliers, suppliers' organizations or representative consumers' organizations have submitted to it.

Article 112 La commission établit chaque année un rapport de son activité et propose éventuellement les modifications législatives ou réglementaires qui lui paraissent souhaitables.Ce rapport est publié au *Journal officiel*.	*Article 112* The Commission draws up an annual report of its activities and where necessary proposes the legislative or reglementary modifications which it deems desirable. This report is published in the Official Journal.

So far, no part of these proposals has been transformed into legislation. However, with a view of liberalizing the economy, the government has announced that it may implement some parts of the Commission's proposals[16]. According to a draft which the Ministry of Justice brought into circulation in 1987, the following clauses or combinations of clauses are to be considered unfair: the clauses which are intended to, or have the effect of:

1. allowing a trader the possibility of not concluding the contract, although the consumer is definitively committed.
2. limiting a trader's obligation to respect undertakings given by his representatives.
3. altering the price in the light of elements that depend directly or indirectly on the will of the contracting trader or of the party responsible for drawing up, distributing or using the standard form contract.
4. reserving to a trader the right unilaterally to change the characteristics of the article to be delivered or the service to be rendered; however, it may be specified that a trader may introduce changes associated with technological developments, provided this does not lead to an increase in the price nor a change in quality.
5. granting a trader the right to determine whether the article delivered or the service provided is in accordance with the provisions of the contract.
6. requiring a consumer to carry out his obligations when a trader has not carried out those devolving upon him.
7. cancelling or reducing the consumer's right to compensation in the event of failure to execute, defective, partial or late execution by a trader of any one of his obligations.
8. prohibiting a consumer from offsetting a debt owed to a trader against a claim upon him.

9. authorizing a trader to cancel the contract at his discretion without granting the consumer the same facility.
10. obliging a consumer to reimburse any costs and fees incurred by a trader when recovering his claim without a reciprocal obligation on the trader to reimburse any costs and fees incurred by the consumer in obtaining performance of the contract.

11. German Federal Republic

One of the most interesting developments in the area of unfair contract terms in the 1970's has been the introduction of the German *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)*. This Act of December 9, 1976 entered into force on April 1, 1977. The full text and its English translation[17] are given below.

Within the possibilities which traditional Civil Code provisions on offer and acceptance, construction *contra proferentem* and good faith clauses offer courts, German courts had already succeeded in extending consumer protection against unfair (standard) contract terms to its near-maximum before 1977. This was considered insufficient by many legal writers. Some of these argued for an administrative control of standard contract terms[18]. They were supported by one of the major political parties, the Social Democrat Party SPD[19], as well as by the Federal Monopoly Board (*Bundes Kartell Amt*) which may have foreseen a new field of activity.

Other legal writers preferred a codification of case-law and possibly the addition of some kind of abstract control procedure[20]. Supporters for this view were found in the SPD's coalition partner FDP (Conservative Liberal) and in the opposition of CDU-CSU (Christian Democrats).

Legislative history of the AGB-Gesetz is hectic. Only in 1971, the Government presented to Parliament a Report on Consumer Policy, in which measures against unfair standard contract terms were announced. In 1972, a Working Group was set up, which published a First Report on substantive provisions in March 1974[21] and a Second Report only one year later[22]. On the basis of the First Report, a

draft bill was submitted by the Ministry of Justice to interested parties[23]. In the beginning of 1975, more than 150 trade organizations and consumers' organizations were heard[24]. In May 1975, the government presented its bill to Parliament[25]. The bill was still only devoted to substantive law. Meanwhile, in January 1975, the opposition CDU/CSU had presented its own bill[26] which relied heavily on the Second Report of the Working Group and therefore included provisions on a control procedure. On the eve of a general election, both the SDP/FDP government and the opposition CDU/CSU, which controlled the Senate (*Bundesrat*), had interest in obtaining a compromise, which indeed was reached at by the end of 1975. As a result of the compromise, the government dropped its idea to establish Consumer Ombud-like government agencies to control unfair standard contract terms. Another consequence was that there was no time to integrate the new Act in existing legislation.

Ever since the *AGB-Gesetz* has entered into force, there has been criticism of its effectiveness[27]. Radical changes, however, are not in the air. The only change which may conceivably be expected is the re-integration of the Law in the German Civil Code (*Bürgerliches Gesetzbuch:* BGB). At the end of the 1970's, the German government has taken up the idea of a reworking of the Law of Obligations (*Schuldrecht*)[28]. The main factor behind this movement has been the idea that the *AGB-Gesetz*, dealing as it does with a central part of the Law of Obligations, should not be a separate Act (*Sondergesetz*) but rather be incorporated in the Civil Code[29]. When the *AGB-Gesetz* should be integrated into the Civil Code, a minor revision may well be undertaken. Any such operation is not to be expected shortly, however[30].

The text of the *AGB-Gesetz* runs as follows:

Erster Abschnitt	**Chapter 1**
Sachlich-rechtliche Vorschriften	**Substantive Law**
1. Unterabschnitt Allgemeine Vorschriften	**Section 1** General Provisions
§ 1. Begriffsbestimmung	**1. Definition**

(1) Allgemeine Geschäftsbedingungen sind alle für eine Vielzahl von Verträgen vorformulierten Vertragsbedingungen, die eine Vertragspartei (Verwender) der anderen Vertragspartei bei Abschluß eines Vertrages stellt. Gleichgültig ist, ob die Bestimmungen einen äußerlich gesonderten Bestandteil des Vertrages bilden oder in die Vertragsurkunde selbst aufgenommen werden, welchen Umfang sie haben, in welcher Schriftart sie verfaßt sind und welche Form der Vertrag hat.

(2) Allgemeine Geschäftsbedingungen liegen nicht vor, soweit die Vertragsbedingungen zwischen den Vertragsparteien im einzelnen ausgehandelt sind.

(1) Standard contract terms are contract terms which have been drafted in advance for use in a number of contracts and which one party (the user) presents to the other party at the conclusion of a contract. It is irrelevant whether the terms are set out in a separate document or are contained in the contract document itself, what their length may be, in what way they have been reduced to writing and whatever form the contract takes.

(2) To the extent to which the terms of a contract have been negotiated individually by the parties, they do not constitute standard contract terms.

§ 2. Einbeziehung in den Vertrag.

2. Incorporation of terms

(1) Allgemeine Geschäftsbedingungen werden nur dann Bestandteil eines Vertrages, wenn der Verwender bei Vertragesabschluß
1. die andere Vertragspartei ausdrücklich oder, wenn ein ausdrücklicher Hinweis wegen der Art des Vertragsabschlusses nur unter unverhältnismäßigen Schwierigkeiten möglich ist, durch deutlich sichtbaren Aushang am Ort des Vertragsabschlusses auf sie hinweist und
2. der anderen Vertragspartei die Möglichkeit verschafft, in zumutbarer Weise von ihrem Inhalt Kenntnis zu nehmen, und wenn die andere Vertragspartei mit ihrer Geltung einverstanden ist.

(1) Standard contract terms are deemed to have been incorporated into a contract only if, at the time of the conclusion of the contract, the user
1. expressly refers the other party to them; or if, having regard to the manner in which the contract is concluded, an express reference is unduly difficult, the user refers to them by means of a clearly visible poster at the place where the contract is concluded, and
2. affords the other party a reasonable opportunity to make himself familiar with their contents.

(2) Die Vertragsparteien können für eine bestimmte Art von Rechtsgeschäften die Geltung bestimmter Allgemeiner Geschäftsbedingungen unter Beachtung der in Absatz 1 bezeichneten Erfordernisse im voraus vereinbaren.

(2) The parties may agree in advance that certain standard contract terms shall apply to transactions of a certain kind between them, provided always that the provisions of subsection (1) hereof are complied with.

§ 3. Überraschende Klauseln

Bestimmungen in Allgemeinen Geschäftsbedingungen, die nach den Umständen, insbesondere nach dem äußeren Erscheinungsbild des Vertrags, so ungewöhnlich sind, daß der Vertragspartner des Verwenders mit ihnen nicht zu rechnen braucht, werden nicht Vertragsbestandteil.

3. Surprise clauses

Standard contract terms which under the circumstances, having regard in particular to the outward appearance of the contract, are so unusual that the other party need not expect them, are deemed not to have been incorporated into the contract.

§ 4. Vorrang der Individualabrede

Individuelle Vertragsabreden haben Vorrang vor Allgemeinen Geschäftsbedingungen.

4. Preference of individually negotiated terms

Individually negotiated terms take preference over standard contract terms.

§ 5. Unklarheitenregel

Zweifel bei der Auslegung Allgemeiner Geschäftsbedingungen gehen zu Lasten des Verwenders.

5. The contra proferentem rule

Doubts about the construction or interpretation of standard contract terms shall be resolved against the user of the contract.

§ 6. Rechtsfolgen bei Nichteinbeziehung und Unwirksamkeit

(1) Sind Allgemeine Geschäftsbedingungen ganz oder teilweise nicht Vertragsbestandteil geworden oder unwirksam, so bleibt der Vertrag im übrigen wirksam.

(2) Soweit die Bestimmungen nicht Vertragsbestandteil geworden oder unwirksam sind, richtet sich der Inhalt des Vertrages nach den gesetzlichen Vorschriften.

(3) Der Vertrag ist unwirksam, wenn das Festhalten an ihm auch unter Berücksichtigung der nach Absatz 2 vorgesehenen Änderung eine unzumutbare Härte für eine Vertragspartei darstellen würde.

6. Legal consequences of unincorporated and void standard contract terms

(1) If standard contract terms, whether wholly or in part, are not incorporated into a contract or void, the contract nevertheless remains in force otherwise.

(2) In so far as the terms are not incorporated or void, the contents of the contract are determined according to statute law.

(3) The contract is void if insistence on its remaining in force would impose intolerable hardship on one of the parties even after the alteration provided for in sub-paragraph (2) hereof has been taken into account.

§ 7. Umgehungsverbot

Dieses Gesetz findet auch Anwendung, wenn seine Vorschriften durch anderweitige Gestaltungen umgangen werden.

2. Unterabschnitt

Unwirksame Klauseln

§ 8. Schranken der Inhaltskontrolle

Die §§ 9 bis 11 gelten nur für Bestimmungen in Allgemeinen Geschäftsbedingungen, durch die von Rechtsvorschriften abweichende oder diese ergänzende Regelungen vereinbart werden.

§ 9. Generalklausel

(1) Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen.

(2) Eine unangemessene Benachteiligung ist im Zweifel anzunehmen, wenn eine Bestimmung

1. mit wesentlichen Grundgedanken der gesetzlichen Regelung, von der abgewichen wird, nicht zu vereinbaren ist, oder

2. wesentliche Rechte oder Pflichten, die sich aus der Natur des Vertrages ergeben, so einschränkt, daß die Erreichung des Vertragszwecks gefährdet ist.

§ 10. Klauselverbote mit Wertungsmöglichkeit

In Allgemeinen Geschäftsbedingungen is insbesondere unwirksam

7. Prohibition of disguised transactions

This Act also applies when its provisions are circumvened by other ways.

Section 2

Invalid Provisions

8. Limits of control

Paragraphs 9 to 11 of this Act apply only to standard contract terms which deviate from legal norms or supplement them.

9. General principle

(1) Provisions in standard contract terms are void if they place the other party at an undue disadvantage to such an extent as to be incompatible with the requirements of good faith.

(2) In case of doubt, an undue disadvantage shall be presumed if a provision

1. is incompatible with the fundamental principles of the legal norm from which it deviates, or

2. restricts fundamental rights or duties inherent in the nature of the contract to such a degree as to jeopardize its object.

10. Prohibition of clauses permitting a value judgement

The following provisions in particular are void in standard contract terms

1. (Annahme- und Leistungsfrist)
eine Bestimmung, durch die sich der Verwender unangemessen lange oder nicht hinreichend bestimmte Fristen für die Annahme oder Ablehnung eines Angebots oder die Erbringung einer Leistung vorbehält;

2. (Nachfrist)
eine Bestimmung, durch die sich der Verwender für die von ihm zu bewirkende Leistung entgegen § 326 Abs. 1 des Bürgerlichen Gesetzbuchs eine unangemessen lange oder nicht hinreichend bestimmte Nachfrist vorbehält;

3. (Rücktrittsvorbehalt)
die Vereinbarung eines Rechts des Verwenders, sich ohne sachlich gerechtfertigten und im Vertrag angegebenen Grund von seiner Leistungspflicht zu lösen; dies gilt nicht für Dauerschuldverhältnisse;

4. (Änderungsvorbehalt)
die Vereinbarung eines Rechts des Verwenders, die versprochene Leistung zu ändern oder von ihr abzuweichen,wenn nicht die Vereinbarung der Änderung oder Abweichung unter Berücksichtigung der Interessen des Verwenders für den anderen Vertragsteil zumutbar ist;

5. (Fingierte Erklärungen)
eine Bestimmung, wonach eine Erklärung des Vertragspartners des Verwenders bei Vornahme oder Unterlassung einer bestimmten Handlung als von ihm abgegeben oder nicht abgegeben gilt, es sei denn, daß

a. dem Vertragspartner eine angemessene Frist zur Abgabe einer ausdrücklichen Erklärung eingeräumt ist und

1. (Time for acceptance of offers and performance)
a provision in terms of which the user reserves to himself unreasonably long or insufficiently defined periods of time for the acceptance or rejection of an offer or for the performance of an obligation;

2. (Extension of time for performance)
a provision in terms of which the user reserves to himself, contrary to the provisions of Paragraph 326(1) of the Civil Code, an unreasonably long or insufficiently defined period of grace for the performance of an obligation after it has become due;

3. (Right of rescission)
a provision which confers on the user the right to refuse the performance of his obligation without good and sufficient cause which has not been specified in the contract; this [prohibition] does not apply to continuing obligations;

4. (Variations and deviations)
a provision in terms of which the user shall have the right to modify the obligation he has undertaken to perform or to deviate from it unless the other party, having regard to the interests of the user, may reasonably be expected to agree to such a provision;

5. (Fictitions declarations)
a provision in terms of which the other party is deemed to have made, or failed to have made, a declaration if he does or omits to do a certain act, unless

a. such party is allowed a reasonable period of time within which to make an express declaration and

b. der Verwender sich verpflichtet, den Vertragspartner bei Beginn der Frist auf die vorgesehene Bedeutung seines Verhalten besonders hinzuweisen;

6. (Fiktion des Zugangs)
eine Bestimmung die vorsieht, daß eine Erklärung des Verwenders von besonderer Bedeutung dem anderen Vertragsteil als zugegangen gilt;

7. (Abwicklung von Verträgen)
eine Bestimmung, nach der der Verwender für den Fall, daß eine Vertragspartei vom Vertrage zurücktritt oder den Vertrag kündigt

a. eine unangemessen hohe Vergütung für die Nutzung oder den Gebrauch einer Sache oder eines Rechts oder für erbrachte Leistungen oder

b. einen unangemessen hohen Ersatz von Aufwendungen verlangen kann;

8. (Rechtswahl)
die Vereinbarung der Geltung ausländischen Rechts oder des Rechts der Deutschen Demokratischen Republik in Fällen, in denen hierfür kein anerkennenswertes Interesse besteht.

§ 11. Klauselverbote ohne Wertungsmöglichkeit

In Allgemeinen Geschäftsbedingungen ist unwirksam

b. the user undertakes to draw the attention of the other party specifically and at the commencement of such period to the consequences which his conduct is intended to have;

6. (Fictitious receipts)
a provision in terms of which a declaration by the user which is of special significance is deemed to have been received by the other party;

7. (Rescission and discharge of contracts)
a provision which, in the event of either party rescinding the contract or giving notice of termination thereof, entitles the user to demand

a. an unreasonably high remuneration for the enjoyment or use of a thing or the exercise of a right or for [any other] benefits received by the other party, or

b. an unreasonably large amount as compensation for expenses incurred by him;

8. (Choice of law)
an agreement which provides for the application of foreign law or of the law of the German Democratic Republic if no legitimate interest for the application of such law exists.

11. Prohibition of clauses not permitting a value judgment

The following provisions are void in standard contract terms

1. (Kurzfristige Preiserhöhungen)
eine Bestimmung, welche die Erhöhung des Entgelts für Waren oder Leistungen vorsieht, die innerhalb von vier Monaten nach Vertragsabschluß geliefert oder erbracht werden sollen; dies gilt nicht bei Waren oder Leistungen, die im Rahmen von Dauerschuldverhältnissen geliefert oder erbracht werden, sowie bei Leistungen, auf deren Preise par. 99 Abs. 1 oder 2 Nr. 1 des Gesetzes gegen Wettbewerbsbeschränkungen Anwendung findet;

2. (Leistungsverweigerungsrechte)
eine Bestimmung, durch die

a. das Leistungsverweigerungsrecht, das dem Vertragspartner des Verwenders nach § 320 des Bürgerlichen Gesetzbuchs zusteht, ausgeschlossen oder eingeschränkt wird, oder

b. ein dem Vertragspartner des Verwenders zustehendes Zurückbehaltungsrecht, soweit es auf demselben Vertragsverhältnis beruht, ausgeschlossen oder eingeschränkt, insbesondere von der Anerkennung von Mängeln durch den Verwender abhängig gemacht wird;

3. (Aufrechnungsverbot)
eine Bestimmung, durch die dem Vertragspartner des Verwenders die Befugnis genommen wird, mit einer unbestrittenen oder rechtskräftig festgestellten Forderung aufzurechnen;

1. (Short term price increases)
a term which provides for the increase of the price of goods to be delivered or of [the remuneration for] other obligations to be performed within four months of the conclusion of the contract; this [prohibition] does not apply to goods to be supplied by instalments or to the performance of [other] continuing obligations, or of obligations the price for which is determined according to the provisions of Paragraph 99(1) of 99(2) No. 1 of the Law against Restraints of Competition;

2. (Rights to refuse performance)
a provision which

a. excludes or restricts the right of the other party to refuse the performance of his obligations according to the provisions of Paragraph 320 of the Civil Code, or

b. excludes or restricts a right of retention to which the other party is entitled in so far as it is based on the same contractual relationship, in particular if the exercise of such a right is made dependent on the acknowledgment of the existence of defects by the user;

3. (Exclusion of right of set off)
a provision which deprives the other party of the right to set off a claim which is not disputed or in respect of which he has obtained a final judgment [against the user];

4. (Mahnung, Fristsetzung)
eine Bestimmung, durch die der Verwender von der gesetzlichen Obliegenheit freigestellt wird, den anderen Vertragsteil zu mahnen oder ihm eine Nachfrist zu setzen;

4. (Reminder, period of grace)
a provision which relieves the user from the statutory obligation to send a reminder to the other party [when such other party is in default] or to call on him to perform his obligations within a certain time;

5. (Pauschalierung von Schadensersatzansprüchen)
die Vereinbarung des pauschalierten Anspruchs des Verwenders auf Schadensersatz oder Ersatz einer Wertminderung, wenn

5. (Liquidated damages)
an agreement which entitles the user to payment of liquidated damages or to compensation for a diminution of value

a. die Pauschale den in den geregelten Fällen nach dem gewöhnlichen Lauf der Dinge zu erwartenden Schaden oder die gewöhnlich eintretende Wertminderung übersteigt, oder

a. if the liquidated amount exceeds the amount of damages or diminution of value normally to be expected in cases to which the agreement relates, or

b. dem anderen Vertragsteil der Nachweis abgeschnitten wird, ein Schaden oder eine Wertminderung sei überhaupt nicht entstanden oder wesentlich niedriger als die Pauschale;

b. deprives the other party of the opportunity of proving that the user did not suffer any damages at all or that no diminution in value whatsoever occurred or that the damages or the diminution in value were substantially less than the liquidated amount;

6. (Vertragsstrafe)
eine Bestimmung, durch die dem Verwender für den Fall der Nichtabnahme oder verspäteten Abnahme der Leistung, des Zahlungsverzugs oder für den Fall, daß der andere Vertragsteil sich vom Vertrag löst, Zahlung einer Vertragsstrafe versprochen wird;

6. (Penalty)
a provision in terms of which the user is promised payment of a penalty in the event of [the other party] failing or delaying to accept the performance by the user of his obligations or failing to make payment on due date or in the event of the other party rescinding the contract.

7. (Haftung bei grobem Verschulden)
ein Ausschluß oder eine Begrenzung der Haftung für einen Schaden, der auf einer grob fahrlässigen Vertragsverletzung des Verwenders oder auf einer vorsätzlichen oder grob fahrlässigen Vertragsverletzung eines gesetzlichen Vertreters oder Erfüllungsgehilfen des Verwenders beruht; dies gilt auch für Schäden aus der Verletzung von Pflichten bei den Vertragsverhandlungen;

7. (Liability for gross negligence)
an exclusion or limitation of liability for damage resulting from a grossly negligent breach of contract on the part of the user or from an intentional or grossly negligent breach of contract on the part of a statutory agent of the user or of any person who assists the user in the performance of his obligations; this provision applies also to damages resulting from breaches of duty in the course of negotiations prior to the conclusion of the contract;

8. (Verzug, Unmöglichkeit)
eine Bestimmung, durch die für den Fall des Leistungsverzugs des Verwenders oder der von ihm zu vertretenden Unmöglichkeit der Leistung

8. (Default,impossibility)
a provision which if the user defaults in the performance of his obligations or if his performance becomes impossible as a result of circumstances for which he is held responsible;

a. das Recht des anderen Vertragsteils, sich vom Vertrag zu lösen, ausgeschlossen oder eingeschränkt oder

a. excludes or restricts the right of the other party to rescind the contract, or

b. das Recht des anderen Vertragsteils, Schadensersatz zu verlangen, ausgeschlossen oder entgegen Nummer 7 eingeschränkt wird;

b. excludes the right of the other party to claim damages, or restricts such right contrary to the provisions of No. 7 [of this paragraph]

9. (Teilverzug, Teilunmöglichkeit)
eine Bestimmung, die für den Fall des teilweisen Leistungsverzugs des Verwenders oder bei von ihm zu vertretender teilweiser Unmöglichkeit der Leistung das Recht der anderen Vertragspartei ausschließt, Schadensersatz wegen Nichterfüllung der ganzen Verbindlichkeit zu verlangen oder von dem ganzen Vertrag zurückzutreten, wenn die teilweise Erfüllung des Vertrages für ihn kein Interesse hat;

9. (Partial default, partial impossibility)
a provision which in the event of the user being partially in default with the performance of his obligations or of their performance becoming partially impossible as a result of circumstances for which the user is held responsible, excludes the right of the other party to claim damages on the basis that the user has failed to perform his total obligation or to rescind the whole contract if the partial performance of the contract is of no interest to him;

10. (Gewährleistung)
eine Bestimmung, durch die bei Verträgen über Lieferungen neu hergestellter Sachen und Leistungen

a. (Ausschluß und Verweisung auf Dritte)
die Gewährleistungsansprüche gegen den Verwender einschließlich etwaiger Nachbesserungs- und Ersatzlieferungsansprüche insgesamt oder bezüglich einzelner Teile ausgeschlossen, auf die Einräumung von Ansprüchen gegen Dritte beschränkt oder von der vorherigen gerichtlichen Inanspruchnahme Dritter abhängig gemacht werden;

b. (Beschränkung auf Nachbesserung)
die Gewährleistungsansprüche gegen den Verwender insgesamt oder bezüglich einzelner Teile auf ein Recht auf Nachbesserung oder Ersatzlieferung beschränkt werden, sofern dem anderen Vertragsteil nicht ausdrücklich das Recht vorbehalten wird, bei Fehlschlagen der Nachbesserung oder Ersatzlieferung Herabsetzung der Vergütung oder, wenn nicht eine Bauleistung Gegenstand der Gewährleistung ist, nach seiner Wahl Rückgängigmachung des Vertrags zu verlangen

10. (Warranties against defects)
a provision in contracts for the supply of newly manufactured goods and of services in terms of which

a. (exclusion and reference to third parties)
claims in respect of defects against the user, including claims for rectification or replacement, irrespective of whether they relate to the entire product or to parts thereof, are excluded, or restricted to an assignment of claims against third parties, or made dependent on the prior institution of an action against third parties;

b. (rectification only)
claims in respect of defects against the user, irrespective of whether they relate to the entire product or to parts thereof, are restricted to rectification or replacement, unless the other party is expressly given the right to demand, at his option, either a reduction of the price or, except in the case of a defective building or other construction works, rescission of the contract, if the rectification or replacement is inadequate or insufficient;

c. (Aufwendungen bei Nachbesserung)
die Verpflichtung des gewährleistungspflichtigen Verwenders ausgeschlossen oder beschränkt wird, die Aufwendungen zu tragen, die zum Zweck der Nachbesserung erforderlich werden, insbesondere Transport-, Wege- Arbeits- und Materialkosten;

d. (Vorenthalten der Mängelbeseitigung)
der Verwender die Beseitigung eines Mangels oder die Ersatzlieferung einder mangelfreien Sache von der vorherigen Zahlung des vollständigen Entgelts oder eines unter Berücksichtigung des Mangels unverhältnismäßig hohen Teils des Entgelts abhängig macht;

e. (Ausschlußfrist für Mängelanzeige)
der Verwender dem anderen Vertragsteil für die Anzeige nicht offensichtlicher Mängel eine Ausschlußfrist setzt, die kürzer ist als die Verjährungsfrist für den gesetzlichen Gewährleistungsanspruch;

f. (Verkürzung von Gewährleistungsfristen)
die gesetzlichen Gewährleistungsfristen verkürzt werden;

11. (Haftung für zugesicherte Eigenschaften)
eine Bestimmung, durch die bei einem Kauf- Werk- oder Werklieferungsvertrag Schadensersatzansprüche gegen den Verwender nach den §§ 463, 480 Abs. 2, § 635 des Bürgerlichen Gesetzbuchs wegen Fehlens zugesicherter Eigenschaften ausgeschlossen oder eingeschränkt werden;

c. (costs and expenses of rectification)
the obligation of the user who is liable for a defect to bear the costs and expenses which its rectification necessarily involves, in particular the cost of transport, delivery, labour and materials, is excluded or restricted;

d. (conditional refusal to eliminate)
the user makes the elimination of a defect or the supply of a replacement which is not defective conditional on the prior payment of the full price or, having regard to [the nature of] the defect, a disproportionately large part thereof;

e. (time of limit for notification of defects)
the user stipulates that the other party must notify him of latent defects within a period which is less than the period of limitation of the statutory claim for the elimination of defects;

f. (reduction of period of user's liability for defects)
the statutory periods of liability for defects are reduced;

11. (Liability for breach of express warranties)
a provision in contracts of sale, contracts for skill and labour or for labour and materials, which excludes or restricts claims for damages under Civil Code Paragraphs 463, 480(2), Paragraph 635 against the user for breaches of an express warranty that the product sold or supplied or serviced has specific qualities or characteristics;

12. (Laufzeit bei Dauerschuldverhältnissen)
bei einem Vertrangsverhältnis, das die regelmäßige Lieferung von Waren oder die regelmäßige Erbringung von Dienst- oder Werkleistungen durch den Verwender zum Gegenstand hat,

a. eine den anderen Vertragsteil länger als zwei Jahre bindende Laufzeit des Vertrags,

b. eine den anderen Vertragsteil bindende stillschweigende Verlängerung des Vertragsverhältnisses um jeweils mehr als ein Jahr oder

c. zu Lasten des anderen Vertragsteils eine längere Kündigungsfrist als drei Monate vor Ablauf der zunächst vorgesehenen oder stillschweigend verlängerten Vertragsdauer;

13. (Wechsel des Vertragspartners)
eine Bestimmung, wonach bei Kauf-, Dienst- oder Werkverträgen ein Dritter an Stelle des Verwenders in die sich aus dem Vertrag ergebenden Rechte und Pflichten eintritt oder eintreten kann, es sei denn, in der Bestimmung wird

a. der Dritte namentlich bezeichnet, oder

b. den anderen Vertragsteil das Recht eingeräumt, sich vom Vertrag zu lösen;

14. (Haftung des Abschlußvertreters)
eine Bestimmung, durch die der Verwender einem Vertreter, der den Vertrag für den anderen Vertragsteil abschließt

a. ohne hierauf gerichtete ausdrückliche und gesonderte Erklärung eine eigene Haftung oder Einstandspflicht oder

12. (Duration of continuing obligations)
[a term] in contracts for the regular supply of goods, services or labour and materials by the user, which

a. binds the other party for more than two years,

b. provides for the tacit renewal of the contract and binds the other party for more than one year at a time, or

c. requires the other party to give notice of termination of the contract more than three months before the end of the period for which it was initially concluded or tacitly renewed;

13. (Assignment of contract by user)
a provision in contracts of sale or service or for the supply of labour and materials in terms of which a third party takes over or is entitled to take over the contractual rights and obligations of the user unless

a. such third party is named in the contract or

b. the other party is entitled to rescind the contract;

14. (Liability of agents)
a provision in terms of which the user imposes on an agent who enters into the contract for and on behalf of the other party -

a. liability, either as co-principal debtor or as surety, for the other party unless the agent expressly accepts such liability in a separate declaration, or

b. im Falle vollmachtloser Vertretung eine über § 179 des Bürgerlichen Gesetzbuchs hinausgehende Haftung auferlegt;

15. (Beweislast)
eine Bestimmung, durch die der Verwender die Beweislast zum Nachteil des anderen Vertragsteils ändert, insbesondere indem er

a. diesem die Beweislast für Umstände auferlegt,die in Verantwortungsbereich des Verwenders liegen;

b. den anderen Vertragsteil bestimmte Tatsachen bestätigen läßt.

Buchstabe b gilt nicht für gesondert unterschriebene Empfangsbekenntnisse;

16. (Form von Anzeigen und Erklärungen)
eine Bestimmung, durch die Anzeigen oder Erklärungen, die dem Verwender einem Dritten gegenüber abzugeben sind, an eine strengere Form als die Schriftform oder an besondere Zugangserfordernisse gebunden werden.

Zweiter Abschnitt

Kollisionsrecht

§ 12. Zwischenstaatlicher Geltungsbereich

Unterliegt ein Vertrag ausländischem Recht oder dem Recht der Deutschen Demokratischen Republik, so sind die Vorschriften dieses Gesetzes gleichwohl zu berücksichtigen, wenn

b. in the case of an agent without authority, extends the liability of such agent beyond the limits laid down in Paragraph 179 of the Civil Code;

15. (Burden of proof)
a provision which shifts the burden of proof to the disadvantage of the other party, especially in so far as

a. it imposes on that party the burden of proof for circumstances which are within the sphere of responsibility of the user;

b. it requires the other party to acknowledge the existence of certain facts.

This latter provision (b) does not apply to separately signed receipts;

16. (Form of notifications and declarations)
a provision in terms of shich notifications or declarations to be addressed to the user or a third party are made subject to stricter form requirements than writing or which contain special requirements as regards their receipt.

Chapter II

Conflict of Laws

12. Inter-State Application

When a foreign law or the law of the German Democratic Republic is the proper law of a contract the provisions of this Act shall nevertheless be taken into account if

1. der Vertrag auf Grund eines öffentlichen Angebots, einer öffentlichen Werbung oder einer ähnlichen im Geltungsbereich dieses Gesetzes entfalteten geschäftlichen Tätigkeit des Verwenders zustande kommt und

1. the contract has been concluded on the basis of a public offer, public advertising or similar business activities within the territory in which this Act is in force and

2. der andere Vertragsteil bei Abgabe seiner auf den Vertragsschluß gerichteten Erklärung seinen Wohnsitz oder gewöhnlichen Aufenthalt im Geltungsbereich dieses Gesetzes hat und seine Willenserklärung im Geltungsbereich dieses Gesetzes abgibt.

2. the other party has his permanent or usual place of abode in the territory in which this Act is in force when he makes the statement which leads to the conclusion of the contract and such statement is made in the territory in which this Act is in force.

Dritter Abschnitt

Verfahren

Chapter III

Legal Proceedings

§ 13. Unterlassungs- und Widerrufsanspruch

13. Claims for injunctions and withdrawal

(1) Wer in Allgemeinen Geschäftsbedingungen Bestimmungen, die nach §§ 9 bis 11 dieses Gesetzes unwirksam sind, verwendet oder für den rechtsgeschäftlichen Verkehr empfiehlt, kann auf Unterlassung und im Fall des Empfehlens auch auf Widerruf in Anspruch genommen werden.

(1) Proceedings for an injunction may be instituted against any person who uses or recommends standard contract terms which are void under the provisions of Paragraphs 9 to 11 of this Act requiring that person not to use or to recommend such terms and, in the case of a recommendation, to withdraw it.

(2) Die Ansprüche auf Unterlassung und auf Widerruf können nur geltend gemacht werden

(2) Such proceedings may be instituted only

1. von rechtsfähigen Verbänden, zu deren satzungsgemäßen Aufgaben es gehört, die Interessen der Verbraucher durch Aufklärung und Beratung wahrzunehmen, wenn sie in diesem Aufgabenbereich tätige Verbände oder mindestens fünfundsiebzig natürliche Personen als Mitglieder haben,

1. by associations which possess legal personality and whose statutory aims include the protection of consumers by information and advice,provided that such associations have as members other associations which are doing business in the same field or at least seventyfive natural persons.

2. von rechtsfähigen Verbänden zur Förderung gewerblicher Interessen oder

2. by associations which possess legal personality and have been established for the promotion of business interests,

3. von den Industrie- und Handelskammern oder den Handwerkskammern.

(3) Die in Absatz 2 Nr. 1 bezeichneten Verbände können Ansprüche auf Unterlassung und auf Widerruf nicht geltend machen, wenn Allgemeine Geschäftsbedingungen gegenüber einem Kaufmann verwendet werden und der Vertrag zum Betriebe seines Handelsgewerbes gehört oder wenn Allgemeine Geschäftsbedingungen zur ausschließlichen Verwendung zwischen Kaufleuten empfohlen werden.

(4) Die Ansprüche nach Absatz 1 verjähren in zwei Jahren von dem Zeitpunkt an, in welchem der Anspruchsberechtigte von der Verwendung oder Empfehlung der unwirksamen Allgemeinen Geschäftsbedingungen Kenntnis erlangt hat, ohne Rücksicht auf diese Kenntnis in vier Jahren von der jeweiligen Verwendung oder Empfehlung an.

§ 14. Zuständigkeit

(1) Für Klagen nach § 13 dieses Gesetzes ist das Landgericht ausschließlich zuständig, in dessen Bezirk der Beklagte seine gewerbliche Niederlassung oder in Ermangelung einer solchen seinen Wohnsitz hat. Hat der Beklagte im Inland weder eine gewerbliche Niederlassung noch einen Wohnsitz, so ist das Gericht des inländischen Aufenthaltsorts zuständig, in Ermangelung eines solchen das Gericht, in dessen Bezirk die nach §§ 9 bis 11 dieses Gesetzes unwirksamen Bestimmungen in Allgemeinen Geschäftsbedingungen verwendet wurden.

3. by chambers of industry and commerce or by associations of craftsmen and artisans.

(3) Associations referred to in sub-paragraph 2 No. 1 are not entitled to institute proceedings for an injunction prohibiting the use or the recommendation of standard contract terms if they are used vis-à-vis a merchant who enters into the contract in the course of his business or if they are recommended exclusively for use in dealings between merchants.

(4) The right of action referred to in sub-paragraph 1 hereof becomes prescribed within two years of the time when the association entitled to institute proceedings receives knowledge of the use or the recommendataioin of the void standard conditions and, irrespective of such knowledge, within four years of the time when they were first used or recommended.

14. Jurisdiction

(1) Actions referred to in Paragraph 13 of this Act fall within the exclusive jurisdiction of the Landgericht (County court) in the district of which the defendant has his place of business or, if he does not conduct a business, in whose district he permanently resides. If the defendant has neither a place of business nor a permanent place of residence in Germany, the Court of the district in which the defendant is living for the time being shall have jurisdiction,and failing this Court, the Court in the district of which the (according to the provisions of Paragraphs 9 to 11) void standard contract terms were used.

(2) Die Landesregierungen werden ermächtigt, zur sachdienlichen Förderungen oder schnelleren Erledigung der Verfahren durch Rechtsverordnung einem Landgericht für die Bezirke mehrerer Landgerichte Rechtsstreitigkeiten nach diesem Gesetz zuzuweisen. Die Landesregierungen können die Ermächtigung durch Rechtsverordnung auf die Landesjustizverwaltungen übertragen.

(2) In the interests of efficiency and despatch State Governments are authorised to designate,by regulation, one **Landgericht** (County Court) to deal with legal disputes which arise out of this Act in several **Landgericht** districts. State Governments may, by regulation, delegate this authority to the State Ministries of Justice.

(3) Die Parteien können sich vor den nach Absatz 2 bestimmten Gerichten auch durch Rechtsanwälte vertreten lassen, die bei dem Gericht zugelassen sind, vor das der Rechtsstreit ohne die Regelung nach Absatz 2 gehören würde.

(3) In proceedings before the Courts designated in terms of sub-paragraph (2) hereof the parties may also be represented by solicitors who are admitted to practice before the **Landgericht** which would have jurisdiction to hear their case but for the designation of one **Landgericht** in terms of the provisions of sub-paragraph (2).

(4) Die Mehrkosten,die einer Partei dadurch erwachsen, daß sie sich nach Absatz 3 durch einen nicht beim Prozeßgericht zugelassenen Rechtsanwalt vertreten läßt, sind nicht zu erstatten.

(4) The additional costs which a party incurs because he is represented, in terms of sub-paragraph (3) hereof, by a solicitor who is not admitted to practice before the Court which deals with the case, cannot be recovered.

§ 15. Verfahren

15. Proceedings

(1) Auf das Verfahren sind die Vorschriften der Zivilprozeßordnung anzuwenden, soweit sich aus diesem Gesetz nicht etwas anderes ergibt.

(1) The provisions of the Code of Civil Procedure shall be applied to the proceedings exept in so far as they are inconsistent with the provisions of this act.

(2) Der Klageantrag muß auch enthalten:
1. den Wortlaut der beanstandeten Bestimmungen in Allgemeinen Geschäftsbedingungen:

(2) The statement of claim must also include:
1. the exact wording of the provisions in the standard contract; terms to which the plaintiff objects;

2. die Bezeichnung der Art der Rechtsgeschäfte, für die die Bestimmungen beanstandet werden.

2. the description of the type of legal transactions in respect of which objection is taken to such provisions.

§ 16. Anhörung

Das Gericht hat vor der Entscheidung über eine Klage nach § 13 zu hören

1. die zuständige Aufsichtsbehörde für das Versicherungswesen, wenn Gegenstand der Klage Bestimmungen in Allgemeinen Geschäftsbedingungen sind, die von ihr nach Maßgabe des Gesetzes über die Beaufsichtigung der privaten Versicherungsunternehmungen zu genehmigen sind, oder

2. das Bundesaufsichtsamt für das Kreditwesen, wenn Gegenstand der Klage Bestimmungen in Allgemeinen Geschäftsbedingungen sind, die das Bundesaufsichtsamt für das Kreditwesen nach Maßgabe des Gesetzes über Bausparkassen, des Gesetzes über Kapitalanlagegesellschaften, des Hypothekenbankgesetzes oder des Gesetzes über Schiffpfandbriefbanken zu genehmigen hat.

16. Hearing

Before delivering judgment in an action instituted in terms of the provisions of Paragraph 13, the Court is obliged to hear

1. the authorities responsible for the supervision of insurance companies if the action concerns standard contract terms the use of which is subject to the consent of such authorities in terms of the Act regulating the Supervision of Private Insurance Companies, or

2. the federal authorities responsible for the supervision of credit transactions if the action concerns standard contract terms the use of which is subject to the consent of the federal authorities responsible for the supervision of credit transaction in terms of the Building Societies Act, the Investment Companies Act, the Mortgage Banking Act, or the Bottomry (Bonds) Act.

§ 17 Urteilsformel

Erachtet das Gericht die Klage für begründet, so enthält die Urteilsformel auch:

1. die beanstandeten Bestimmungen der Allgemeinen Geschäftsbedingungen im Wortlaut;

2. die Bezeichnung der Art der Rechtsgeschäfte, für die die den Uterlassungsanspruch begründenden Bestimmungen der Allgemeinen Geschäftsbedingungen nicht verwendet werden dürfen;

3. das Gebot, die Verwendung inhaltsgleicher Bestimmungen in Allgemeinen Geschäftsbedingungen zu unterlassen;

17. Judgment

If the Court finds that the complaint is founded, the judgment shall also contain:

1. the exact wording of the provisions in the standard contract terms to which objection was taken;

2. a description of the type of legal transactions in which the provisions to which the injunction relates shall not be used;

3. an order not to use standard contract terms which contain substantially the same provisions;

4. für den Fall der Verurteilung zum Widerruf das Gebot, das Urteil in gleicher Weise bekanntzugeben, wie die Empfehlung verbreitet wurde.

4. in the case of a judgment directing the withdrawal [of a recommendation for the use of provisions in standard terms] an order that the judgment shall be published in the same manner as the recommendation was published.

§ 18 Veröffentlichungsbefugnis

Wird der Klage stattgegeben, so kann dem Kläger auf Antrag die Befugnis zugesprochen werden, die Urteilsformel mit der Bezeichnung des verurteilten Verwenders oder Empfehlers auf Kosten des Beklagten im Bundesanzeiger, im übrigen auf eigene Kosten bekanntzumachen. Das Gericht kann die Befugnis zeitlich begrenzen.

18. Authority to publish

A successful plaintiff may on application be authorised to publish the dictum of the judgment including the description of the user or recommender in the Official Gazette at the expense of the defendant, and otherwise at his own expense. The Court may set a time limit on such authority.

§ 19 Einwendung bei abweichender Entscheidung

Der Verwender, dem die Verwendung einer Bestimmung untersagt worden ist, kann im Wege der Klage nach § 767 ZPO einwenden, daß nachträglich eine Entscheidung des Bundesgerichtshofs oder des Gemeinsamen Senats der Obersten Gerichtshöfe des Bundes ergangen ist, welche die Verwendung dieser Bestimmung für dieselbe Art von Rechtsgeschäften nicht untersagt, und daß die Zwangsvollstreckung aus dem Urteil gegen ihn in unzumutbarer Weise seinen Geschäftsbetrieb beeinträchtigen würde.

19. Right of objection if judgment [granting an injunction] is overruled

A user who has been prohibited from using a [particular] provision in standard contract terms may object [to such prohibition] by instituting an action in terms of Paragraph 767 of the Civil Procedure Code on the ground that a subsequent judgment of the Federal Supreme Court or of the Joint Senate of the Federal Supreme Courts did not prohibit the use of that provision for the same type of legal transaction and that the enforcement of the injunction against him would prejudice the conduct of his business in an intolerable manner.

§ 20 Register

(1) Das Gericht teilt dem Bundeskartellamt von Amts wegen mit

20. Register

(1) The Court advises the Federal Restrictive Trade Practices Commission on its own initiative of

1. Klagen, die nach § 13 oder nach § 19 anhängig werden

1. actions which have been instituted in terms of the provisions of Paragraph 13 or Paragraph 19 of this Act,

2. Urteile, die im Verfahren nach § 13 oder nach § 19 ergehen, sobald sie rechtskräftig sind,

2. judgments delivered in proceedings instituted in terms of the provisons of Paragraph 13 or Paragraph 19 of this Act as soon as they have become final,

3. die sonstige Erledigung der Klage.

3. the manner in which an action has been otherwise disposed of.

(2) Das Bundeskartellamt führt über die nach Absatz 1 eingehenden Mitteilungen ein Register.

(2) The Federal Restrictive Trade Practices Commission keeps a register of the information received in terms of sub-paragraph (1) hereof.

(3) Die Eintragung ist nach zwanzig Jahren seit dem Schluß des Jahres zu löschen, in dem die Entragung in das Register erfolgt ist. Die Löschung erfolgt durch Eintragung eines Löschungsvermerks; mit der Löschung der Eintragung einer Klage ist die Löschung der Eintragung ihrer sonstigen Erledigung (Absatz 1 Nr. 3) zu verbinden.

(3) The entry shall be cancelled after twenty years reckoned from the end of the year in which it was made. The cancellation shall be effected by means of an endorsement to the effect that it has been cancelled; the cancellation of the entry of an action shall be combined with the cancellation of the entry relating to its disposal otherwise than by judgment (sub-paragraph 1 No. 3 hereof).

(4) Über eine bestehende Eintragung ist jedermann auf Antrag Auskunft zu erteilen. Die Auskunft enthält folgende Angaben:

(4) Information about an existing entry shall be given to every person who applies for it. Such information shall contain the following details:

1. für Klagen nach Absatz 1 Nr. 1
a. die beklagte Partei
b. das angerufene Gericht

c. den Klageantrag;

1. in respect of actions referred to in sub-paragraph 1 No.1
a. the defendant,
b. the Court in which the action was instituted and the case number,
c. the prayer in the statement of claim;

2. für Urteile nach Absatz 1 Nr. 2.

a. die verurteilte Partei

2. in respect of judgments referred to in sub-paragraph 1 No. 2
a. the party against whom judgment was given,

b. das entscheidende Gericht samt Geschäftsnummer,
c. die Urteilsformel;

3. für die sonstige Erledigung nach Absatz 1 Nr. 3 die Art der Erledigung.

b. the Court which gave the judgment and the case number,
c. the tenor of the judgment;

3. in respect of the disposal of an action otherwise than by judgment referred to in sub-paragraph 1 No. 3, the manner in which it was settled.

§ 21 Wirkungen des Urteils

Handelt der verurteilte Verwender dem Unterlassungsgebot zuwider, so ist die Bestimmung in den Allgemeinen Geschäftsbedingungen als unwirksam anzusehen, soweit sich der betroffene Vertragsteil auf die Wirkung des Unterlassungsurteils beruft. Er kann sich jedoch auf die Wirkung des Unterlassungsurteils nicht berufen, wenn der verurteilte Verwender gegen das Urteil die Klage nach § 19 erheben könnte.

21. Effect of the judgment

If a user defies an injunction which has been issued against him, the provision in standard contract terms [to which the injunction relates] shall be regarded as void in so far as the other party relies on the effect of the infunction. However, he cannot rely on the effect of the injunction if the user would be entitled to institute an action in terms of the provisions of Paragraph 19 of this Act [the enforcement of] the injunction.

§ 22 Streitwert

Bei Rechtsstreitigkeiten auf Grund dieses Gesetzes darf der Streitwert nicht über 500 000 Deutsche Mark angenommen werden.

22. Procedural value

The procedural value of the subject matter in disputes to which this Act applies shall not exceed DM 500,000.

Vierter Abschnitt

Anwendungsbereich

Chapter IV

Scope of Application

§ 23 Sachlicher Anwendungsbereich

(1) Dieses Gesetz findet keine Anwendung bei Verträgen auf dem Gebiet des Arbeits-, Erb-, Familien- und Gesellschaftsrechts.

23. Substantive scope of application

(1) This Act does not extend to contracts in the field of the law of labour relations, the law of succession, family law and company law (including the law relating to partnerships).

(2) Keine Anwendung finden ferner

(2) In addition the following provisions of this Act do not apply

1. § 2 für die mit Genehmigung der zuständigen Verkehrsbehörde oder auf Grund von internationalen Übereinkommen erlassenen Tarife und Ausführungsbestimmungen der Eisenbahnen und die nach Maßgabe des Personenbeförderungsgesetzes genehmigten Beförderungsbedingungen der Straßenbahnen, Obusse und Kraftfahrzeuge im Linienverkehr;

1. Paragraph 2 to railway tariffs and conditions which have been approved by the appropriate public traffic control authorities or which have been issued in pursuance of international conventions and to the conditions of carriage of tramway, omnibus and public motor vehicle transport companies issued in terms of the provisions of the Carriage of Persons Act;

2. die §§ 10 und 11 für Verträge der Elektrizitäts- und der Gasversorgungsunternehmen über die Versorgung von Sonderabnehmern mit elektrischer Energie und mit Gas aus dem Versorgungsnetz, soweit die Versorgungsbedingungen nicht zum Nachteil der Abnehmer von den auf Grund des § 7 des Energiewirtschaftsgesetzes erlassenen Allgemeinen Bedingungen für die Versorgung mit elektrischer Arbeit aus dem Niederspannungsnetz der Elektrizitätsversorgungsunternehmen und Allgemeinen Bedingungen für die Versorgung mit Gas aus dem Versorgungsnetz der Gasversorgungsunternehmen abweichen;

2. Paragraphs 10 and 11 to contracts of electricity and gas supply corporations for the supply of electricity and gas in so far as their conditions of supply do not deviate, to the disadvantage of the consumer, from the General Conditions for the Supply of Electricity by Electricity Supply Corporations or the General Conditions for the Supply of Gas by Gas Supply Corporations issued in terms of Paragraph 7 of the Energy Control Act;

3. § 11 Nr. 7 und 8 für die nach Maßgabe des Personenbeförderungsgesetzes genehmigten Beförderungsbedingungen und Tarifvorschriften der Straßenbahnen, Obusse und Kraftfahrzeuge im Linienverkehr, soweit sie nicht zum Nachteil des Fahrgastes von der Verordnung über die Allgemeinen Beförderungsbedingungen für den Straßenbahn- und Obusverkehr sowie den Linienverkehr mit Kraftfahrzeugen vom 27. Februar 1970 abweichen;

3. Paragraph 11 Nos. 7 and 8 to the conditions and tariffs for the carriage of persons by tramway, omnibus and public vehicle transport companies serving fixed routes which have been approved in terms of the Carriage of Persons Act in so far as such conditions do not, to the disadvantage of passengers, deviate from the General Conditions of Carriage of Tramways, Omnibusses and Other Public Motor Vehicles Serving Fixed Routes prescribed by Government Regulations issued on 27 February 1970.

4. § 11 Nr. 7 für staatlich genehmigte Lotterieverträge oder Ausspielverträge.

4. Paragraph 11 No. 7 to lotteries and raffles which have been authorised by the State.

5. § 10 Nr. 5 und § 11 Nr. 10 Buchstabe f für Leistungen, für die die Verdingungsordnung für Bauleistungen (VOB) Vertragsgrundlage ist;

6. § 11 Nr. 12 für Verträge über die Lieferung als zusammengehörig verkaufter Sachen, für Versicherungsverträge sowie für Verträge zwischen den Inhabern urheberrechtlicher Rechte und Ansprüche und Verwertungsgesellschaften im Sinne des Gesetzes über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten.

(3) Ein Bausparvertrag, ein Versicherungsvertrag sowie das Rechtsverhältnis zwischen einer Kapitalanlagegesellschaft und einem Anteilinhaber unterliegen den von der zuständigen Behörde genehmigten Allgemeinen Geschäftsbedingungen der Bausparkasse, des Versicherers sowie der Kapitalanlagegesellschaft auch dann, wenn die in § 2 Abs. 1 Nr. 1 und 2 bezeichneten Erfordernisse nicht eingehalten sind.

§ 24 Persönlicher Anwendungsbereich

Die vorschriften der §§ 2, 10, 11 und 12 finden keine Anwendung auf Allgemeine Geschäftsbedingungen,

1. die gegenüber einem Kaufmann verwendet werden, wenn der Vertrag zum Betriebe seines Handelsgewerbes gehört;

2. die gegenüber einer juristischen Person des öffentlichen Rechts oder einem öffentlich-rechtlichen Sondervermögen verwendet werden.

5. Paragraph 10 No. 5 and Paragrah 11 No. 10 (f) to the performance of obligations on the basis of the General Construction Conditions;

6. Paragraph 11 No. 12 to contracts for the supply of goods which have been sold together as a functional unit, insurance contracts, contracts between the owners of copyright and companies which represent the interests of such owners in terms of the Copyright Act 1965.

(3) A building [society] savings contract, a contract of insurance and the legal relations between an investment company and its investors are subject to the investment or insurance company's standard conditions which have been approved by the competent supervising authorities even if the requirements of Paragraph 2(1) Nos. 1 and 2 have not been complied with.

24. Personel scope of application

The provisions of Paragraphs 2, 10, 11 and 12 of this Act do not extend to standard contract terms

1. which are used in a contract with a merchant in the course of his business;

2. which are used in contracts with public institutions and corporations.

§ 9 ist in den Fällen des Satzes 1 auch insoweit anzuwenden, als dies zur Unwirksamkeit von in den §§ 10 und 11 genannten Vertragsbestimmungen führt; auf die im Handelsverkehr geltenden Gewohnheiten und Gebräuche ist angemessen Rücksicht zu nehmen.

The provisions of the first sentence of Paragraph 9 of this Act shall also be applied in so far as they would result in any standard contract terms referred to in Paragraphs 10 and 11 of this Act becoming void; commercial customs and usages shall be taken into account in an appropriate manner.

Fünfter Abschnitt

Schluß- und Übergangsvorschriften

Chapter V

Interim and Final Provisions

§ 25 Änderung des Bürgerlichen Gesetzbuchs

25. Amendment of the Civil Code

Das Bürgerliche Gesetzbuch wird wie folgt geändert

The Civil Code will be amended as follows:

1. Nach § 476 wird folgende Vorschrift eingefügt:

1. After Paragraph 476 the following provision will be inserted:

"§ 476 a. Ist an Stelle des Rechts des Käufers auf Wandlung oder Minderung ein Recht auf Nachbesserung vereinbart, so hat der zur Nachbesserung verpflichtete Verkäufer auch die zum Zwecke der Nachbesserung erforderlichen Aufwendungen, insbesondere Transport-, Wege-, Arbeits- und Materialkosten, zu tragen, Dies gilt nicht, soweit die Aufwendungen sich erhöhen, weil die gekaufte Sache nach der Lieferung an einen anderen Ort als den Wohnsitz oder die gewerbliche Niederlassung des Empfängers verbracht worden ist, es sei denn, das Verbringen entspricht dem bestimmungsgemäßen Gebrauch der Sache."

"476 a. If it has been agreed that the right of the buyer to rescind the contract or to demand a reduction of the purchase price shall be substituted by a right to demand the rectification of any defects, the costs and expenses which such rectification necessarily involves, in particular the cost of transport, delivery, labour and materials, shall be borne by the seller who is obliged to rectify defects.This [provision] does not apply in so far as costs are increased because the good bought has been removed, after delivery, to a place other than the place of residence or business of the recipient unless the removal took place in the course of the normal use of the good."

2. In § 633 Abs. 2 wird folgender Satz 2 eingefügt:

2. In Paragraph 633(2) the following second sentence shall be added:

"§ 476 a gilt entsprechend."

"Paragraph 476a shall apply mutatis mutandis."

Der bisherige Satz 2 wird Satz 3.

§ 26 Änderung des Energiewirtschaftsgesetzes

§ 7 des Energiewirtschaftsgesetzes vom 13. Dezember 1935 (Reichsgesetzbl. I S. 1451), zuletzt geändert durch Artikel 18 des Zuständigkeitslockerungsgesetzes vom 10. März 1975 (Bundesgesetzbl. I S. 685) wird wie folgt geändert:

1. In Satz 1 werden die Worte "allgemeine Bedingungen und" gestrichen.

2. Die Sätze 1 und 2 werden Absatz 1.

3. Es wird folgender Absatz 2 angefügt:

"(2) Der Bundesminister für Wirtschaft kann durch Rechtsverordnung mit Zustimmung des Bundesrates die allgemeinen Bedingungen der Energieversorgungsunternehmen (§ 6 Abs. 1) ausgewogen gestalten.Er kann dabei die Bestimmungen der Verträge einheitlich festsetzen und Regelungen über den Vertragsabschluß, den Gegenstand und die Beendigung der Verträge treffen sowie die Rechte und Pflichten der Vertragspartner festlegen; hierbei sind die beiderseitigen Interessen angemessen zu berücksichtigen. Die Sätze 1 und 2 gelten entsprechend für Bedingungen öffentlich-rechtlich gestalteter Versorgungsverhältnisse mit Ausnahme der Regelung des Verwaltungsverfahrens."

The previous second sentence becomes the third sentence.

26. Amendment of the Energy Control Act

Paragraph 7 of the Energy Control Act of 13 December 1935 (Reichsgesetzbl. I p. 1451), last amended by Art. 18 of the Kompetenzlockerungs Act of 10 March 1975 Official Journal I p. 685) will be amended as follows:

1. In the first sentence the words "general conditions" are deleted.

2. The first and the second sentence become sub-section 1.

3. The following sub-section 2 shall be added:

"(2) The Federal Minister for Economic Affairs may, with the consent of the Senate, issue regulations to adjust the general conditions of energy supply enterprises which are fairly balanced (Paragraph 6(1)). In the exercise of these powers he may lay down uniform conditions of contract and make regulations concerning the conclusion, the subject matter, and the termination of the contract, and also determine the rights and duties of the parties; in this connection adequate consideration shall be given to the interests of the parties. Sentences 1 and 2 apply mutatis mutandis to the conditions of supplies which are regulated by public law with the exception of the regulation of administrative procedures."

§ 27 Ermächtigung zum Erlaß von Rechtsverordnungen

Der Bundesminister für Wirtschaft kann durch Rechtsverordnung mit Zustimmung des Bundesrates die allgemeinen Bedingungen für die Versorgung mit Wasser und Fernwärme ausgewogen gestalten. Er kann dabei die Bestimmungen der Verträge einheitlich festsetzen und Regelungen über den Vertragsabschluß, den Gegenstand und die Beendigung der Verträge treffen sowie die Rechte und Pflichten der Vertragspartner festlegen; hierbei sind die beiderseitigen Interessen angemessen zu berücksichtigen. Die Sätze 1 und 2 gelten entsprechend für Bedingungen öffentlichrechtlich gestalteter Versorgungsverhältnisse mit Ausnahme der Regelung des Verwaltungsverfahrens.

27. Delegation of powers

The Federal Minister for Economic Affairs may, with the consent of the Senate, issue regulations for the adjustment of the general conditions for the supply of water and long distance thermal power, which are fairly balanced. In the exercise of these powers he may lay down uniform conditions of contract and make regulations concerning the conclusion, the subject matter, and the termination of the contract, and also determine the rights and duties of the parties; in this connection adequate consideration shall be given to the interests of the parties. Sentences 1 and 2 apply *mutatis mutandis* to the conditions of supply which are regulated by public law with the exception of the regulation of administrative procedures.

§ 28 Übergangsvorschrift

(1) Dieses Gesetz gilt vorbehaltlich des Absatzes 2 nicht für Verträge, die vor seinem Inkrafttreten geschlossen worden sind.

(2) § 9 gilt auch für vor Inkrafttreten dieses Gesetzes abgeschlossene Verträge über die regelmäßige Lieferung von Waren, die regelmäßige Erbringung von Dienst- oder Werkleistungen sowie die Gebrauchsüberlassung von Sachen, soweit diese Verträge noch nicht abgewickelt sind.

(3) Auf Verträge Uber die Versorgung mit Wasser und Fernwärme sind die Vorschriften dieses Gesetzes erst drei Jahre nach seinem Inkrafttreten anzuwenden.

28. Savings

(1) Subject to the provisions of sub-paragraph (2) hereof this Act does not extend to contracts which have been concluded before it comes into force.

(2) the provisions of Paragraph 9 of this Act shall also extend to contracts for the regular delivery of goods, the regular supply of services or the supply of labour and materials, and for the use of a good in so far as such contracts have not been executed.

(3) The provisions of this Act shall not apply to contracts for the supply of water and long distance thermal power until three years have elapsed from the date on which it comes into force.

§ 29 Berlin-Klausel	**29. Berlin Clause**
Dieses Gesetz gilt nach Maßgabe des § 13 Abs. 1 des Dritten Überleitungsgesetzes vom 4. Januar 1952 (Bundesgesetzbl. I S. 1) auch im Land Berlin. Rechtsverordnungen, die auf Grund dieses Gesetzes erlassen werden, gelten im Land Berlin nach § 14 des Dritten Überleitungsgesetzes.	This Act shall extend to the Land Berlin in terms of Paragraph 13(1) of the Third Überleitungs Act of 4 January 1952 (Official Journal I p. 1). Regulations published under the authority of this Act extend to the Land Berlin in terms of Paragraph 14 of the Third Überleitungs Act.
§ 30 Inkrafttreten	**30. Commencement**
Dieses Gesetz tritt vorbehaltlich des Satzes 2 am 1. April 1977 in Kraft. § 14 Abs. 2, §§ 26 und 27 treten am Tage nach der Verkündung in Kraft.	Subject to the provisions of the second sentence hereof this Act comes into force on 1 April 1977. Paragraph 14(2), Paragraphs 26 and 27 come into force on the day following its promulgation.

12. Greece

Like Belgium, Greece has so far not passed any specific legislation with regard to unfair contract terms in consumer contracts[31]. As a matter of fact, the legislative record of Greece with regard to consumer protection in general is still rather poor. Greece has been late in joining the welfare societies; consumers' organizations, of which INKA (1971) is the biggest and the most active[32], and a department within the Ministry of Commerce dealing with consumer protection (1982)[33] have only been founded recently. Whenever a case concerning unfair contract terms arises, the courts have to take recourse to the general provisions of the civil code[34]. An administrative control procedure has only been instituted for a limited number of specific contracts, such as the insurance contract[35].

There are some prospects for specific legislation in the near future, however. Unfair contract terms were among the first subjects taken up by the Consumer Protection Agency after its establishment in 1982. At present, the Ministry of Commerce, under which the Agency operates, is considering introducing a consumer protection bill in Parliament. The bill is to deal with products liability, the equitable and prompt settlement of small claims,

and the right of participation in and representation to bodies and committees in the area of consumer policy. It is the Ministry's intention that the bill shall include a general provision on unfair contract terms. This general provisions will then be followed by more specific rules, laid down either in subsequent laws or in Presidential Decrees[36].

13. Irish Republic

The law as to unfair contract terms in the Irish Republic basically follows the United Kingdom model, which will be described in Nr 18 below. This means that Ireland is governed by the common law, like England and Wales. In the 1970's, the fundamental breach of contract doctrine and the contra proferentem rule served as means to protect consumers[37]. By the early 1980's, this situation had changed. Like the United Kingdom, the Irish Republic now possesses two statutes which both lay down substantive rules and provide for a control machinery.

The substantive rules are to be found in the Sale of Goods and Supply of Services Act, 1980, which reflects the British Sale of Goods Act, 1979. The Act contains a number of substantive law provisions which in consumer transactions are of a mandatory nature. It also lays down a number of requirements for guarantees: they must be clearly legible, state the duration and the terms and any costs to the buyer, etc. In a number of cases the exclusion of liability is prohibited, in some others exclusion is allowed only when it is fair and reasonable. Fairness and reasonableness are defined in the same way as in the United Kingdom.

The 1980 Act also contains some novelties. The Act enables the Minister to require written contract terms or notices to include any specified particulars. He can also compel suppliers who use standard forms to give such notice to the public as the order may specify as to his use of such standard form and as to whether he is or is not willing to contract on any other terms. Finally, the Minister may decide the size of type to be used in printed contracts and other documents and he may require certain contracts to be in writing[38].

The Office of Director of Consumer Affairs (established by the Consumer Information Act 1978) has certain functions in relation to contract terms under the Sale of Goods and Supply of Services Act 1980. The Director may take action by way of prosecution and otherwise against contracts (or notices in shops) which contain terms contrary to those terms which are mandatory under the Act. I shall now give some details, based on information given by the Director of Consumer Affairs.

- Under the Sale of Goods Acts 1893 to 1980 it is an implied term of *all* contracts for the sale of goods that the goods should be of merchantable quality, fit for their purpose and as described.
- In consumer contracts the implied terms may not be excluded under any circumstances and they are therefore mandatory. It is a prosecutable offence to include in a consumer contract (or in a notice in a shop) a term which is in conflict with these mandatory terms. For example, a notice saying "No Refunds" would be prohibited (unless it also said clearly and conspicuously something like "This does not affect your legal rights"). It is the Director of Consumer Affairs' job, under the Sale of Goods and Supply of Services Act 1980, to take action against such terms.
- In non-consumer contracts for the sale of goods (e.g. agreements between people in business) the implied terms may be excluded or restricted but only to the extent that it is fair and reasonable to do so. Certain criteria for assessing what is fair and reasonable are set out in the 1980 Act, but in the last analysis it is only a court which can decide and then only in the context of a concrete dispute between two individual parties to a specific contract.
- Under the Sale of Goods and Supply of Services Act 1980, it is implied in all contracts for the supply of services that the supplier has the requisite skill to supply the service, that the service will be provided with due skill, care and diligence and that goods or materials supplied with the service will be of merchantable or reasonable quality.
- In contracts for the supply of services to consumers these implied terms may be excluded but the exclusion is not valid unless it is shown that it is fair and reasonable and that it was specifically brought to the consumer's attention. A decision on the validity or otherwise of a clause excluding the implied terms

can only be made by a court in an individual case.In practice the Director of Consumer Affairs cannot require the removal of exclusion clauses in contracts for services.

- In non-consumer contracts for the supply of a service the terms implied by the 1980 Act may be excluded or varied.
- The functions of the Director of Consumer Affairs under the Consumer Information act 1978 relate only to misleading practices and have nothing to do with contract terms as such. Under the Sale of Goods and Supply of Services Act 1980 the Director has some functions in relation to contract terms, as described in par. 1 above. The Director also has a general, if vague, monitoring function in this area but strictly speaking he can only intervene in specific cases along the lines described in par. 1.
- The British (Unfair Contract Terms) Act is more general and more extensive in scope than the Irish Act. There is not really any generalised concept of "unfair" in the Irish Law. Certain terms are implied in certain contracts. These implied terms may not be excluded unless the *exclusion* can be shown to be fair and reasonable. In other words the concept of fairness has no general application - it is applied only in the context of exclusions of terms that would otherwise be implied by law.

14. Italy

One of the first countries in Europe to enact legislation on unfair contract terms, long before the invention of consumerism here, had been Italy. The 1942 Civil Code (Codice civile) contains three provisions which deal with standard form contracts explicitly:

Art. 1341. 1. Le condizioni generali di contratto predisposte da uno dei contraenti sono efficaci nei confronti dell'altro, se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l'ordinaria diligenza.

Art. 1341. 1. The general contract conditions which have been drafted in advance by one of the parties to the contract are binding for the other party, if at the moment of conclusion of the contract the orther party knew them or, using ordinary care, should have known them.

2. In ogni caso non hanno effetto, se non sono specificamente approvate per iscritto, le condizioni che stabiliscono, a favore di colui che le ha predisposte, limitazioni di responsabilità di recedere dal contratto o di sospendere l'esecuzione, ovvero sanciscono a carico dell'altro contraente decadenze, limitazioni alla facoltà di opporre eccezioni, restrizioni alla libertà contrattuale nei rapporti coi terzi, tacita proroga o rinnovazione del contratto, clausole compromissorie o deroghe alla competenza dell'autorità guidiziaria.

2. In any case the following terms are ineffective, unless they have been specifically approved in writing: terms which in favour of the party who drafted them lay down an exemption of his liability, the power to withdraw from the contract or to stay its execution or expiry dates which are prejudicial to the other party, limitations as to his power to raise means of defence, limitations in his freedom to contract with third parties, tacit prolongation or renewal of the contract, arbitration clauses or clauses which derogate from the competence of the judicial authorities.

Art. 1342. 1. Nei contratti conclusi mediante la sottoscrizione di moduli o formulari, predisposti per disciplinare in maniera uniforme determinati rapporti contrattuali, le clausole aggiunte al modulo o al formulario prevalgono su quelle del modulo o del formulario qualora siano incompatibili con esse, anche se queste ultime non sono state cancellate.

Art. 1342. 1. In contracts which have been concluded by means of the signing of models or forms, which have been drafted in advance to regulate certain contractual relationships in a uniform way, these terms which have been added to the model or the form, prevail over those of the model or the form, in case they are contrary to these, even when the last-mentioned terms have not been struck.

2. Si osserva inoltre la disposizione del secondo comma dell'articolo precedente.

2. Furthermore the second alinea of the preceding article is applicable.

Art. 1370. Le clausole inserite nelle condizioni generali di contratto o in moduli o formulari predisposti da uno dei contraenti s'interpretano, nel dubbio, a favore del'altro.

Art. 1370. The terms which have been inserted in general contract conditions or in models or forms which have been drafted in advance by one of the parties, when there is doubt, are interpreted in favour of the other party.

These provisons have yielded quite an impressive case law, as we shall see in Chapter III, Nr 37. They have not led to a thorough reform of Italian standard form contracts, however. In the 1970's a reform movement has started. A major part in this movement is

played by Professor C.Massimo Bianca from Rome University. On the basis of a comprehensive comparative survey[39], Professor Bianca and his team have elaborated a draft bill, which was submitted to legal criticism in 1981[40]. The draft bill reads as follows:

Art. 1. Dopo l'art. 1341 cod. civ. sono inseriti i seguenti articoli:

"Art. 1341/2. *Nullità delle clausole abusive.* - Sono nulle, anche se approvate specificamente per iscritto, le clausole che alterano l'equilibrio del contratto in pregiudizio dell'aderente senza giustificarsi obiettivamente nell'economia dell'affare e, in generale, le clausole non conformi alle regole della correttezza, anche professionalmente, o all'equità.

A titolo esemplificativo sono reputate nulle, salvo che risultino giustificate obiettivamente nell'economia dell'affare:

1) le clausole indicate nell' II comma dell'art. 1341;

2) le clausole che prevedono a carico dell'aderente limitazioni dei rimedi contro la mancata, inesatta o ritardata esecuzione della prestazione del predisponente ovvero deroghe alla disciplina legale per il caso di impossibilità di esecuzione del contratto non imputabile ad alcuna delle parti;

3) le clausole che prevedono il potere del predisponente di determinare o variare il contenuto o le modalità del contratto successivamente al momento in cui questo è stato concluso o in cui l'aderente ha fatto offerta di concluderlo;

art. 1. After art. 1341 Civil Code the following articles are inserted:

"Art. 1341/2. *Nullity of unfair contract terms.* - Are null and void. even if they have been approved explicitly in writing, those clauses which change the balance of the contract to the detriment of the other party without being justified objectively by the economy of the transaction and, in general, the clauses which are not in conformity with the rules of ethics, including professional rules, or with equity.

By way of example are considered null and void, safe for an objective justification by the economy of the transaction:

1) the clauses indicated in the second section of article 1341;

2) the clauses which at the expense of the other party limit the remedies in case of a missing, not conform or late execution of the supplier's performance or derogating from the legal regime of force majeure;

3) the clauses which authorize the supplier to determine or to modify the contents or the quality of the contract after the moment on which the contract was concluded or the other party has offered to conclude the contract;

4) le clausole che impongono all'aderente interessi corrispettivi compensativi o moratori manifestamente eccessivi in relazione al mercato bancario;

5) le clausole che liquidano preventivamente il danno eventuale del predisponente in misura forfettaria escludendo l'accertamento del danno effettivo;

6) le clausole che escludono o limitano il diritto dell'aderente di ottenere il risarcimento del danno effettivamente subito;

7) le clausole che compromettono le controversie ad arbitrati rituali o irrituali se il diritto di difesa delle parti ne risulta limitato o l'esercizio reso più gravoso o se la composizione del collegio non rispetta il principio di parità.

Art. 1341/3. *Deroghe alla competenza territoriale della autorità giudiziaria*. - Sono comunque nulle le clausole che derogano alla competenza territoriale dell'autorita giudiziaria salvo che il contratto sia stipulato dall'aderente nell'esercizio della sua attività professionale.

4) the clauses which charge to the other party compensatory or moratory interests which are manifestly excessive in relation to the banking market;

5) the clauses which fix in advance possible damages to be paid by the supplier excluding an assessment of the effective damages;

6) the clauses which exclude or limit the other party's right to obtain immediately the effective repair of the damage;

7) the clauses which subject the conflicts to arbitration or binding advice if the other party's defence is thereby limited or the execution made more cumbersome or if the composition of the board does not respect the principle of parity.

Art. 1341/3. *Derogation from territorial competence of judicial authorities*. - Are null and void anyway the clauses which derogate from the territorial competence of the judicial authority except when the contract is concluded by the other party in the exercise of his professional activities.

Art. 1341/4. *Azione di inibitoria*. - Il giudice può inibire al predisponente di includere nelle condizioni generali di contratto le clausole di cui sia accertata la nullità in applicazione degli artt. 1341/2 e 1341/3 o per contrarietà ad altre norme imperative o all'ordine pubblico.
L'azione di inibitoria può essere esercitata dalla camera di commercio o dalle associazioni di lavatori o di imprenditori maggiormente rappresentative nonché da altre associazioni che per le finalità statuarie e per il numero degli iscritti siano reputate dal giudice sufficientemente rappresentative.
Le questioni di legittimazione attiva devono essere sollevate non oltre la prima udienza di trattazione a pena di decadenza.
Giudice competente per materia è il tribunale.
La sentenza che, a seguito dell'azione inibitoria, accerta la nullità della clausola contestata, inibisce al predisponente l'uso della clausola stessa o di altra clausola sostanzialmente identica in tutto il territorio nazionale. La clausola ulteriormente inserita nelle condizioni generali di contratto in violazione dell'inibitoria si considera come non apposta.
La domanda di inibitoria accolta con sentenza passata in giudicato non può essere riproposta da altri legittimati dinanzi allo stesso o ad altri tribunali.
Il rigetto della domanda non ne preclude la proponibilità da parte di altri legittimati né preclude l'accertamento della nullità della clausola da parte del giudice adito dal singolo aderente.

Art. 1341/4. *Injunction*. - The court may prescribe the supplier from incorporating into the general contract terms the clauses which either are considered null and void in pursuance of articles 1341/2 and 1341/3 or are at variance with other mandatory norms or with public order. The injunction may be requested by the Chamber of Commerce or by the trade unions or trade associatons which are highly representative and also by other associations which by the aims laid down in their bye-laws and by the number of affiliated persons are considered by the court sufficiently representative.

Questions of legitimacy shall be raised no later than at the first hearing, at the penalty of expiration.

The competent court is the tribunal.
The decision which, on the basis of the request for the injunction, establishes the nullity of the litigious clause, prescribes the supplier from using the same clause or other clauses which are substantially identical on the whole national territory. The clause which afterwards is incorporated in general contract terms in violation of the injunction is considered not agreed upon.
When a court has given an injunction order from which no appeal lies any longer, such injunction may not be requested by other plaintiffs before the same or other courts.
The rejection of the request does not preclude its availability to other plaintiffs nor does it preclude the establishment of the nullity by the court when it is addressed by an individual adhering party.

Art. 1341/5. *Contratti stipulati dagli enti pubblici.* Le disposizioni degli artt. 1341, 1341/2, 1341/3 e 1341/4 si applicano anche alle condizioni generali di contratto predisposte da enti pubblici.
Dall'applicazione di tali disposizioni sono esclusi i capitolati generali approvati con decreto presidenziale o ministeriale.

Art. 1341/5. *Contracts made by public entities.* - The provisions of articles 1341, 1341/2, 1341/3 and 1341/4 also apply to the general contract terms which have been drafted by public entities.

Are excluded from the application of these provisions the general contracts which have been approved by presidential or ministerial decree.

Art. 1341/6. *Inderogabilità delle norme sulle condizioni generali di contratto.* - Le disposizioni degli artt. 1341, 1341/2, 1341/3, 1341/4 e 1341/5 sono inderogabili.

Tali disposizioni si applicano anche ai contratti non regolati dalla legge italiana aventi esecuzione in tutto o in parte nel territorio nazionale."

Art. 1341/6. *No exemption from the provisions on general contract terms.* - The provisions of the articles 1341, 1341/2, 1341/3, 1341/4 and 1341/5 may not be derogated from.
These provisions also apply to the contracts which are not regulated by Italian law but which are executed, wholly or partially, on the national territory."

Art. 2. Il II comma dell'art. 1342 cod. civ. è sostituito dal seguente:
"Si osservano inoltre le disposizioni del II comma dell'art. 1341 e gli artt. 1341/2, 1341/3, 1341/4, 1341/5 e 1341/6".

Art. 2. The second alinea of art. 1342 Civil Code is substituted by the following:
"Are applicable the provisions of the second alinea of art. 1341 and articles 1341/2, 1341/3, 1341/4, 1341/5 and 1341/6".

This proposal has met with wide acclaim by Italian legal writers[41], but so far no government action has been taken to incorporate the proposed provisions into the Civil Code.

15. Luxemburg

In 1983, Luxemburg became the first of the Benelux countries to enact specific provisions on unfair contract terms. The provisions constitute one of the main elements of the Consumer Protection Act (*Loi relative à la protection juridique du consommateur*) of August 25, 1983, *Mémorial* 1983, 1494. The relevant provisions will be set out below, both in the original French language and in an English translation[42]. The Luxemburg regulation of unfair contract terms has been inspired among others by the Council of Europe's

resolution 76 (47) on unfair contract terms and by the German *AGB-Gesetz*, as will be shown. Apart from unfair contract terms, the 1983 Act also deals with jurisdiction clauses, mail order transactions, repair of goods and the liability for advertising. The 1983 Act has already been amended twice. The first time has been by Law of March 27, 1986, *Mémorial* 1986, 1145, by which Luxemburg aproved the Rome Convention on the Law Applicable to Contractual Obligations. This amendment does not bear directly on unfair contract terms and will therefore not be set out below.

The Consumer Protection Act's scope of application is limited, as will be apparent from its name, to consumer transactions. This is not the case with the amendments of the Civil Code, which have been brought about by the Law of May 15, 1987, *Mémorial* 1987, 1987. The original government bill of 1978[43] already contained a proposal to introduce a number of new provisions in the Civil Code, which would apply to all contracts. This part of the bill was first criticised by the Council of State. In order not to jeopardize the remainder of the bill, it was then dropped provisionally. However, the government did not give up, and in 1987 it finally succeeded. The 1987 Act also adds to the Consumer Protection Act an article 13, under which a consultative Consumer Council may be established, and an article 14, providing for the compulsory disclosure in the contract of the real interest rate.

The 1987 Act amends the Civil Code in twelve different places. The amendment which has the most direct bearing on unfair contract terms consists of the introduction in the Code of a new article 1135-1, which runs as follows:

Les conditions générales d'un contrat préétablies par l'une des parties ne s'imposent à l'autre partie que si celle-ci a été en mesure de les connaître lors de la signature du contrat et si elle doit, selon les circonstances, être considérée somme les ayant acceptées.	The general contract conditions, which have been established in advance by one of the parties, are not binding for the other party, unless he has had the occasion to acquaint himself with them at the moment of signing the contract, and if under the circumstances he should be considered as having accepted them.

Sauf acceptation spéciale par écrit, sont toujours inopposables les clauses qui prévoient en faveur de celui qui a établi les conditions générales des limitations de responsabilité, la possibilité de se retirer du contrat ou d'en différer l'exécution, le recours obligatoire à l'arbitrage, ainsi que celles attribuant compétence à d'autres juridictions que celles normalement compétentes.	Apart from specific written acceptance, the following clauses are always not binding: the clauses which in favour of the one who has drafted the general conditions envisage limitations of responsibility, the possibility to withdraw from the contract or to delay its execution, the compulsory recourse to arbitration, as well as those which attribute competence to other jurisdictions than those which normally are competent.

As is quite apparent from the text, inspiration for this provision has been drawn from art. 1341 of the Italian civil code.

We shall now take a look at the Consumer Protection Act. The 1983 Act differs from the original bill on a number of counts. The control system which has been introduced in articles 5 and 6 was only inserted in 1983. Before, a quite different system was envisaged. The 1978 bill proposed the establishment of a Consumer Council, to be composed of representatives of consumer's and suppliers' organizations and of the ministries of Justice and of Retail Trade (Classes moyennes). The Council was to take knowledge of general contract terms and to issue recommendations in this regard.
So far, the control system resembles the French system, which has been discussed above in Nr 10, but now it becomes different. Whereas the French Commission on unfair contract terms addresses its recommendations to the French government, which may or more often may not follow the recommendations, the Luxemburg Consumer Council was to have handed over its files to the Public Ministry which would then have had the power to request the court to declare the terms concerned unfair.

The Consumer Council was to be entrusted with yet another task, that of establishing general contract terms for specific trades itself. This idea bears some resemblance with art. 6.5.1.2 of the New Civil Code of the Netherlands (although the Explanatory Memorandum does not show any influence of the Dutch bill, as it then was).

The 1987 amendments do finally provide for the establishment of a Luxemburg Consumer Council (art. 13), but this Council has only been entrusted with a consultative status.

The present provisions of the 1983 Act as to unfair contract terms read as follows:

Art. 1er. Dans les contrats conclus entre un fournisseur professionnel de biens de consommation, durables ou non, ou de services et un consommateur final privé, toute clause ou toute combinaison de clauses qui entraîne dans le contrat un déséquilibre des droits et obligations au préjudice du consommateur est abusive et comme telle réputée nulle et non écrite.

Art. 1. In contracts concluded by a professional supplier of consumer goods, whether they are durable or not, or services and a private final consumer, any clause or combination of clauses which brings about an imbalance in the contract between the rights and obligations to the detriment of the consumer is unfair and as such held to be null and void.

Art. 2. Sont notamment à considérer comme abusives:

Art. 2. Notably to be considered unfair are:

(1) Les clauses excluant ou limitant la garantie légale en cas de vice caché.

(1) Clauses excluding or restricting the legal guarantee in case of a hidden fault.

(2) Toute clause conventionnelle portant augmentation de la créance en raison de sa réclamation en justice.

(2) Any clause providing for a contractual increase in the price in the event of legal proceedings.

(3) Les clauses interdisant au consommateur de suspendre en tout ou en partie le versement des sommes dues si le fournisseur ne remplit pas ses obligations.

(3) Clauses preventing the consumer from suspending, in whole or in part, the payment of amounts due if a supplier fails to fulfil his obligations.

(4) Les clauses, selon lesquelles le fournisseur se réserve le droit de modifier ou de rompre unilatéralement le contrat sans motif spécifique et valable stipulé dans le contrat.

(4) Clauses allowing the stipulator to alter or terminate the contract without legitimate grounds specified in the contract.

(5) Les clauses excluant le droit pour le consommateur de demander la résiliation du contrat, lorsque la fourniture ou la prestation n'est pas effectuée dans le délai promis ou, à défaut d'indication de délai, dans un délai raisonnable ou d'usage.

(5) Clauses prohibiting the consumer to cancel the contract when the goods are not supplied, or the services provided,within the agreed period, or, where no time limit is indicated, within a reasonable or customary period.

(6) Les clauses, par lesquelles le fournisseur se réserve, sans motif valable et spécifié dans le contrat, le droit de fixer unilatéralement la date d'exécution de son obligation.

(6) Clauses allowing the supplier to determine unilaterally and without objective reasons the date for the performance of his obligation.

(7) Les clauses prévoyant que les biens ne doivent pas correspondre à leurs éléments descriptifs essentiels pour le consommateur ou à l'échantillon ou à l'usage spécifié par le consommateur et accepté par le fournisseur ou, à défaut de cette spécification, à leur usage normal.

(7) Clauses laying down that the contract may not be cancelled when the goods or services do not correspond essentially, for the consumer, to the agreed specifications, or, in the absence of such specifications, to what may reasonably be expected.

(8) Les clauses réservant au fournisseur le droit de déterminer unilatéralement si le bien ou la prestation est conforme ou non au contrat.

(8) Clauses by which the supplier reserves the right to determine unilaterally whether the good or the service conform to the terms of the contract.

(9) Les clauses, selon lesquelles le contrat est prorogé pour une durée supérieure à un an si le consommateur ne le dénonce pas à une date déterminée.

(9) Clauses providing for the tacit renewal of a contract for a period exceeding 12 months, if the consumer does not cancel it at a specific date.

(10) Les clauses prévoyant la détermination du prix au moment de la fourniture ou des fournitures successives ou permettant au stipulant de l'augmenter, même en considération de critères objectifs, si le consommateur n'a pas corrélativement le droit de résilier le contrat lorsque le prix définitif devient excessif pour le consommateur par rapport à celui auquel il pouvait s'attendre lors de la conclusion du contrat.

(10) Clauses providing for the fixing of prices at the time of performance or allowing the stipulator to increase them, even on the basis of objective criteria, if the consumer does not have the parallel right to terminate the contract when the final price exceeds that which the consumer might reasonably have expected at the time of conclusion of the contract.

(11) Les clauses imposant au consommateur un délai anormalement court pour faire des réclamations au fournisseur.

(11) Clauses limiting the period normally granted to the consumer for submitting any complaints.

(12) Les clauses excluant le droit pour le consommateur de résilier le contrat lorsque le fournisseur a l'obligation de réparer le bien et n'a pas satisfait à cette obligation dans un délai raisonnable.

(12) Clauses excluding the consumer's right to terminate the contract where the supplier is obliged to repair the product and has not complied with this obligation within a reasonable period.

(13) Les clauses excluant pour le consommateur le droit de recourir aux tribunaux de droit commun.

(13) Clauses excluding the consumer's right to have recourse to the normal courts.

(14) Les clauses permettant au fournisseur de substituer à la fourniture ou à la prestation promise une fourniture ou une prestation différente, à moins que celle-ci n'ait été spécifiée au contrat et expressément acceptée par le consommateur.

(14) Clauses giving the supplier the general right to replace the goods or services desired by the consumer with different goods or services, unless this has been specified in the contract and expressly accepted by the consumer.

(15) Les clauses imposant au consommateur la charge de la preuve incombant normalement au fournisseur.

(15) Clauses imposing on the consumer the burden of proof normally borne by the supplier.

(16) Les clauses interdisant au consommateur d'invoquer la compensation à l'égard du fournisseur.

(16) Clauses preventing the consumer from claiming compensation from the supplier.

(17) Les clauses contenues dans des contrats portant sur la fourniture de gaz, d'électricité ou de combustibles et obligeant à un minimum de consommation.

(17) Clauses contained in contracts relating to the supply of gas, electricity or fuels requiring a minimum consumption.

(18) Les clauses, par lesquelles celui qui s'engage à effectuer un travail déterminé sur une chose qui lui et remise à cette fin, exclut ou limite son obligation de veiller à la conservation de cette chose et de la restituer après le travail effectué.

(18) Clauses whereby anyone who undertakes to carry out specified work on an object handed over to him for that purpose excludes or limits his obligation to ensure that such object is properly looked after and returned after the work has been carried out.

(19) Les clauses, par lesquelles le consommateur renonce à l'égard du réparateur d'une chose ou à l'égard de celui qui effectue sur elle des travaux, d'invoquer la garantie incombant à un vendeur professionnel en raison des travaux et pièces nouvelles fournis par celui-ci.

(19) Clauses whereby the consumer vis-à-vis the person carrying out the repair of an object or specified work on that object renounces the right to invoke the guarantee which a professional seller shall give with regard to the work or new materials which he supplies.

(20) Les clauses, par lesquelles un consommateur final privé consent à une cession de créance au profit d'un tiers en renonçant à faire valoir contre celui-ci les droits et exceptions qu'il pouvait faire valoir contre son cocontractant.

(20) Clauses whereby a private final consumer consents to the assignment of his debt to a third party and renounces his right to invoke as against that third party the rights and defenses which he had vis-à-vis the supplier.

Art. 5. Le président du tribunal d'arrondissement du domicile du demandeur peut, à la requête de toute personne, d'un groupement professionnel ou d'une association de consommateurs représentée à la commission des prix, constater le caractère abusif d'une clause ou d'une combinaison de clauses au sens des article ler et 2 et dire que cette clause ou combinaison de clauses est réputée nulle et non écrite.
L'action est introduite et jugée comme en matière de référé.
L'affichage de la décision pourra être ordonné à l'intérieur des installations de vente de l'utilisateur de la clause et aux frais de celui-ci. La décision précisera la durée de l'affichage. Elle pourra également ordonner la publication, en totalité ou par extrait, aux frais de l'utilisateur de la clause, par la voie des journaux ou de toute autre manière.
Il ne pourra être procédé à l'affichage et à la publication qu'en vertu d'une décision judiciaire non susceptible d'appel ou d'opposition.

Art. 5. The president of the district court of the petitioner's domicile, at the request of any person, suppliers' organization or consumers' organization represented on the Price Board,may declare a clause or combination of clauses unfair in the sense of articles 1 and 2 and pronounce such clause or combination of clauses null and void.

The action is introduced and heard as in summary proceedings.
Posting the decision may be ordered within the premises of the user of the clause and at his expense. The decision shall state the length of the posting. It may also order its publication, in whole or in part, at the expense of the supplier, in a newspaper or by any other means.

The posting and publication may not be executed unless in pursuance of a judicial decision which is not susceptible to appeal or to opposition.

Art. 6. Le fournisseur professionnel qui invoque à l'encontre d'un consommateur final privé une clause ou une combinaison de clauses, déclarée abusive et comme telle nulle et non écrite, par une décision judiciaire irrévocable intervenue à son égard, est puni d'une amende de 3.000 à 100.000 francs.

Les personnes, les groupements professionnels et les associations représentatives de consommateurs visés à l'article précédent sont recevables à se constituer partie civile devant les juridictions répressives relativement aux faits portant un préjudice à leurs intérêts particuliers ou collectifs.

Art. 6. The professional supplier who vis-à-vis a private final consumer invokes a clause or combination of clauses which has been declared unfair and therefore null and void by way of a judicial decision which has become irrevocable as far as the supplier is concerned, will be fined from 3,000 to 100,000 francs.

The persons, suppliers' organizations and consumers' organizations envisaged in the previous article may constitute themselves a civil party before the criminal jurisdictions with regard to damage to their proper or collective interests.

It is interesting to trace the influence of various earlier texts on unfair contract terms. Those which seem to have had the greatest impact are the Resolution of the Council of Europe, the German *AGB-Gesetz* and the Austrian *Konsumentenschutzgesetz*. The first of the clauses to be considered unfair was already held to be null and void under existing Luxemburg (and French) law. Codifying this in the Consumer Protection Act has the advantage of paving the way towards an injunction on the basis of art. 5. In the Explanatory memorandum, Nrs 11-13 of the Council of Europe's black list, as well as par. 6(1)9, 8 and 9 of the Austrian *Konsumentenschutzgesetz* and par. 11 Nr. 10 of the German *AGB-Gesetz* are referred to.

Nr 2 of art. 2 appears to be directed against contract terms, which Luxemburg courts had to deal with on a number of occasions. The Explanatory memorandum refers to art. 1023 of Belgium's Judicial Code for a comparable provision.

Nr 3 has been taken from the Council of Europe's black list (Nr 18). Par. 6(1)(6) contains a similar prohibition. Nr 4 has been taken from Nr 5 of the Council of Europe's list and Nr 5 from Nr 18. Nr 6 has been taken from Nr 7 of the Council of Europe's list

- in other countries this provision usually is formulated in a broader way, so as to regulate uncustomary or unfairly long periods as well.

Nr 7 of art. 2 of the Luxemburg Act has been taken from the Council of Europe's Nr 8 and Nr 8 of the Luxemburg Act from Strasburg's Nr 6 (see also par. 6(1)(10) of the Austrian Law). Nr 9 is derived from the Council of Europe's Nr 4 - see also par 11 Nr 12 (b) *AGB-Gesetz* and par. 15 *Konsumentenschutzgesetz*. Nr 10 of the Luxemburg list has been inspired by Nrs 10 and 16 of the Council of Europe - as to the second part see also par. 11 (1) *AGB-Gesetz* and part. 6(2)(4) Konsumentenschutzgesetz.

Nr 11 is what is left of the proposal to amend art. 1648 Civil Code in the original bill. This amendment was inspired by art. 201 of the Swiss Law of Obligations and by art. 16 of the Benelux draft bill on sale of goods. Nr 12 has been taken from Nr 14 of the Council of Europe's list. Nr 13 of the Luxemburg list may be found in the Italian and the Israeli legislation. It was also on the draft list of the Council of Europe and in the draft bill of The Netherlands, but in both cases was struck at the last moment- in the latter case because of pressure from commercial circles. Nr 14 has been inspired by par. 6(2)3 of the Austrian Law and Par. 10 Nr 4 of the *AGB-Gesetz*. Nr 15 has been taken from the Council of Europe's list (Nr 25) which has also inspired par. 6(1)11 of the Austrian Law and Par. 11 Nr 15 of the German Act. Nr 16 has been taken from Nr 21 of the Council of Europe's list - see also par. 6(1)8 *Konsumentenschutzgesetz* and par. 11 Nr 3 of the German Act. Nr 17 of the Luxemburg list does not mention the supply of water, which was struck because this was deemed to be regulated not by contract law but rather by municipal decree. Nrs 18-20 finally were adopted at the request of the Council of State in order to replace articles 9, 11 and 12 or parts thereof in the original government bill.

16. The Netherlands

Among the countries which have shown the largest resistance to legislation on unfair contract terms, The Netherlands deserve a

place of honour. Although a government bill on standard form contracts[44] was approved by the Second Chamber of Parliament in May 1985, it remained uncertain whether the bill would be enacted until two years later. Meanwhile, the bill had already influenced the case law of the Supreme Court (*Hoge Raad*) which for a short time even treated parts of the bill as if they had entered into force[45].

The resistance against legislation has not existed right from the outset, when the consumer movement argued for such intervention[46]. Rather, in the early period of draft legislation, some professional organizations supported the plea for legislation[47]. The Consumer Council (*Commissie voor Consumentenaangelegenheden: CCA*) of the Social and Economic Council (*Sociaal-Economische Raad: SER*) even managed to arrive at a near-unanimous advisory opinion[48].

But when the government, supported by the Netherlands Lawyers Association (*Nederlandse Juristen-Vereniging*), introduced a bill which followed all the 'consumer-friendly' options in the CCA Report and in some regards even went further, the professional associations lost confidence in the project and they have been lobbying against its enactment.

All the same, the bill has escaped nearly unscathed from attempts to kill it. Taken together, at least five attempts have been made to kill the unfair contract terms bill. Before getting into details, it should be mentioned that the act which in many regards bears a close resemblance to the German *AGB-Gesetz*, does differ in the sense that its provisions do not constitute a separate Act but rather are incorporated in the New Civil Code. Since the enactment of the new code has in itself become a cumbersome exercise, which started forty years ago[49], the bill on unfair contract terms suffered not only from opposition to this specific piece of legislation but also from opposition to the recodification project in general.

The first attempt at curtailing the provisions on standard form contracts actually was part of a larger operation to liberate the New Civil Code of unnecessary or unnecessarily intricate provisions. Contrary to the expectations, the unfair contract terms bill

withstood this first challenge without any problems[50]. A second attempt at killing came from a similar corner, but this time from the Ministry of Economic Affairs instead of the Justice Department. In the wake of a general 'deregulation zeal', all pending bills and draft bills were checked on their being compatible with the new deregulation guidelines. A government commission charged with making this check, advised against enactment of the unfair contract terms bill[51]. Once again, the government withstood the assault and agreed to some minor simplifications only[52].

A third attempt to kill the bill was made in the Second Chamber of Parliament. Although the bill had first been hailed by all major parties, the spokesmen of the two government parties, the Christian Democrats and the Liberals, changed their opinions at the last moment[53]. Political pressure was exerted on the two spokesmen, however, and the bill was approved by the Second Chamber and subjected to only a limited number of amendments[54]. The fourth attempt was probably kindled by the way the government thwarted the earlier attempt of the spokesmen of the two government parties. When a new government took office in 1986, the Minister of Justice who received another four-year mandate, to his anger found a clause in the government covenant stipulating that a government commission be charged with advising the government on the question whether to continue the enactment of the New Civil Code or not[55]. This obvious move to frustrate the recodification project probably was inspired by the two spokesmen mentioned earlier. The move was once again thwarted by the Minister of Justice, who did appoint a government commission, but who also made it clear that in his opinion the project should be continued[56]. It was feared in some circles, however, that the commission might ask the Minister to sacrifice the unfair contract terms bill.

The commission has recently reported favorably with regard to the continuation of enacting the new code[57]. It has not asked for any sacrifices. The only suggestion which reminds one of the expectation of such sacrifice is that politically sensitive parts of the code might better be enacted at a later time in order not to jeopardize the whole recodification project. This suggestion may well have been inspired by what may be described as the fifth

attempt to kill the bill.

That the unfair contract terms bill was still controversial, is apparent from the attitude of the two government parties in the First Chamber of Parliament[58]. Since Members of the First Chamber (Senate) are usually more independent than their colleagues of the Second Chamber, it appeared quite possible that political pressure would not result in a vote in favour of the bill. On June 16, 1987, however, the First Chamber did approve the bill, which has since become the Act of June 18, 1987[59].

The relevant provisions of the unfair contract terms act read as follows:

Afdeling 2A Algemene voorwaarden	Part 2A General conditions
Art. 6.5.2A.1. In deze afdeling wordt verstaan onder: a. algemene voorwaarden: een of meer schriftelijke bedingen die zijn opgesteld teneinde in een aantal overeenkomsten te worden opgenomen, met uitzondering van bedingen die de kern van de prestaties aangeven: b. gebruiker: degene die algemene voorwaarden in een overeenkomst gebruikt; c. wederpartij: degene die door ondertekening van een geschrift of op andere wijze de gelding van algemene voorwaarden heeft aanvaard.	*Art. 6.5.2A.1.* For the purposes of this Part, a. "general conditions" mean: one or more written terms which have been drafted in advance in order to be incorporated in a number of contracts, with the exception of terms pertaining to the core of the performances; b. "user" means: the one who uses general conditions in a contract; c. "the other party" means: the one who by undersigning a document or otherwise has accepted the applicability of general conditions.
Art. 6.5.2A.2. Een wederpartij is ook dan aan de algemene voorwaarden gebonden als bij het sluiten van de overeenkomst de gebruiker begreep of moest begrijpen dat zij de inhoud daarvan niet kende.	*Art. 6.5.2A.2.* The other party is also bound by general conditions, when at the time the contract was concluded the user knew or should have known that the other party did not know the substance of these conditions.
Art. 6.5.2A.2a. Een beding in algemene voorwaarden is vernietigbaar	*Art. 6.5.2A.2a.* A term in general conditions is voidable

a. indien het, gelet op de aard en de overige inhoud van de overeenkomst, de wijze waarop de voorwaarden zijn tot stand gekomen, de wederzijds kenbare belangen van partijen en de overige omstandigheden van het geval, onredelijk bezwarend is voor de wederpartij; of
b. indien de gebruiker aan de wederpartij niet een redelijke mogelijkheid heeft geboden om van de algemene voorwaarden kennis te nemen.

a. if, taking into account the nature and the other contents of the contract, the way in which these terms have been drafted, the interests of both parties and the other circumstances of the case, it is unreasonably onerous for the other party; or

b. if the user has not offered the other party a reasonable opportunity to take notice of the general conditions.

Art. 6.5.2A.2b. 1. De gebruiker heeft aan de wederpartij de in artikel 2a onder b genoemde mogelijkheid geboden, indien hij
a. hetzij de algemene voorwaarden voor of bij het sluiten van de overeenkomst aan de wederpartij ter hand heeft gesteld,
b. hetzij, indien dit redelijkerwijs niet mogelijk is, voor de totstandkoming van de overeenkomst aan de wederpartij heeft bekend gemaakt dat de voorwaarden bij hem ter inzage liggen of bij een door hem opgegeven Kamer van Koophandel en Fabrieken of een griffie van een gerecht zijn gedeponeerd, alsmede dat zij op verzoek zullen worden toegezonden.

Art. 6.5.2A.2b. 1. The user has offered the other party the opportunity envisaged by article 2a under b, once he

a. either has handed over the general conditions to the other party before or at the time the contract was concluded,
b. or, if this reasonably is impossible, has given notice to the other party before the contract was concluded that the terms may be inspected at his office, a Chamber of Commerce mentioned by him or a court registry, and that they will be sent upon request.

2. Indien de voorwaarden niet voor of bij het sluiten van de overeenkomst aan de wederpartij ter hand zijn gesteld, zijn de bedingen tevens vernietigbaar indien de gebruiker de voorwaarden niet op verzoek van de wederpartij onverwijld op zijn kosten aan haar toezendt.

2. In case the conditions have not been handed over to the other party before or at the time the contract was concluded, the terms are also voidable if the user does not upon request send the conditions at once at his own expense to the other party.

3. Het in de leden 1 onder b en 2 omtrent de verplichting tot toezending bepaalde is niet van toepassing, voor zover deze toezending redelijkerwijze niet van de gebruiker kan worden gevergd.

3. The provisions of sections 1 under b and 2 as to the obligation to send the conditions do not apply, in so far as sending the conditions may in reason not be required from the user.

Art. 6.5.2A.2c. 1. Op de vernietigingsgronden bedoeld in artikelen 2a en 2b kan geen beroep worden gedaan door
a. een rechtspersoon bedoeld in artikel 360 van Boek 2, die ten tijde van het sluiten van de overeenkomst laatstelijk haar jaarrekening openbaar heeft gemaakt, of ten aanzien waarvan op dat tijdstip laatstelijk artikel 403 lid 1 van boek 2 is toegepast;
b. een partij op wie het onder a bepaalde niet van toepassing is, indien op voormeld tijdstip bij haar vijftig of meer personen werkzaam zijn of op dat tijdstip uit een opgave op grond van artikel 17a van de Handelsregisterwet volgt dat bij haar vijftig of meer personen werkzaam zijn.

2. Op de vernietigingsgrond bedoeld in artikel 2a onder a, kan mede een beroep worden gedaan door een partij voor wie de algemene voorwaarden door een gevolmachtigde zijn gebruikt, mits de wederpartij meermalen overeenkomsten sluit waarop dezelfde of nagenoeg dezelfde algemene voorwaarden van toepassing zijn.

3. Op de vernietigingsgronden bedoeld in de artikelen 2a en 2b, kan geen beroep worden gedaan door een partij die meermalen dezelfde of nagenoeg dezelfde algemene voorwaarden in haar overeenkomsten gebruikt.

4. De termijn bedoeld in artikel 3.2.17 lid 1 onder d, begint met de aanvang van de dag, volgende op die waarop een beroep op het beding is gedaan.

Art. 6.5.2A.2c. 1. The grounds to avoid the contract mentioned in articles 6.5.2A.2a and 6.5.2A.2b may not be invoked by
a. a juristic person as referred to in article 360 of Book 2, which at the time the contract was concluded had published its annual account as of late, or with regard to which at that time article 403 section 1 of Book 2 was applied as of late;
b. a party to whom (a) does not apply, if at the aforementioned moment fifty or more persons were employed by him or if at that moment it is apparent from a declaration in pursuance of article 17a of the Trade Register Act that fifty or more persons were employed by him;

2. The grounds to avoid the contract mentioned in article 6.5.2A.2a under (a) may also be invoked by a party on behalf of whom general conditions have been used by an agent, provided the other party frequently concludes contracts upon which the same or almost the same general conditions are applicable.

3. The grounds to avoid the contract mentioned in articles 6.5.2A.2a and 6.5.2A.2b may not be invoked by a party who frequently uses the same or nearly the same general conditions in his contracts.

4. The period mentioned in article 3.2.17, section 1 under (d) begins on the commencement of the day following the one on which the term has been invoked.

Art. 6.5.2A.3. Bij een overeenkomst tussen een gebruiker en een wederpartij, natuurlijk persoon, die niet handelt in de uitoefening van een beroep of bedrijf, wordt als onredelijk bezwarend aangemerkt een in de algemene voorwaarden voorkomend beding

a. dat de wederpartij geheel en onvoorwaardelijk het recht ontneemt de door de gebruiker toegezegde prestatie op te eisen;

b. dat de aan de wederpartij toekomende bevoegdheid tot ontbinding, zoals deze in afdeling 6.5.4 is geregeld, uitsluit of beperkt;

c. dat een de wederpartij volgens de wet toekomende bevoegdheid tot opschorting van de nakoming uitsluit of beperkt of de gebruiker een verdergaande bevoegdheid tot opschorting verleent dan hem volgens de wet toekomt;

d. dat de beoordeling van de vraag of de gebruiker in de nakoming van een of meer van zijn verbintenissen is te kort geschoten aan hem zelf overlaat, of dat de uitoefening van de rechten die de wederpartij ter zake van een zodanige tekortkoming volgens de wet toekomen, afhankelijk stelt van de voorwaarde dat deze eerst een derde in rechte heeft aangesproken;

Art. 6.5.2A.3. In a contract between a user and another party, who is a natural person and does not act in the exercise of a profession or a trade, a term in general conditions is considered to be unreasonably onerous

a. which wholly and unconditionally denies the other party the right to claim the performance promised by the user;

b. which excludes or limits the other party's right of annulment as set out in Part 6.5.4;

c. which excludes or limits the other party's legal right to stay his performance or which accords the user a more far-reaching right to stay than the law accords him;

d. whereby it is left to the user himself to decide whether or not he has fallen short of fulfilling one or more of his obligations, or whereby the exercise of the right which the law accords to the other party in case of such non-performance is made dependent upon prior legal action taken against a third party;

e. krachtens hetwelk de wederpartij aan de gebruiker bij voorbaat toestemming verleent zijn uit de overeenkomst voortvloeiende verplichtingen op een der in afdeling 6.2.3 bedoelde wijzen op een derde te doen overgaan, tenzij de wederpartij te allen tijde de bevoegdheid heeft de overeenkomst te ontbinden, of de gebruiker jegens de wederpartij aansprakelijk is voor de nakoming door de derde, of de overgang plaatsvindt in verband met de overdracht van een onderneming waartoe zowel die verplichtingen als de daartegenover bedongen rechten behoren;

e. whereby the other party gives the user his consent in advance to transfer the user's obligations arising out of the contract upon a third party in one of the ways described in Part 6.2.3, unless the other party has the right to rescind the contract at any time, or the user is liable as against the other party for performance by the third party, or the transfer takes place in connection with the transfer of an enterprise to which both the obligations and the rights which were stipulated in consideration thereof belong;

f. dat voor het geval uit de overeenkomst voor de gebruiker voortvloeiende rechten op een derde overgaan, ertoe strekt bevoegdheden of verweermiddelen, die de wederpartij volgens de wet jegens die derde zou kunnen doen gelden, uit te sluiten of te beperken;

f. which in the case rights arising out of the contract are transferred from the user to a third party, purports to exclude or limit rights or defenses, which the other party would have against such third party under law;

g. dat een wettelijke verjarings- of vervaltermijn waarbinnen de wederpartij enig recht moet geldend maken, tot een verjarings- onderscheidenlijk vervaltermijn van minder dan een jaar verkort;

g. which diminishes a legal period of limitation or expiration, within which the other party must invoke a right, to a period of limitation or expiration of less than one year;

h. dat voor het geval bij de uitvoering van de overeenkomst schade aan een derde wordt toegebracht door de gebruiker of door een persoon of zaak waarvoor deze aansprakelijk is, de wederpartij verplicht deze schade hetzij aan de derde te vergoeden, hetzij in haar verhouding tot de gebruiker voor een groter deel te dragen dan waartoe zij volgens de wet verplicht zou zijn;

h. which in case damages are inflicted upon a third party by the user or by a person for whom or a chattel for which the user is liable, obliges the other party either to indemnify the third party or, in his relation to the user, to make a larger contribution than the law would require him;

i. dat de gebruiker de bevoegdheid geeft de door hem bedongen prijs binnen drie maanden na het sluiten van de overeenkomst te verhogen, tenzij de wederpartij bevoegd is in dat geval de overeenkomst te ontbinden;

i. which gives the user the right to raise the price within three months after the contract was concluded, unless the other party is empowered to repudiate the contract in such case;

j. dat in een geval van een overeenkomst tot het geregeld afleveren van zaken, elektriciteit daaronder begrepen, of tot het geregeld doen van verrichtingen, leidt tot stilzwijgende verlenging of vernieuwing van meer dan een jaar;

j. which in case of a contract for the regular supply of goods, including electricity, or the regular rendering of services, leads to tacit prolongation or renewal of more than one year;

k. dat de bevoegdheid van de wederpartij om bewijs te leveren uitsluit of beperkt, of dat de uit de wet voortvloeiende verdeling van de bewijslast ten nadele van de wederpartij wijzigt, hetzij doordat het een verklaring van haar bevat omtrent de deugdelijkheid van de haar verschuldigde prestatie, hetzij doordat het haar belast met het bewijs dat een tekortkoming van de gebruiker aan hem kan worden toegerekend;

k. which excludes or limits the other party's right to furnish evidence, or which changes the law as to the burden of proof to the other party's detriment, either by a declaration by the other party as to the quality of the performance due to her, or by charging her with the burden of proof that a non-performance by the user may be attributed to him;

l. dat ten nadele van de wederpartij afwijkt van artikel 3.2.4, tenzij het betrekking heeft op de vorm van door de wederpartij af te leggen verklaringen of bepaalt dat de gebruiker het hem door de wederpartij opgegeven adres als zodanig mag blijven beschouwen totdat hem een nieuw adres is meegedeeld;

l. which derogates from article 3.2.4 to the detriment of the other party, unless it concerns the form of notices to be given by the other party or it states that the user may keep considering the address given by the other party as the correct one until a new address is given to him;

m. waarbij een wederpartij die bij het aangaan van de overeenkomst werkelijke woonplaats in een gemeente in Nederland heeft, woonplaats kiest anders dan voor het geval zij te eniger tijd geen bekende werkelijke woonplaats in die gemeente zal hebben, tenzij de overeenkomst betrekking heeft op een registergoed en woonplaats ten kantore van een notaris wordt gekozen;

m. whereby the other party who when concluding the contract was domiciled in a Dutch municipality chooses domicile otherwise than in case she may not at any time in the future have a known real address in that municipality, unless the contract concerns a registered good and domicile is chosen at the office of a notary public;

n. dat voorziet in de beslechting van een geschil door een ander dan hetzij de rechter die volgens de wet bevoegd zou zijn, hetzij een of meer arbiters, tenzij het de wederpartij een termijn gunt van tenminste een maand nadat de gebruiker zich schriftelijk jegens haar op het beding heeft beroepen, om voor beslechting van het geschil door de volgens de wet bevoegde rechter te kiezen.

n. which provides for the settlement of a dispute otherwise than either by the court which would legally have jurisdiction, or by one or more arbitrators, unless it gives the other party a one month period after the user has invoked the clause as against the other party in writing, to choose the court which has legal jurisdiction.

Art. 6.5.2A.4. Bij een overeenkomst tussen een gebruiker en een wederpartij, natuurlijk persoon, die niet handelt in de uitoefening van een beroep of bedrijf, wordt vermoed onredelijk bezwarend te zijn een in de algemene voorwaarden voorkomend beding

Art. 6.5.2A.4. In a contract between a user and another party, who is a natural person and does not act in the exercise of a profession or a trade, a term in general conditions is presumed to be unreasonably onerous

a. dat de gebruiker een, gelet op de omstandigheden van het geval, ongebruikelijk lange of onvoldoende bepaalde termijn geeft om op een aanbod of een andere verklaring van de wederpartij te reageren;

a. whereby a consumer having made an offer or another declaration, the supplier stipulates for an uncustomarily long or insufficiently precise period to react;

b. dat de inhoud van de verplichtingen van de gebruiker wezenlijk beperkt ten opzichte van hetgeen de wederpartij, mede gelet op de wettelijke regels die op de overeenkomst betrekking hebben, zonder dat beding redelijkerwijs mocht verwachten;

b. whereby the content of the supplier's obligation is limited essentially as compared with what the other party, in view of among others the legislation as to this contract, might expect without such term;

c. dat de gebruiker de bevoegdheid verleent een prestatie te verschaffen die wezenlijk van de toegezegde prestatie afwijkt, tenzij de wederpartij bevoegd is in dat geval de overeenkomst te ontbinden;

c. which authorizes the supplier to perform in a way which is substantially different from the performance which was promised, unless the other party is authorized to rescind the contract in such case;

d. dat de gebruiker van zijn gebondenheid aan de overeenkomst bevrijdt of hem de bevoegdheid daartoe geeft anders dan op in de overeenkomst vermelde gronden welke van dien aard zijn dat deze gebondenheid niet meer van hem kan worden gevergd;

d. which liberates the supplier from the contract or authorizes him to liberate himself on other grounds than mentioned in the contract, which grounds are of such a nature that he can no longer be held to be bound;

e. dat de gebruiker een ongebruikelijk lange of onvoldoende bepaalde termijn voor de nakoming geeft;

e. whereby the supplier is given a period for performance which is uncustomarily long or insufficiently precise;

f. dat de gebruiker of een derde geheel of ten dele bevrijdt van een wettelijke verplichting tot schadevergoeding;

f. whereby the supplier or a third party is exempted wholly or partially from a legal duty of indemnification;

g. dat een de wederpartij volgens de wet toekomende bevoegdheid tot verrekening uitsluit of beperkt of de gebruiker een verdergaande bevoegdheid tot verrekening verleent dan hem volgens de wet toekomt;

g. whereby the other party is prohibited from claiming a legal right of set-off or whereby the supplier is given a further reaching right of set-off than the law accords him;

h. dat als sanctie op bepaalde gedragingen van de wederpartij, nalaten daaronder begrepen, verval stelt van haar toekomende rechten of van de bevoegdheid bepaalde verweren te voeren, behoudens voor zover deze gedragingen het verval van die rechten of verweren rechtvaardigen;

h. whereby, as a sanction for certain acts by the other party, negligence included, his rights and defenses are held to expire, unless such acts justify the expiration of those rights or defenses;

i. dat voor het geval de overeenkomst wordt beëindigd anders dan op grond van het feit dat de wederpartij in de nakoming van haar verbintenis is tekort geschoten, de wederpartij verplicht een geldsom te betalen, behoudens voor zover het betreft een redelijke vergoeding voor door de gebruiker geleden verlies of gederfde winst;

i. whereby in case the contract is rescinded for another reason than non-performance by the other party, the other party has to pay a sum of money, unless this is a reasonable indemnification for damages and lost earnings;

j. dat de wederpartij verplicht tot het sluiten van een overeenkomst met de gebruiker of met een derde, tenzij dit, mede gelet op het verband van die overeenkomst met de in dit artikel bedoelde overeenkomst, redelijkerwijze van de wederpartij kan worden gevergd;

j. whereby the other party is obliged to conclude a contract with the supplier or with a third party, unless, taking into account among others the link between such contract and the original contract, this may in reason be required from him;

k. dat voor een overeenkomst als bedoeld in artikel 3 onder j een duur bepaalt van meer dan een jaar, tenzij de wederpartij de bevoegdheid heeft de overeenkomst telkens na een jaar op te zeggen;

k. whereby for a contract as envisaged in article 3 under (j) a period is set of more than one year, unless the other party is authorized to cancel the contract every year;

l. dat de wederpartij aan een opzegtermijn bindt die langer is dan drie maanden of langer dan de termijn waarop de gebruiker de overeenkomst kan opzeggen;

l. whereby the other party is bound to a period of cancellation which is longer than three months or which is longer than the supplier's period of cancellation;

m. dat voor de geldigheid van een door de wederpartij te verrichten verklaring een strengere vorm dan het vereiste van een onderhandse akte stelt;

m. whereby the validity of a declaration by the other party is made dependent upon more stringent requirements than a written contract;

n. dat bepaalt dat een door de wederpartij verleende volmacht onherroepelijk is of niet eindigt door haar dood of ondercuratelestelling, tenzij de volmacht strekt tot levering van een registergoed.

n. whereby a power of attorney accorded by the other party is irrevocable or does not end with his death or his placement under guardianship, unless the power of attorney concerns the sale of real property.

Art. 6.5.2A.4a. Bij een overeenkomst als bedoeld in de artikelen 3 en 4, kan jegens de wederpartij geen beroep worden gedaan

Art. 6.5.2A.4a In case of a contract as envisaged by articles 3 and 4, as against the other party it may not be invoked

a. op het feit dat de overeenkomst in naam van een derde is gesloten, indien dit beroep berust op het enkele feit dat een beding van deze strekking in de algemene voorwaarden voorkomt;

a. that the contract has been concluded in the name of a third party, if this claim rests on the single fact that the general conditions do so declare;

b. op het feit dat de algemene voorwaarden beperkingen bevatten van de bevoegdheid van een gevolmachtigde van de gebruiker, die zo ongebruikelijk zijn dat de wederpartij ze zonder het beding niet behoefde te verwachten, tenzij zij ze kende.

b. that the general conditions limit the powers of the suppliers's agent in such an uncustomary way that the other party could not have expected this, unless he knew about it.

Art. 6.5.2A.5. 1. Bij algemene maatregel van bestuur kunnen de onderdelen a-n van artikel 4 worden gewijzigd en kan hun toepassingsgebied worden beperkt.

Art. 6.5.2A.5. 1. By decree clauses a-n of article 4 may be modified or their scope of application may be limited.

2. Alvorens een voordracht tot vaststelling, wijziging of intrekking van een maatregel als bedoeld in het eerste lid te doen, hoort Onze Minister van Justitie de naar zijn oordeel representatieve organisaties van hen die bij het sluiten van de overeenkomsten waarop de maatregel betrekking heeft, algemene voorwaarden plegen te gebruiken en van hen die bij die overeenkomsten als hun wederpartij plegen op te treden.

2. Before proposing a measure envisaged in the first section or its modification or cancellation, the Minister of Justice shall hear the organizations which in his view are representative of those who when concluding contracts as envisaged by the decree use general conditions and of those who in such contracts are the other parties.

3. Een besluit als in het eerste lid bedoeld wordt zodra het is vastgesteld toegezonden aan de voorzitters van de beide Kamers van de Staten-Generaal. Een dergelijk besluit treedt niet in werking dan nadat twee maanden zijn verstreken sinds de datum van uitgifte van het Staatsblad waarin het is geplaatst.

3. A decree as envisaged in the first section is sent immediately to the Presidents of both Chambers of Parliament. Such decree does not enter into force until two months after the day of publication of the Official Journal in which the decree is published.

Art. 6.5.2A.6. 1. Op vordering van een rechtspersoon als bedoeld in lid 3 kunnen bepaalde bedingen in bepaalde algemene voorwaarden onredelijk bezwarend worden verklaard; de artikelen 2a onder a, 3 en 4 zijn van overeenkomstige toepassing. Voor de toepassing van de vorige zin wordt een beding in algemene voorwaarden dat in strijd is met een dwingende wetsbepaling, als onredelijk bezwarend aangemerkt.

2. De vordering kan worden ingesteld tegen de gebruiker, alsmede tegen een rechtspersoon met volledige rechtsbevoegdheid die ten doel heeft de behartiging van belangen van personen die een beroep of bedrijf uitoefenen, indien hij het gebruik van de algemene voorwaarden door die personen bevordert.

3. De vordering komt toe aan rechtspersonen met volledige rechtsbevoegdheid die ten doel hebben de behartiging van belangen van personen die een beroep of bedrijf uitoefenen of van eindgebruikers van niet voor een beroep of bedrijf bestemde goederen of diensten. Zij kan slechts betrekking hebben op algemene voorwaarden die worden gebruikt of bestemd zijn te worden gebruikt in overeenkomsten met personen wier belangen door de rechtspersoon worden behartigd.

Art. 6.5.2A.6. 1. On the request of a legal person envisaged in section 3 specific clauses in specific general conditions may be declared unreasonably onerous; articles 2a under a, 3 and 4 apply. For the application of the last sentence, a term in general conditions which violates mandatory legislation is held to be unreasonably onerous.

2. The action may be instituted against any supplier, as well as against a legal person with full powers which aims at protecting the interests of persons exercising a profession or a trade, if such legal person promotes the use of general conditions by such persons.

3. The action may be instituted by legal persons with full powers which aim at protecting the interests of persons exercising a profession or a trade or of consumers of goods or services not intended for professional use. It may only deal with general conditions which are used or intended to be used in contracts with persons the interests of whom are protected by that legal person.

4. De eiser is niet ontvankelijk indien niet blijkt dat hij, alvorens de vordering in te stellen, de gebruiker of, in het geval bedoeld in artikel 1003 van het Wetboek van Burgerlijke Rechtsvordering, de aldaar bedoelde vereniging, de gelegenheid heeft geboden om in onderling overleg de algemene voorwaarden zodanig te wijzigen dat de bezwaren die grond voor de vordering zouden opleveren, zijn weggenomen. Een termijn van zes maanden na schriftelijke kennisgeving van de bezwaren is daartoe in elk geval voldoende.

4. The plaintiff has no standing if it does not become apparent that before instituting the action he has offered the supplier or, in the case envisaged in article 1003 of the Code of Civil Procedure, the association, the opportunity to change the general conditions amicably in such a way as to take away the grounds of the action. A period of six months after a written communication of the grievances is in any case sufficient for that means.

5. Voor zover een rechtspersoon met het gebruik van bedingen in algemene voorwaarden heeft ingestemd, komt hem geen vordering als bedoeld in lid 1 toe.

5. Insofar as a legal person has consented to the use of terms in general conditions, he does not have the action envisaged in section 1.

Art. 6.5.2A.7. 1. Het Gerechtshof te 's-Gravenhage is bij uitsluiting bevoegd tot kennisneming van vorderingen als in het vorige artikel bedoeld.

Art. 6.5.2A.7. 1. The Court of Appeal in The Hague hears the cases envisaged in the previous article.

2. De in het vorige lid bedoelde rechtspersonen hebben de bevoegdheden, geregeld in de artikelen 285 en 376 van het Wetboek van Burgerlijke Rechtsvordering; artikel 379 van dat wetboek is niet van toepassing.

2. The legal persons envisaged in the previous article have the rights as laid down in articles 285 and 376 of the Code of Civil Procedure; article 379 of that Code does not apply.

3. Op vordering van de eiser kan aan de uitspraak worden verbonden
a. een verbod van het gebruik van de door de uitspraak getroffen bedingen of van het bevorderen daarvan;
b. een gebod om een aanbeveling tot het gebruik van deze bedingen te herroepen;
c. een veroordeling tot het openbaar maken of laten openbaar maken van de uitspraak, zulks op door de rechter te bepalen wijze en op kosten van de door de rechter aan te geven partij of partijen.

3. On the request of plaintiff the court may add to the decision
a. a prohibition to use or to promote the terms voided by the decision;
b. an order to revoke the use of such terms;
c. an order to render public the decision, in the way to be set out by the court and at the expense of the party or the parties to be named by the court.

4. De rechter kan in zijn uitspraak aangeven op welke wijze het onredelijk bezwarend karakter van de bedingen waarop de uitspraak betrekking heeft, kan worden weggenomen.

4. The court may indicate in its decision how the unreasonably onerous character of the terms concerned may be taken away.

5. Geschillen terzake van de tenuitvoerlegging van de in lid 3 bedoelde veroordelingen, alsmede van de veroordeling tot betaling van een dwangsom, zo deze is opgelegd, worden bij uitsluiting door het Gerechtshof te 's-Gravenhage beslist.

5. Conflicts as to the execution of the decisions envisaged in section 3 and as to the astreinte concerned will be heard by the Court of Appeal in The Hague.

Art. 6.5.2A.8. 1. Op vordering van een of meer van degenen tegen wie de in artikel 6 lid 1 bedoelde uitspraak is gedaan, kan de rechter die uitspraak wijzigen of opheffen op grond dat zij tengevolge van een wijziging in de omstandigheden niet langer gerechtvaardigd is. De vordering wordt ingesteld tegen de rechtspersoon op wiens vordering de uitspraak was gedaan.

Art. 6.5.2A.8. At the request of one or more of those against whom judgment as envisaged in article 6 section 1 is given, the court may change or rescind such decision on the ground that it no longer is justified due to a change of circumstances. The action is instituted against the legal person at the request of which the decision has been rendered.

2. Indien de rechtspersoon op wiens vordering de uitspraak was gedaan, is ontbonden, wordt de zaak met een verzoekschrift ingeleid. Voor de toepassing van artikel 429f lid 1 van het Wetboek van Burgerlijke Rechtsvordering worden rechtspersonen als bedoeld in artikel 6 lid 3 als belanghebbenden aangemerkt.

2. In case the legal person at the request of which the decision was rendered has been dissolved, the case is introduced by a simple request. As far as the application of article 429f section 1 of the Code of Civil Procedure is concerned legal persons envisaged in article 6 section 3 are considered as interested parties.

3. Artikel 7 leden 1, 2, 3 onder c en 5 is van overeenkomstige toepassing.

3. Article 7 sections 1, 2, 3 under c and 5 applies.

4. De vorige leden zijn niet van toepassing voor zover de uitspraak betrekking had op een beding dat door de wet als onredelijk bezwarend wordt aangemerkt.

4. The preceding sections do not apply in so far as the decision involves a term which is held to be unreasonably onerous by legislation.

Art. 6.5.2A.9. Een beding in algemene voorwaarden dat door degene jegens wie een verbod tot gebruik ervan is uitgesproken, in strijd met het verbod in een overeenkomst wordt opgenomen, is vernietigbaar. Artikel 2c is van overeenkomstige toepassing.

Art. 6.5.2A.9. A term in general conditions which a supplier who has been ordered to refrain from using that term, has incorporated into a contract in violation of such order is voidable. Article 2c applies.

Art. 6.5.2A.10. 1. Een persoon die handelt in de uitoefening van een beroep of bedrijf, kan geen beroep doen op een beding in een overeenkomst met een partij die terzake van de goederen of diensten waarop die overeenkomst betrekking heeft, met gebruikmaking van algemene voorwaarden overeenkomsten met haar afnemers heeft gesloten, voor zover een beroep op dat beding onredelijk zou zijn wegens zijn nauwe samenhang met een in de algemene voorwaarden voorkomend beding dat krachtens deze afdeling is vernietigd of door een uitspraak als bedoeld in artikel 6 lid 1 is getroffen.

Art. 6.5.2A.10. 1. A person who acts in the exercise of a profession or a trade may not invoke a term in a contract with a party who in connection with the goods or services to which that contract pertains, has concluded contracts with her customers on the basis of general conditions, insofar as invoking such clause would be unreasonable because of a narrow link with a term in the general conditions which has been voided in pursuance of this Part or which has been struck by a judgement envisaged in article 6 section 1.

2. Is tegen de gebruiker een vordering als bedoeld in artikel 6 lid 1 ingesteld, dan is hij bevoegd die persoon in het geding te roepen teneinde voor recht te horen verklaren dat een beroep als bedoeld in het vorige lid onredelijk zou zijn. Artikel 7 leden 2, 3 onder c, 4 en 5 alsmede de artikelen 68, 69 en 73 van het Wetboek van Burgerlijke Rechtsvordering zijn van overeenkomstige toepassing.

2. In case an action envisaged in article 6 section 1 is instituted against a supplier, he may involve such person in the case as a third party in order to have the court declare that invoking the clause as envisaged in the previous section would be unreasonable. Article 7 sections 2, 3 under c, 4 and 5 as well as articles 68, 69 and 73 of the Code of Civil Procedure apply.

3. Op de uitspraak is artikel 8 van overeenkomstige toepassing.

3. To the judgment article 8 applies.

4. Op eerdere overeenkomsten met betrekking tot de voormelde goederen en diensten zijn de leden 1-3 van overeenkomstige toepassing.

4. Sections 1-3 apply to previous contracts concerning the aforementioned goods and services by way of analogy.

Art. 6.5.2A.11. Deze afdeling is noch van toepassing op arbeidsovereenkomsten, noch op collectieve arbeidsovereenkomsten.

Art. 6.5.2A.11. This Part does not apply to labour contracts, nor to collective labour agreements.

Art. 6.5.2A.12. Noch van de artikelen 1-10, noch van de bepalingen van de in artikel 5 lid 1 bedoelde algemene maatregelen van bestuur kan worden afgeweken. De bevoegdheid om een beding krachtens deze afdeling door een buitengerechtelijke verklaring te vernietigen, kan niet worden uitgesloten.

Art. 6.5.2A.12. Articles 1-10 and the decrees envisaged in article 5 section 1 may not be derogated from. The right to avoid a term in pursuance of this Part out of court may not be excluded.

Art. 6.5.2A.13. 1. Op overeenkomsten tussen partijen die handelen in de uitoefening van een beroep of bedrijf en die beide in Nederland gevestigd zijn, is deze afdeling van toepassing, ongeacht het recht dat de overeenkomst beheerst.

Art. 6.5.2A.13. 1. This Part applies to contracts between parties who act in the exercise of a profession or trade and who both have domicile in The Netherlands, no matter which law governs the contract.

2. Op overeenkomsten tussen partijen die handelen in de uitoefening van een beroep of bedrijf en die niet beide in Nederland gevestigd zijn, is deze afdeling niet van toepassing, ongeacht het recht dat de overeenkomst beheerst.

2. This Part does not apply to contracts between parties who act in the exercise of a profession or a trade and who do not both have domicile in The Netherlands, no matter which law governs the contract.

3. Een partij is in de zin van de leden 1 en 2 in Nederland gevestigd, indien haar hoofdvestiging, of, zo de prestatie volgens de overeenkomst door een andere vestiging dan de hoofdvestiging moet worden verricht, deze andere vestiging zich in Nederland bevindt.

3. A party is domiciled in The Netherlands as envisaged in sections 1 and 2, if her headquarters or, in case under the contract the obligation must be performed by another branch, her other branch is located in The Netherlands.

4. Op overeenkomsten tussen een gebruiker en een wederpartij, natuurlijk persoon, die niet handelt in de uitoefening van een beroep of bedrijf, is, indien de wederpartij haar gewone verblijfplaats in Nederland heeft, deze afdeling van toepassing, ongeacht het recht dat de overeenkomst beheerst.

4. This Part applies to contracts between a supplier, and another party, natural person who does not act in the exercise of a profession or a trade, if the other party has her customary domicile in The Netherlands, no matter which law governs the contract.

17. Portugal

On February 22, 1986, a new regulation of general contract terms entered into force in Portugal. The Decree-Law 446/85 of October 25, 1985 codifies earlier case-law, but it also lays down a number of new provisions often inspired by the Council of Europe Resolution 76 (47) and by legislation already in force in other European countries. Together they form one of the most comprehensive legislations on unfair contract terms in Europe. The text of the decree, together with its English translation by the present writer, will be set out below.

Although the 1985 decree does not state so explicitly, it may be seen as an elaboration of articles 81 and 110 of the Portuguese Constitution of 1976. These declare both the protection of consumers and the repression of abuse of economic power to be State priorities. On the basis of articles 81 and 110, the Consumer Protection Law 29/81 of August 22, 1981 was promulgated. Article 7 of the Act reads as follows:

The consumer is entitled to equal and fair treatment when entering into a contract, in particular with regard to:
(a) protection against abuses arising out of the use of general contract terms and aggressive marketing practices which impair the consumer's possibility to evaluate the contract terms and to take a free decision whether or not to enter into a contract;
(b) clear and precise drafting, in legible wording, in the absence of which the contract terms as to the supply of goods or services shall be considered null and void;
(...)

Until the decree of October 25, 1985, this latter provision had not been implemented.

Portuguese legislation also encompasses some mandatory regulations on specific contracts, such as the decree-law 405/78 of December 15, 1978 on the supply of goods and services by public agencies, decree-law 449/85 of October 25, 1985 on private contracts for supply of gas, etc.[60].

Portugal's modern Civil Code (*Código civil*) of 1966 entered into force just before the consumerist movement gained speed and apart from some amendments does not provide for protection of consumers. The Decree-Law 446/85 of October 25, 1985 reads as follows:

Capítulo I

Disposições Gerais

Artigo 1. (Cláusulas contratuais gerais)

As cláusulas contratuais gerais elaboradas de antemão, que proponentes ou destinatários indeterminados se limitem, respectivamente, a subscrever ou aceitar, regem-se pelo presente diploma.

Artigo 2. (Forma, extensão, conteúdo e autoria)

O artigo anterior abrange, salvo disposição em contrário, todas as cláusulas contratuais gerais, independentemente da forma da sua comunicação ao público, da extensão que assumam ou que venham a apresentar nos contratos a que se destinem, do conteúdo que as informe ou de terem sido elaboradas pelo proponente, pelo destinatário ou por terceiros.

Artigo 3. (Excepções)

1. O presente diploma não se aplica:
a. A cláusulas típicas aprovadas pelo legislador;
b. A cláusulas que resultem de tratados ou convenções internacionais vigentes em Portugal;

c. A cláusulas impostas ou expressamente aprovadas por entidades públicas com competência para limitar a autonomia privada;
d. A contratos submetidos a normas de direito público;

Chapter I

General Provisions

Article 1. (General contract terms)

The general contract terms which have been drafted in advance and which those who propose them or the addressees limit themselves to subscribe to or to accept, are governed by the present decree.

Article 2. (Form, length, contents and authorship)

The previous article includes, save for provision to the contrary, all general contract terms, no matter in which form they are communicated to the public, the length they assume or which they come to occupy in the contracts for which they have been drafted, the contents they have or which party has drafted them: the one which proposes them, the addressee or a third party.

Article 3. (Exceptions)

1. The present decree does not apply:
a. To contract clauses approved by the legislator;
b. To clauses which are the result of international treaties or conventions in force in Portugal;
c. To clauses imposed or expressly approved by public entities which have the authority to limit private autonomy;

d. To contracts which are the domain of public law;

e. A actos do direito da família ou do direito das sucessões;
f. A cláusulas de instrumentos de regulamentação colectiva de trabalho.

e. To legal acts in the areas of family law and the law of inheritance;
f. To clauses in collective labour agreements.

2. Quando, por força da alínea c) do número anterior, funcionem cláusulas contratuais gerais do tipo das que neste diploma são proibidas, podem as associações de defesa do consumidor dotadas de representatividade, as associações sindicais, profissionais ou de interesses económicos legalmente constituídas, actuando no âmbito das atribuições respectivas, ou o Provedor de Justiça, solicitar aos órgãos competentes as alterações necessárias.

2. When, in pursuance of Nr (c) of the previous section, general contract terms of a nature which is prohibited in this decree are used, the consumers' associations endowed with representative functions, the trade associations, the professional associations and the associations of economic interests, when legally established, acting within their respective prerogatives, or the Ombudsman may solicit from the competent bodies the modifications which are necessary.

Capítulo II

Inclusão de cláusulas contratuais gerais em contratos singulares

Chapter II

Incorporation of general contract terms in individual contracts

Artigo 4. (Inclusão em contratos singulares)

As cláusulas contratuais gerais inseridas em propostas de contratos singulares incluem-se nos mesmos, para todos os efeitos, pela aceitação, com observância do disposto neste capítulo.

Article 4. (Incorporation in individual contracts)

The general contract terms which are proposed in offers for individual contracts are incorporated in these contracts, with all consequences, after acceptance, under observance of what is laid down in this Chapter.

Artigo 5. (Comunicação)

1. As cláusulas contratuais gerais devem ser comunicadas na íntegra aos aderentes que se limitem a subscrevê-las ou a aceitá-las.

Article 5. (Communication)

1. The general contract terms shall be communicated in their entirety to the adherents who limit themselves to subscribe to them or to accept them.

2. A comunicação deve ser realizada de modo adequado e com a antecedência necessária para que, tendo em conta a importância do contrato e a extensão e complexidade das cláusulas, se torne possível o seu conhecimento completo e efectivo por quem use de comum diligência.

3. O ónus da prova da comunicação adequada e efectiva cabe ao contratante determinado que submeta a outrem as cláusulas contratuais gerais.

Artigo 6. (Dever de informação)

1. O contratante determinado que recorra a cláusulas contratuais gerais deve informar, de acordo com as circunstâncias, a outra parte dos aspectos nelas compreendidos cuja aclaração se justifique.

2. Devem ainda ser prestados todos os esclarecimentos razoáveis solicitados.

Artigo 7. (Cláusulas prevalentes)

As cláusulas especificamente acordadas prevalecem sobre quaisquer cláusulas contratuais gerais, mesmo quando constantes de formulários assinados pelas partes.

Artigo 8. (Cláusulas excluídas dos contratos singulares)

Consideram-se excluídas dos contratos singulares:

a. As cláusulas que não tenham sido comunicadas nos termos do artigo 5;

2. The communication shall be realized in an adequate manner and at such an early stage, that taking into account the importance and the length and complexity of the clauses, it is possible to take complete and effective knowledge of them by someone using ordinary care.

3. The burden of proof that the communication was adequate and effective lies with the contracting party which has proposed the general contract terms.

Article 6. (Obligation to inform)

1. The contracting party which wishes to take recourse to general contract terms shall inform, in accordance with the circumstances, the other party of the aspects in those terms, the clarification of which is justified.

2. Shall also be given all the clarifications which are reasonably asked for.

Article 7. (Individual clauses prevail)

Clauses which have specifically been approved shall prevail over any general contract terms, even when these are laid down in standard forms signed by the parties concerned.

Article 8. (Clauses excluded from individual contracts)

Shall be considered excluded from individual contracts:

a. The terms which have not been communicated in accordance with article 5;

b. As cláusulas comunicadas com violação do dever de informação, de molde que não seja de esperar o seu conhecimento efectivo;
c. As cláusulas que, pelo contexto em que surjam, pela epígrafe que as precede ou pela sua apresentação gráfica, passem despercebidas a um contratante normal, colocado na posição do contratante real;
d. As cláusulas inseridas em formulários, depois da assinatura de algum dos contratantes.

b. The terms which have been communicated in violation of the duty to inform, to the extent that they will not effectively be known;
c. The terms which through the context in which they appear, the heading which precedes them or their graphical presentation pass unnoticed by a normal contracting party, placed in the position of the real contracting party;
d. The terms inserted in forms after they have been signed by any of the contracting parties.

Artigo 9. (Subsistência dos contratos singulares)

1. Nos casos previstos no artigo anterior os contratos singulares mantêm-se,vigorando na parte afectada as normas supletivas aplicáveis, com recurso, se necessário, às regras de integração dos negócios jurídicos.

2. Os referidos contratos são, todavia, nulos quando, não obstante a utilização dos elementos indicados no número anterior, ocorra uma indeterminação insuprível de aspectos essenciais ou um desequilíbrio nas prestações gravemente atentatório da boa fé.

Article 9. (Subsistence of individual contracts)

1. In the cases envisaged in the previous article the individual contracts remain in force; instead of the affected part, the suppletory norms shall apply, with recourse, if necessary, to the rules on the integration of legal acts.

2. The contracts referred to shall, however, be null and void, when notwithstanding the utilization of the elements indicated in the previous alinea there occurs an indeterminable part which is essential or an imbalance between the performances which grossly violates good faith.

Capítulo III

Interpretação e integração das cláusulas contratuais gerais.

Chapter III

Interpretation and integration of general contract terms.

Artigo 10. (Princípio geral)

As cláusulas contratuais gerais são interpretadas e integradas de harmonia com as regras relativas à interpretação e integração dos negócios jurídicos, mas sempre dentro do contexto de cada contrato singular em que se incluam.

Article 10. (General principle)

The general contract terms shall be constructed and integrated in harmony with the rules relating to the construction and integration of legal acts, but always in the context of any individual contract into which they are incorporated.

Artigo 11. (Cláusulas ambíguas)

1. As cláusulas contratuais gerais ambíguas têm o sentido que lhes daria o contratante indeterminado normal que se limitasse a subscrevê-las ou a aceitá-las, quando colocado na posição de aderente real.

2. Na dúvida, prevalece o sentido mais favorável ao aderente.

Article 11. (Ambiguous terms)

1. Ambiguous general contract terms shall have the meaning which an undetermined normal contracting party who would limit himself to subscribe or to adhere to them would give to them when placed in the position of the real adhering party.

2. In case of doubt, the meaning which is most favourable to the consumer shall prevail.

Capítulo IV

Nullidade das cláusulas contratuais gerais.

Chapter IV

Nullity of general contract terms.

Artigo 12. (Cláusulas proibidas)

As cláusulas contratuais gerais proibidas por disposição deste diploma são nulas nos termos nele previstos.

Article 12. (Prohibited clauses)

The general contract clauses which are prohibited by virtue of this decree are null and void in terms of this Act.

Artigo 13. (Subsistência dos contratos singulares)

1. O aderente que subscreva ou aceite cláusulas contratuais gerais pode optar pela manutenção dos contratos singulares quando algumas dessas cláusulas sejam nulas.

2. A manutenção de tais contratos implica a vigência, na parte afectada, das normas supletivas aplicáveis, com recurso, se necessário, às regras de integração dos negócios jurídicos.

Article 13. (Subsistence of individual contracts)

1. The adhering party which subscribes or adheres to general contract clauses may opt for maintenance of individual contracts when some of these clauses are null and void.

2. The maintenance of such contracts implies that instead of the affected part the supletory law will apply, with recourse, if necessary, to the rules on the integration of legal acts.

Artigo 14. (Redução)

Se a faculdade prevista no artigo anterior não for exercida ou, sendo-o, conduzir a um desequilíbrio de prestações gravemente atentatório da boa fé, vigora o regime da redução dos negócios jurídicos.

Article 14. (Reduction)

When the faculty envisaged in the previous article is not exercised or leads to an imbalance of performances which gravely violates good faith, the rules with regard to legal acts do apply.

Capítulo V

Cláusulas contratuais gerais proibidas

Secção I.

Relações entre empresários ou entidades equiparadas

Artigo 15. (Âmbito das proibições)

Nas relações entre empresários ou os que exerçam profissões liberais, singulares ou colectivos, ou entre uns e outros, quando intervenhem apenas nessa qualidade e no âmbito da sua actividade específica, aplicam-se as proibições constantes desta secção.

Artigo 16. (Princípio geral)

São proibidas as cláusulas contratuais gerais contrárias à boa fé.

Artigo 17. (Concretização)

Na aplicação da norma anterior devem ponderar-se os valores fundamentais do direito, relevantes em face da situação considerada, e, especialmente:

a. A confiança suscitada, nas partes, pelo sentido global das cláusulas contratuais em causa, pelo processo de formação do contrato singular celebrado, pelo teor deste e ainda por quaisquer outros elementos atendíveis;

b. O objectivo que as partes visam atingir negocialmente, procurando-se a sua efectivação à luz do tipo de contrato utilizado.

Artigo 18. (Cláusulas absolutamente proibidas)

Chapter V

Prohibited general contract terms

Section I

Relations between enterprises or similar entities.

Article 15. (Scope of the prohibitions)

On relations between suppliers or those who exercise a liberal profession, whether they are singular or collective, or between the ones and the others, when they act but in their quality and within the scope of their specific activities, the invariable prohibitions of this section apply.

Article 16. (General principle)

Shall be prohibited the general contract terms which violate good faith.

Article 17. (Concretization)

In the application of the previous norm shall be taken into consideration the fundamental legal values which are relevant in the situation concerned, and specifically:

a. The expectations raised with the parties as to the general gist of the contract terms concerned, the procedure of concluding the individual contract, the nature thereof and any other elements to be expected;

b. The objective which the parties envisage in their negotiations, in the light of the contract type which is used.

Article 18. (Clauses which are absolutely prohibited)

São em absoluto proibidas, designadamente, as cláusulas contratuais gerais que:

a. Excluam ou limitem, de modo directo ou indirecto, a responsabilidade pro danos causados à vida, à integridade moral ou física ou à saúde das pessoas;
b. Excluam ou limitem, de modo directo ou indirecto, a responsabilidade por danos patrimoniais extracontratuais, causados na esfera da contraparte ou de terceiros;
c. Excluam ou limitem, de modo directo ou indirecto, a responsabilidade por não cumprimento definitivo, mora ou cumprimento defeituoso, em caso de dolo ou de culpa grave;
d. Excluam ou limitem, de modo directo ou indirecto, a responsabilidade por actos de representantes ou auxiliares, em caso de dolo ou de culpa grave;
e. Confiram, de mode directo ou indirecto, a quem as predisponha, a faculdade exclusiva de interpretar qualquer cláusula do contrato;
f. Excluam a excepção de não cumprimento do contrato ou a resolução por incumprimento;
g. Excluam ou limitem o direito de retenção;
h. Excluam a faculdade de compensação, quando admitida na lei;
i. Limitem, a qualquer título, a faculdade de consignação em depósito, nos casos e condições legalmente previstos;
j. Estabeleçam obrigações duradouras perpétuas ou cujo tempo de vigência dependa, apenas, da vontade de quem as predisponha;

Shall be absolutely prohibited, specially, the general contract terms which:

a. Exclude or limit, directly or indirectly, responsibility for damage of the life, the moral or physical integrity or the health of persons;
b. Exclude or limit, directly or indirectly, responsibility for non-contractual damage caused in the sphere of the other party or of a third party;
c. Exclude or limit, directly or indirectly, responsibility for non-performance, late performance or defective performance, in case of intent or grave negligence;
d. Exclude or limit, directly or indirectly, responsibility for acts of representatives or auxiliaries, in case of intent or grave negligence;

e. Confer, directly or indirectly, on the party which has drafted the terms in advance the exclusive authority to construct any contract clause;
f. Exclude the exception of non-performance or the cancellation for malperformance;
g. Exclude or limit the right of retention;
h. Exclude the right of compensation, when allowed by law;
i. Limit, by whatever title, the power of consignment in deposit in the cases and circumstances inferred by law;
j. Establish lasting obligations which are perpetual or the validity of which depends only upon the discretion of the party which has drafted the terms in advance;

1. Consagrem, a favor de quem as predisponha, a possibilidade de cessão de posição contratual, de transmissão de dívidas ou de subcontratar, sem o acordo da contraparte, salvo se a identidade do terceiro constar do contrato inicial.

Artigo 19. (Cláusulas relativamente proibidas)

São proibidas, consante o quadro negocial padronizado, designadamente, as cláusulas contratuais gerais que:

a. Estabeleçam, a favor de quem as predisponha, prazos excessivos para a aceitação ou rejeição de propostas;

b. Estabeleçam, a favor de quem as predisponha, prazos excessivos para o cumprimento, sem mora, das obrigações assumidas;

c. Consagrem cláusulas penais desproporcionadas aos danos a ressarcir;

d. Imponham ficções de recepção, de aceitação ou de outras manifestações de vontade com base em factos para tal insuficientes;
e. Façam depender a garantia das qualidades da coisa cedida ou dos serviços prestados, injustificadamente, do não recurso a terceiros;
f. Coloquem na disponibilidade de uma das partes a possibilidade de denúncia, imediata ou com pré-aviso insuficiente, sem compensação adequada, do contrato, quando este tenha exigido à contraparte investimentos ou outros dispêndios consideráveis;
g. Estabeleçam um foro competente que envolva graves inconvenientes para uma das partês, sem que os interesses da outra o justifiquem;

1. Confer upon the party which has drafted the terms in advance the right of assignment, of transmission of debts or of subcontracting, without the other party's agreement, except in case the identity of the third party is known as of the conclusion of the contract;

Article 19. (Clauses which are relatively prohibited)

Shall be prohibited, depending upon the negotiations, specially, the general contract terms which:

a. Establish, in favour of the party which has drafted the terms, periods for the acceptance or rejection of proposals;
b. Establish, in favour of the party which has drafted the terms, excessive periods for the performance, without defaault, of the obligations assumed;
c. Establish penalties which are disproportionate with regard to the damages to be indemnified;
d. Impose fictions of reception, of acceptance or of other manifestations of the will, based on facts which therefore are insufficient;
e. Make depend the warranty for qualities of the goods supplied or services rendered, injustifiably, upon not having recourse to third parties;
f. Make available to one of the parties the possibility to retreat from the contract, immediately or with insufficient warning, when the contract requires considerable investments or other expenditures from the other party;
g. Make a forum choice which involves grave inconvenience for one of the parties, without the interests of the other party justifying this;

h. Remetam para o direito estrangeiro, quando os inconvenientes causados a uma das partes não sejam compensados por interesses sérios e objectivos da outra;
i. Consagrem, a favor de quem as predisponha, a faculdade de modificar as prestações, sem compensação correspondente às alterações de valor verificadas;
j. Limitem, sem justificação, a faculdade de interpelar.

Secção II

Relações com consumidores finais

Artigo 20. (Âmbito das proibições)

Nas relações com consumidores finais e, genericamente, em todas as não abrangidas pelo artigo 15, aplicam-se as proibições da secção anterior e as constantes desta secção.

Artigo 21. (Cláusulas absolutamente proibidas)

São em absoluto proibidas, designadamente, as cláusulas contratuais gerais que:

a. Limitem ou de qualquer modo alterem obrigações assumidas, na contratação, directamente por quem as predisponha ou pelo seu representante;

b. Confiram, de modo directo ou indirecto, a quem as predisponha, a faculdade exclusiva de verificar e estabelecer a qualidade das coisas ou serviços fornecidos;
c. Permitam a não correspondência entre as prestações a efectuar e as indicações, especificações ou amostras feitas ou exibidas na contratação;

h. Refer to foreign law, when the inconveniences caused to one of the parties are not compensated by serious and objective interests of the other party;
i. Confer upon the party which has drafted the terms in advance the right to modify the performance, without a corresponding compensation of the verifiable change in value;
j. Limit, without justification, the right to interrupt.

Section II

Relations with final consumers

Article 20. (Scope of the prohibition)

In the relations with final consumers and, generally, with all those who are not comprised by article 15, are applicable the prohibitions of the previous section and this section.

Article 21. (Clauses which are absolutely prohibited)

Shall be absolutely prohibited, specially, the general contract terms which:

a. Limit or in any way modify obligations which, upon the conclusion of the contract, have been assumed directly by the party which has drafted the terms in advance by himself or through an agent;
b. Confer, in a direct or indirect way, upon the one who has drafted the terms the exclusive right to verify or establish the quality of the goods or services furnished;
c. Allow that the performance to be effectuated need not correspond with the indication, specification or sample made or exhibited in the contract;

d. Atestem conhecimentos das partes relativos ao contrato, quer em aspectos jurídicos, quer em questões materiais;

e. Alterem as regras respeitantes ao ónus da prova;
f. Alterem as regras respeitantes à distribuição do risco.

Artigo 22. (Cláusulas relativamente proibidas)

São proibidas, consoante o quadro negocial padronizado, designadamente, as cláusulas contratuais gerais que:

a. Prevejam prazos excessivos para a vigência do contrato ou para a sua denúncia;

b. Permitam, a quem as predisponha, denunciar livremente o contrato, sem pré-aviso adequado, ou resolvê-lo sem motivo justificativo, fundado na lei ou em convenção;

c. Limitem a responsabilidade de quem as predisponha, por vício da prestação, a reparações ou a indemnizações pecuniárias predeterminadas;

d. Permitam elevações de preços, em contratos de prestações sucessivas, dentro de prazos manifestamente curtos, ou, para além desse limite, elevações exageradas, sem prejuízo do que dispõe o artigo 437 do Código Civil;
e. Impeçam a denúncia imediata do contrato quando as elevações dos preços a justifiquem;
f. Afastem, injustificadamente, as regras relativas ao cumprimento defeituoso ou aos prazos para denúncia dos vícios da prestação;
g. Impeçam, injustificadamente, reparações ou fornecimentos por terceiros;
h. Imponham antecipações de cumprimento exageradas;

d. Confirm declarations of the parties concerning the contract, either with regard to legal aspects or to factual aspects;
e. Modify the rules regarding the charge of proof;
f.Modify the rules regarding the distribution of risks.

Article 22. (Relatively prohibited clauses)

Shall be prohibited, according to the negotiations, specially, the general contract clauses which:

a. Provide for excessive periods for the contract to remain in force or for cancelling it;
b.Allow the party which has drafted the terms to cancel the contract freely, without an adequate warning, or to resolve it without a justified motive, founded upon the law of on contract;
c. Limit the liability of the party which has drafted the terms in case of defective performance to the repair or a fixed financial indemnification;
d. Allow price raises, in contracts for successive deliveries, within periods which are manifestly short, or exaggerated raises, without prejudice to what is provided in article 437 of the Civil Code;

e. Prevent the immediate cancelling of the contract when a price raise justifies this;
f. Injustifiably derogate from the rules regarding defective performance or delays for reclamations regarding defects in the performance;
g. Injustifiably prevent repair or supply by third parties;

h. Impose exaggerated anticipations upon the performance;

i. Estabeleçam garantias demasiado elevadas ou excessivamente onerosas em face do valor a assegurar;
j. Fixem locais, horários ou modos de cumprimento despropositados ou invonvenientes;
l. Exijam, para a prática de actos na vigência do contrato, formalidades que a lei não prevê ou vinculem as partes a comportamentos supérfluos, para o exercício dos seus direitos contratuais.

i. Establish excessively high or onerous guaranties with a view of the value to be insured;
j. Fix inappropriate or inconvenient places, times or ways of performance;
l. Require, for the validity of the contract, formalities which the law does not set or force the parties to superfluous acts in order to exercise their contractual rights.

Capítulo VI

Disposições processuais

Chapter VI

Procedural provisions

Artigo 23. (Declaração de nulidade)

As nulidades previstas neste diploma são invocáveis nos termos gerais.

Article 23. (Declaration of nullity)

The nullities envisaged in this decree may be invoked in general terms.

Artigo 24. (Acção inibitória)

As cláusulas contratuais gerais, elaboradas para utilização futura, quando contrariem o disposto nos artigos 18, 19, 21 e 22 podem ser proibidas por decisão judicial, independentemente da sua inclusão efectiva em contratos singulares.

Article 24. (Injunction)

General contract clauses, drafted for future use, which violate articles 18, 19, 21 and 22, may be prohibited by judicial decision, independent from their actual incorporation into individual contracts.

Artigo 25. (Legitimidade activa)

1. A acção destinada a obter a condenação na abstanção do uso ou da recomendação de cláusulas contratuais gerais só pode ser intentada:

a. Por associações de defesa do consumidor dotadas de representatividade, no âmbito previsto na legislação respectiva;
b. Por associações sindicais, profissionais ou de interesses económicos legalmente constituídas, actuando no âmbito das suas atribuições;

Article 25. (Active legitimation)

1. The action to obtain the condemnation to abstain from any further use or recommendation of general contract terms may be instituted:

a. By consumers' organizations with legal personality, within the scope envisaged by the respective legislation;

b. By trade unions, professional associations or associations of economical interests which have been legally established, acting within the scope of their prerogatives;

c. Pelo Ministério Público, oficiosamente, por indicação do Provedor de Justiça ou quando o entenda, mediante solicitação de qualquer interessado.

2. As entidades referidas no número anterior actuam no processo em neme próprio, embora façam valer um direito alheio pertencente, em conjunto, aos consumidores susceptíveis de virem a ser atingidos pelas cláusulas cuja proibição é solicitada.

Artigo 26. (Legitimidade passiva)

1. A acção referida no artigo anterior pode ser intentada:

a. Contra quem, predispondo cláusulas contratuais gerais, proponha contratos que as incluam ou aceite propostas feitas nos seus termos;

b. Contra quem, independentemente da sua predisposição e utilização em concreto, as recomende a terceiros.

2. A acção pode ser intentada, em conjunto, contra várias entidades que predisponham e utilizem ou recomendem as mesmas cláusulas contratuais gerais, ou cláusulas substancialmente idênticas, ainda que a coligação importe ofensa do disposto no artigo 27.

Artigo 27. (Tribunal competente)

c. By the Public Ministry, officiously, by indication of the Ombudsman or, when necessary, by the solicitation of anyone who has an interest.

2. The entities referred to in the first alinea act on their own name in the procedure, although they invoke a right belonging, in general, to the consumers susceptible to being inflicted by the clauses, the prohibition of which is sought.

Article 26. (Passive legitimation)

1. The action referred to in the previous article may be instituted:

a. Against the one, who has at his disposal general contract terms drafted in advance and proposes to incorporate these terms in a contract or accepts an offer made on the basis of these terms;

b. Against the one who, independent from their drafting or utilization, recommends them to third parties.

2. The action may be instituted against various entities, together, which dispose of and utilize or recommend the same or substantially identical general contract terms, although this runs counter to article 27.

Article 27. (Competent tribunal)

Para a acção inibitória é competente o tribunal da comarca onde se localiza o centro da actividade principal do demandado ou, não se situando ele em território nacional, o da comarca da sua residência ou sede; se estas se localizarem no estrangeiro, será competente o tribunal do lugar em que as cláusulas contratuais gerais foram propostas ou recomendadas.

With regard to the injunction shall be competent the tribunal of the district where the centre of the main activities of defendant is located, or of his domicile when the centre is not located in national territory; when these are located abroad, shall be competent the tribunal of the district where the general contract terms have been proposed or recommended.

Artigo 28. (Forma de processo e isenções)

Article 28. (Procedure and exemptions)

1. A acção de proibição de cláusulas contratuais gerais segue os termos do processo sumário de declaração e está isenta de custas.

1. The action for an injunction against general contract terms follows the rules of summary declaration proceedings and is exempt from costs.

2. O valor da acção excede 1$ ao fixado para a alçada da Relação.

2. The value of the action exceeds $1 as fixed for the jurisdiction of the Appeal Court.

Artigo 29. (Parte decisória da sentença)

Article 29. (The dictum)

1. A decisão que proíba as cláusulas contratuais gerais especificará o âmbito da proibição, designadamente através da referência concreta do seu teor e a indicação do tipo de contratos a que a proibição se reporta.

1. The decision whereby an injunction is given against general contract terms shall specify its scope of application, especially by concrete references as to its meaning and by indicating the type of contracts to which the injunction shall apply.

2. A pedido do autor, pode ainda o vencido ser condenado a dar publicidade à proibição, pelo modo e durante o tempo que o tribunal determine.

2. At the request of the winning party, the losing party may be condemned to give publicity to the injunction, by the way and during the period set by the tribunal.

Artigo 30. (Proibição provisória)

Article 30. (Provisional injunction)

1. Quando haja receio fundado de virem a ser incluídas em contratos singulares cláusulas gerais incompatíveis com o disposto no presente diploma, podem as entidades referidas no artigo 25 requerer provisoriamente a sua proibição.

1. When there is a well-founded fear lest general contract terms which are incompatible with the provisions of this decree will be incorporated into individual contracts, the entities referred to in article 25 may request a provisional injunction.

2. A proibição provisória segue, com as devidas adaptações, os termos fixados pela lei processual para os procedimentos cautelares não especificados.

2. The action for a provisional injunction follows, with the necessary adaptations, the rules established by procedural law for non-specified precautionary proceedings.

Artigo 31. (Consequências da proibição definitiva)

Article 31. (Consequences of a definitive injunction)

1. As cláusulas contratuais gerais objecto de proibição definitiva por decisão transitada em julgado, ou outras cláusulas que se lhes equiparem substancialmente, não podem ser incluídas em contratos que o demendado venha a celebrar, nem continuar a ser recomendadas.

1. General contract terms which are the object of a definitive injunction by a judicial decision which has entered into force, or other substantially similar terms, may not be incorporated into contracts which the petitioner will conclude, nor be recommended to be used.

2. Aquele que seja parte, juntamente com o demandado vencido na acção inibitória, em contratos onde se incluam cláusulas gerais proibidas, nos termos referidos no número anterior, pode invocar a todo o tempo, em seu benefício, a declaração incidental de nulidade contida na decisão inibitória.

2. Anyone who is a party, together with the losing petitioner in the injunction procedure, may, in the contracts in which prohibited general contract terms have been included, invoke at any time, to his advantage, within the terms referred to in the first alinea, the incidental declaration of nullity contained in the injunction decision.

3. A inobservância do preceituado no n. 1 tem como consequência a aplicação do artigo 9.

3. The inobservance of what is prescribed by alinea 1 shall have as a consequence the application of article 9.

Artigo 32. (Sanção pecuniária compulsória)

Article 32. (Compulsory pecuniary sanction)

1. Se o demandado, vencido na acção inibitória, infringir a obrigação de se abster de utilizar ou de recomendar cláusulas contratuais gerais que foram objecto de proibição definitiva por decisão transitada em julgado, incorre numa sanção pecuniária compulsória que não pode ultrapassar o valor de 1.000.000$ por cada infracção.

2. A sanção prevista no número anterior é aplicada pelo tribunal que apreciar a causa em primeira instância, a requerimento de quem possa prevalecer-se da decisão proferida, devendo facultar-se ao infractor a oportunidade de ser previamente ouvido.

3. O montante da sanção pecuniária complusória destina-se, em partes iguais, ao requerente e ao Estado.

Capítulo VII

Normas de conflitos.

Artigo 33. (Aplicação no espaço)

O presente diploma aplica-se:

a. Aos contratos regidos pela lei portuguesa;
b. Aos demais contratos celebrados a partir de propostas ou solicitações feitas ao público em Portugal, quando o aderente resida habitualmente no País e nele tenha emitido a sua declaração de vontade.

Artigo 34. (Aplicação no tempo)

1. When a petitioner who has lost the injunction action infringes an obligation to abstain from the use or from the recommendation of general contract terms which are the object of a definitive injunction by a judicial decision which has entered into force, he is exposed to a compulsory pecuniary sanction which may not exceed the value of 1,000,000 $ per infraction.

2. The sanction envisaged in the precious alinea is applied by the tribunal which has considered the case in first instance, at the request of anyone who may invoke this decision, whereby the infringing person shall be given the opportunity to be heard.

3. The amount of the compulsory pecuniary damages shall be due, in equal parts, to the petitioner and to the State.

Chapter VII

Conflict norms

Article 33. (Geographical application)

The present decree applies to

a. Contracts governed by Portuguese law;
b. Other contracts concluded on the basis of offers or solicitations made to the public in Portugal, when the adhering party has his regular domicile in this country and here has given his consent.

Article 34. (Temporal application)

O presente diploma aplica-se também às cláusulas contratuais gerais existentes à data da sua entrada em vigor, exceptuando-se todavia, os contratos singulares já celebrados com base nelas.

The present decree also applies to the standard contract terms which existed on the date when it entered into force, with the exception however of individual contracts which already have been concluded on the basis of these terms.

Capítulo VIII

Chapter VIII

Disposições finais e transitórias

Final and transitional provisions

Artigo 35. (Direito ressalvado)

Article 35. (Reserved rights)

Ficam ressalvadas todas as disposições legais que, em concreto, e mostrem mais favoráveis ao aderente que subscreva ou aceite propostas que contenham cláusulas contratuais gerais.

Are reserved all legal provisions which, in concrete, are most favourable towards the adhering party which subscribes or accepts proposals which contain general contract terms.

Artigo 36. (Vigência)

Article 36. (Entry into force)

Este diploma entra em vigor 120 dias após a sua publicação.

This decree shall enter into force 120 days after its publication.

18. Spain

Since 1984, Spain has a comprehensive General Consumer Protection Law, which among others contains a number of provisions on general contract terms. This *Ley General sobre Consumidores y Usuarios* of July 19, 1984[61] has been enacted in pursuance of art. 51 of the Spanish Constitution of 1978, which reads[62]:

1. Los poderes públicos garantizarán la defensa de los consumidores y usuarios, protegiendo, mediante procedimientos eficaces, la seguridad, la salud y los legítimos intereses económicos de los mismos.

1. The public authorities shall guarantee the protection of consumers and users, by protecting, through efficient procedures, their security, their health and their justified economic interests.

2. Los poderes públicos promoverán la información y la educación de los consumidores y usarios, formentarán sus organizaciones y oirán a éstas en las cuestiones que puedan afectar a aquellos, en los términos que la ley establezca.

2. The public authorities shall promote the information and education of consumers and users, they shall promote the consumers' organizations and hear them as to the questions which may affect them, within the terms established by law.

3. En el marco de lo dispuesto por los apartados anteriores, la ley regirá el comercio interior y el régimen de autorización de productos comerciales.

3. Within the scope of the preceding alinea, the law shall regulate internal commerce and the regime for authorizing commercial products.

The immediate cause of the enactment of the General Consumer Protection Law was the olive oil scandal, which in 1981 cost the lives of several hunderd and maimed thousands of others[63]. The scandal resulted in heavy popular pressure for consumer protection through legislation. This prompted the Conservative government to present a bill to Parliament, which also regulated general contract terms although with this respect there had been no popular pressure. When the Socialist government took over, the bill was slightly expanded[64], but it still included only substantive law provisions. A further reaching draft bill on general contract terms, which also would have provided for procedural rules[65], was not taken into consideration by the authors of the General Consumer Protection Law[66].

The main provisions of the General Consumer Protection Law dealing with general contract terms read as follows:

Articulo octavo

1. La oferta, promoción y publicidad de los productos, actividades o servicios, se ajustarán a su naturaleza, características, condiciones, utilidad o finalidad, sin perjuicio de lo establecido en las disposiciones sobre publicidad. Su contenido, las prestaciones propias de cada producto o servicio, y las condiciones y garantías ofrecidas serán exigibles por los consumidores o usuarios, aun cuando no figuren expresamente en el contrato celebrado o en el documento o comprobante recibido.

Article eight

1. The offer, marketing advertising of products, activities or services shall adjust to the nature thereof, their characteristics, terms, use or finality, notwithstanding the provisions on advertising. Their content, the provisions for each product or service, and the terms and guarantees offered, may be demanded by consumers or users even when not expressly set out in the agreement entered into or in the document or voucher received.

2. No obstante lo dispuesto en el apartado anterior, si el contrato celebrado contuviese cláusulas más beneficiosas, éstas prevalecerán sobre el contenido de la oferta, promoción o publicidad.

2. Notwithstanding the foregoing, if the contract so entered into should contain clauses which are more advantageous, these shall prevail over the content of the offer, marketing or advertising.

3. La oferta, promoción y publicidad falsa o engañosa de productos, actividades o servicios, será perseguida y sancionada como fraude. Las asociaciones de consumidores y usuarios, constituidas de acuerdo con lo establecido en esta Ley, estarán legitimadas para iniciar e intervenir en los procedimientos administrativos tendentes a hacerla cesar.

3. False or misleading offers, trading practices and advertising for products, activities or services shall be prosecuted and sanctioned as fraud. Consumers' and users' organizations duly constituted under the provisions hereof shall be empowered to initiate and take part in administrative proceedings aimed at the cessation thereof.

Artículo décimo

1. Las cláusulas, condiciones o estipulaciones que, con carácter general, se apliquen a la oferta, promoción o venta de productos o servicios, incluidos los que faciliten las Administraciones públicas y las Entidades y Empresas de ellas dependientes, deberán cumplir los siguientes requisitos:

Article ten

1. The clauses, terms or stipulations generally applied to the offer, marketing or sale of products or services, including those facilitated by the public authorities and the entities and enterprises dependent upon them, shall meet the following requirements:

a. Concreción, claridad y sencillez en la redacción, con posibilidad de comprensión directa, sin reenvíos a textos o documentos que no se faciliten previa o simultáneamente a la conclusión del contrato, y a los que, en todo caso, deberá hacerse referencia expresa en el documento contractual.

a. Specific, clear and simple language which may be immediately understood, without resort to texts or documents not provided prior to or at the time of the conclusion of the contract, and to which, in all events, references shall be made in the contractual document in an express form.

b. Entrega, salvo renuncia del interesado, de recibo, justificante, copia o documento acreditativo de la operación, o, en su caso, de presupuesto, debidamente explicado.

b. The provision, except where waived by the interested party, of a receipt, evidencing document, copy or evidence of the operation or, as the case may be, of a duly given reference.

c. Buena fe y justo equilibrio de las contraprestaciones lo que, entre otras cosas, excluye:

1. La omisión, en casos de pago diferido en contratos de compra-venta, de la cantidad aplazada, tipo de interés anual sobre saldos pendientes de amortización y las cláusulas que, de cualquier forma, faculten al vendedor a incrementar el precio aplazado del bien durante la vigencia del contrato.
2. Las cláusulas que otorguen a una de las partes la facultad de resolver discrecionalmente el contrato, excepto, en su caso, las reconocidas al comprador en las modalidades de venta por correo, a domicilio y por muestrario.
3. Las cláusulas abusivas, entendiendo por tales las que perjudiquen de manera desproporcionada o no equitativa al consumidor, o comporten en el contrato una posición de desequilibrio entre los derechos y las obligaciones de las partes en perjuicio de los consumidores o usuarios.
4. Condiciones abusivas de crédito.
5. Los incrementos de precio por servicios, accesorios, financiación, aplazamientos, recargos, indemnizaciones o penalizaciones que no correspondan a prestaciones adicionales, susceptibles de ser aceptados o rechazados en cada caso y expresados con la debida claridad y separación.
6. Las limitaciones absolutas de responsabilidad frente al consumidor o usuario y las relativas a utilidad o finalidad esencial del producto o servicio.

c. Good faith and precise balance of the performances, which shall, amongst others, exclude the following:

1. The omission, in cases of deferred payment in sales contracts, of the deferred amount, annual interest rates on balances pending amortisation, and such clauses as may, in any way, empower the vendor to increase the deferred price of the goods during the term of the agreement.

2. Articles granting one of the parties the power to cancel discretionally the agreement except, where applicable, those granted to the purchaser in cases of sales by post, door-to-door and by sample.

3. Abusive provisions,understood to be those which prejudice the consumer in a disproportionate or inequitable manner or imply in the contract a position of imbalance between the rights and the obligations of the parties, to the detriment of the consumer or user.

4. Abusive credit conditions.

5. Increases in prices for services, accessories, financing, deferrals, surcharges, indemnifications or penalisations which do not correspond to additional services which may be accepted or rejected in each case, and expressed with due clarity and suitably distinguished.
6. Absolute limitations on liability in respect of the consumer or user, and those relating to the use or essential aim of the product or service.

7. La repercusión sobre el consumidor o usuario de fallos, defectos o errores administrativos, bancarios o de domiciliación de pagos, que no le sean directamente imputables, así como el coste de los servicios que en su día y por un tiempo determinado se ofrecieron gratuitamente.
8. La inversión de la carga de la prueba en perjuicio del consumidor o usuario.
9. La negativa expresa al complimiento de las obligaciones o prestaciones propias del productor o suministrador, con reenvío automático a procedimientos administrativos o judiciales de reclamación.
10. La imposición de renuncias a los derechos del consumidor y usuario reconocidos en esta Ley.
11. En la primera venta de viviendas, la estipulación de que el comprador ha de cargar con los gastos derivados de la preparación de la titulación, que por su naturaleza correspondan al vendedor (obra nueva, propiedad horizontal, hipotecas para financiar su construcción o su división y cancelación).
12. La obligada adquisición de bienes o mercancías complementarias o accesorios no solicitados.

2. A los efectos de esta Ley se entiende por cláusulas, condiciones o estipulaciones de carácter general, el conjunto de las redactadas previa y unilateralmente por una Empresa o grupo de Empresas para aplicarlas a todos los contratos que aquélla o éste celebren, y cuya aplicación no puede evitar el consumidor o usuario, siempre que quiera obtener el bien o servicio de que se trate.

7. The repercussion upon the consumer or user of faults, defects or administrative errors, of those of banks and the domiciliation of payments, where not directly attributable to the said consumer, as well as the cost of services at some stage offered free for a determined period.
8. The reversal of the burden of proof to the detriment of the consumer or user.
9. The express refusal to meet the obligations or services which are proper to the producer or supplier, with automatic resort to administrative or legal claims proceedings.

10. The imposition of waivers of consumer and user rights recognised herein.

11. In first home sales, the stipulation that the purchaser shall bear the costs arising from the preparation of the title, by their nature correspond to the vendor (new work, horizontal property, mortgages for financing their construction, or division and cancellation).
12. The compulsory acquisition of complementary goods or merchandise or unsolicited accessories.

2. For the purposes of this Act, clauses, terms or stipulations of a general character shall be understood to be all those drawn up in advance unilaterally by a supplier or group of suppliers in order to apply them to all contracts entered into by them, and the application of which may not be avoided by the consumer or user who wishes to secure the goods or services concerned.

Las dudas en la interpretación se resolverán en contra de quien las haya redactado, prevaleciendo las cláusulas particulares sobre las condiciones generales, siempre que aquéllas sean más beneficiosas que éstas.

Doubts in interpretation shall be settled against the party which drew them up, and specific provisions shall take preference over general ones, provided that they are more beneficial than the said general provisions.

3. Las cláusulas, condiciones o estipulaciones que, con carácter general, utilicen las Empresas públicas o concesionarias de servicios públicos en régimen de monopolio, estarán sometidas a la aprobación y a la vigilancia y control de las Administraciones públicas competentes, con independencia de la consulta prevista en el artículo 22 de esta Ley. Todo ello, sin perjuicio de su sometimiento a las disposiciones generales de esta Ley.

3. The clauses, terms or stipulations used on a general basis by the public bodies or holders of concessions for public services in monopoly conditions shall be subject to the approval and supervision and control of the competent public authorities, irrespective of the consultation which is provided for in Article 22 hereof, and all this notwithstanding the submission to the general provisions of this Act.

4. Serán nulas de pleno derecho y se tendrán por no puestas las cláusulas, condiciones o estipulaciones que incumplan los anteriores requisitos.
No obstante, cuando las cláusulas subsistentes determinen una situación no equitativa de las posiciones de las partes en la relación contractual, será ineficaz el contrato mismo.

4. Articles, terms or stipulations which violate the foregoing requirements shall be null and void as a matter of law and shall be deemed non-written.
Nevertheless, where the remaining terms create an inequitable situation between the positions of the parties to the contract, the contract itself shall be null and void.

5. Los podere públicos velarán por la exactitud en el peso y medida de los bienes y productos, la transparencia de los precios y las condiciones de los servicios postventa de los bienes duraderos.

5. The public authorities shall supervise the exactness of the weights and measures of goods and products, price transparency and the after-sales service conditions in respect of durable products.

Artículo vigésimo segundo

Article twenty two

1. Las Asociaciones de consumidores y usuarios serán oídas, en consulta, en el procedimiento de elaboración de las disposiciones de carácter general relativas a materias que afecten directamente a los consumidores o usuarios.

1. Consumers' and users' organizations shall be heard on a consultative basis in the proceedings for the elaboration of the provisions of a general character relating to subjects which directly affect consumers or users.

2. Será preceptiva su audiencia en los siguientes casos:
(...)
e. Condiciones generales de los contratos de Empresas que prestan servicios públicos en régimen de monopolio.
(...)

2. Such hearing shall be obligatory in the following cases:
(...)
e. General contract terms of bodies which provide public services on a monopoly basis.
(...)

Finally, I draw the attention to art. 20, which may conceivably serve as a basis for a general action for consumers' organizations:

1. Las Asociaciones de consumidores y usuarios se constituirán con arreglo a la Ley de Asociaciones y tendrán como finalidad la defensa de los intereses, incluyendo la información y educación de los consumidores y usuarios, bien sea con carácter general, bien en relación con productos o servicios determinados; podrán ser declaradas de utilidad pública, integrarse en agrupaciones y federaciones de idénticos fines, percibir ayudas y subvenciones, representar a sus asociados y ejercer las correspondientes acciones en defensa de los mismos, de la asociación o de los intereses generales de los consumidores y usuarios, y disfrutarán del beneficio de justicia gratuita en los casos a que se refiere el artículo 2.2. Su organización y funcionamiento serán democráticos.

1. Consumers' and users' organizations shall be incorporated in conformity with the Associations Act, and shall pursue the defence of the interests of consumers and users, and including information and education thereof, whether in a general sense or whether in relation to particular products or services; they may be declared of public utility, they may form groupings and federations of similar aims, they may receive assistance and subsidies, represent their associates and take the pertinent actions in their defence, as well as in that of the association or in that of the general interests of consumers and users,and shall enjoy free legal aid in the cases referred to in Article 2.2 hereof. Their organization and operation shall be democratic.

2. También se considerarán Asociaciones de consumidores y usuarios las Entidades constituidas por consumidores con arreglo a la legislación cooperativa, entre cuyos fines figure, necesariamente, la educación y formación de sus socios y estén obligados a constituir un fondo con tal objeto, según su legislación específica.

2. The status of consumers' and users' organizations shall extend to entities constituted by consumers in accordance with the cooperative legislation, amongst whose aims should appear the education and training of their members; they shall be obliged to create a fund to this end, in conformity with the specific legislation in each case.

3. Para poder gozar de cualquier beneficio que les otorgue la presente Ley y disposiciones reglamentarias y concordantes deberán figurar inscritas en u libro registro, que se llevará en el Ministerio de Sanidad y Consumo, y reunir las condiciones y requisitos que reglamentariamente se establezcan para cada tipo de beneficio. En la determinación reglamentaria de las condiciones y requisitos se tendrán en cuenta, entre otros, criterios de implantación territorial, número de asociados y programas de actividades a desarrollar.	3. To enjoy any benefit conceded hereunder and in the complementary regulations, the said associations shall be recorded in a registry file which shall be kept in the Ministry of Health and Consumer Affairs, and shall meet the conditions and requisites which are established in the Law for each type of benefit. The fixing in the regulations of the said conditions and requisites, shall take account, amongst other things, criteria of territorial scope, number of associates and projected development plans.

None of the major Spanish consumers' organizations, asked for their comments as to this possibility by me, consider this provision a sound basis for injunction procedures.

Under the 1978 Constitution, Spain has a number of autonomous regions with law-making powers[67]. Art. 51, quoted above, is framed in such words that the autonomous regions have the right and the duty to protect consumers. Four of the seven autonomous regions with legislative power have used this power, in two cases even before the central government had done so[68]. By way of example, I mention the Basque Act 10/1981 of November 18, 1981 on the Statute of the Consumer (Bezeroaren Araudia). Art. 11 of this Act provides in its Spanish text (there also is a Basque text) with my translation:

Los compradores de bienes o los usuarios de servicios estarán protegidos contra las prácticas abusivas de venta, y en particular respecto de a. Los contratos tipos establicidos de modo unilateral.	The buyers of goods and the users of services shall be protected against unfair sales practices, and in particular with regard to: a. General contract terms which have been established unilaterally.
b. Las que se refieran a la exclusión en los contratos de derechos irrenunciables.	b. Those which refer to the contractual exclusion of inalienable rights.
c. Las condiciones abusivas de crédito.	c. Unfair credit terms.
d. La demanda de pago de mercancías no solicitades.	d. The demand of payment for unsolicited goods.
e. Los métodos de venta que limiten la libertad de elección.	e. The sales methods which limit free choice.

f. Las cláusulas contractuales que resulten lesivas o simplemente abusivas para el consumidor.
Con este fin, el Gobierno vasco orientará su actividad a la efectiva aplicación de la normativa vigente y a la consecución de aquella que evite y sancione prácticas como las referidas.

f. Contract terms which result in detriment to consumers or are simply abusive towards them.
With this aim, the Basque Government shall orient its activities to the effective application of existing law and to avoiding and sanctioning practices as referred to.

However, the consitutionality of these Laws of the Autonomous regions has been seriously questioned and in a number of instances has been denied by the Constitutional Court[69].

19. United Kingdom

New Legislation

In my 1977 Report, I have set out British legislation on contract terms, notably the Supply of Goods (Implied Terms) Act 1973, the Fair Trading Act (1973) and the Unfair Contract Terms Act (1977). The most important statutes with respect to contract terms which have been promulgated after 1977 are the Sale of Goods Act (1979) (replacing the original Act of 1893 as amended) and the Supply of Goods and Services Act (1982). Both are mainly consolidating statutes.

Aspects of the Sale of Goods Act have been criticised by both the National Consumer Council[70] and by the Law Commission[71]. Section 14 defines the 'merchantable quality' of goods in a way which leaves doubt as to its meaning, while section 35 still provides that once buyers have accepted goods they lose their right to reject those goods and claim a refund of the price. Once the right of rejection has been lost, the only remedy in strict law is the right to damages or financial compensation for loss suffered. Those seeking reform of the law advocate that merchantable quality should be defined to ensure that it covers minor defects and durability of goods, that the right to reject should not be so easily lost as at present and that remedies such as a right to replacement or repair of goods should supplement the existing remedy of damages. The rights in this statute cannot be excluded by standard terms.

The Supply of Goods and Services Act is split up into three parts.

Part I of the Act imposes obligations as to the quality of the goods supplied in the most important types of consumer contracts which are neither contracts for the sale of goods nor hire-purchase agreements, the precise scope of which is not wholly clear[72]. This uncertainty is caused by the dual role of the Act, which may be illustrated by its (long) title:

"An Act to amend the law with respect to the terms to be implied in certain contracts for the transfer of the property in goods, in certain contracts for the hire of goods and in certain contracts for the supply of a service; and for connected purposes".

Part II imposes an obligation of reasonable care in the provision of services and part III relates to supplementary matters.

Goods

Section 7 of the UCTA covers the ground relating to other contracts "where the possession or ownership of goods passes". It can be readily seen that this section is the appropriate one for the supply of goods contracts covered by Part I of the 1982 Act[73]; quasi-sales are contracts under which the property (or ownership) is transferred, c.q. contracts for works and materials or barter and contracts of hire and bailments requiring the passing of possession. So section 7 clearly controls the terms implied by Part I of the 1982 Act.

In the case of consumer contracts liability in respect of description, quality, fitness and sample cannot be excluded (section 7^2 UCTA). It follows that any exemption clause is void which purports to exclude the supplier's obligations under sections 3-4 and 8-10 of the 1982 Act. In the case of business contracts an exclusion clause will be valid, if it is reasonable (section 7^3).

Now that the duties of suppliers in sales and quasi-sales have been aligned by section 2 of the 1982 Act, there is no longer any need for a distinction to be made between them and the sale of goods and hire-purchase agreements in the UCTA. So section 7 has been amended by adding a new section 7 (3A) which appears in section 17 (2) of the 1982 Act.

"The following subsection shall be inserted after section 7 (3) of the UCTA: -
(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 reference

to any such term".

Services

The original wording of clause 16 of the Bill amended the 1977 Act so as to invalidate a clause which attempted to exclude the supplier's liability for breach of the implied term as to care and skill in section 13; such clauses would be void in consumer contracts. It was foreseen that, if such clauses were made void, it might be necessary to make their continued use a criminal offence by an order similar to the Consumer Transactions (Restrictions on Statements) Order 1976.

The clause proved to be a contentious one during the Parliamentary debates. However, in the Committee stage the sponsors agreed to omit clause 16 as then worded in return for a reference to the Law Commission of contracts for services generally. There was doubtless a feeling that to stick resolutely to clause 16 might result in the loss of the whole of Part II of the Bill. With respect to the services, the 1982 Act gives a poor consumer protection.

A general duty

In August 1986, the Office of Fair Trading has published a discussion paper called 'A general duty to trade fairly'[74]. The main purpose of such a duty would be to raise trading standards generally and to improve means of redress. The Office considers that it would be appropriate to allow representative consumer bodies to bring actions on behalf of named individual consumers for breaches of the general duty or the general law.

The Office envisages that legislation would provide for the general duty to be supported by codes of practice both vertical (by trading practice) and horizontal (by sector). The Office proposes that such new-style code should be introduced, taking account of discussions with the interests concerned, by the Director General of Fair Trading; it would seem appropriate for the codes to have the endorsement of the Secretary of State and to be laid before Parliament.

The discussion paper is of high quality. The time will learn us what its result will be with respect to general contract terms.

1. 947 (1984-1985) Nr. 1.

2. See M. Fontaine and Th. Bourgoignie, Le droit de la consommation en Belgique et au Luxembourg, Wokingham Berkshire 1981, Nrs. 372-374.

3. 826 (1986-1987) Nr. 1.

4. P. de Vroede and G.L. Ballon, Handelspraktijken, Antwerpen 1985, No. 1377 (Vivec was in state of liquidation as of January 1, 1985).

5. De Vroede-Ballon, No. 1378.

6. De Vroede-Ballon, No. 1380.

7. J. Stuyck and W. van Gerven, Handelspraktijken, Gent 1985, 18.

8. This became apparent at the François Laurent colloquium in Ghent, September 1987, one of the two subjects of which was the need for recodification in Belgium. Both Members of Parliament and the majority of other participants spoke out in favour of partial reform and against an all-out recodification effort. The publication of the colloquium proceedings is to be expected in early 1988.

9. As to the Marketing Practices Act in general see B. Dahl, Consumer Legislation in Denmark, Wokingham, Berkshire, 1981, p. 36-59.

10. See J. Hansen, Product liability legislation in Denmark, *Products Liability International* 1986, 146-147.

11. Letter of December 17, 1986 by Ms. Hanne Saucant of the *Forbrugerombudsmanden* Office.

12. Letter of August 31, 1987 by Prof. Børge Dahl.

13. M. Trochu, Y. Tremorin and P. Berchon, La protection des consommateurs contre les clauses abusives, *Droit et pratique du commerce international* 1981, p. 37, 42. See also A. Sinay-Cytermann, La Commission des clauses abusives et le droit commun des obligations, *Revue trimestrielle de droit civil* 1985, p. 471-520.

14. J. Calais-Auloy, Propositions pour un nouveau droit de la consommation, Paris 1985.

15. Propositions pour un nouveau droit de la consommation (previous note) at p. 131: 'The collective action may for instance be instituted in order to provide for the disappearance of unfair terms which appear in contract models proposed to consumers' (my translation).

16. *Consommateurs-Actualité* 1986 Nrs. 517 and 519.

17. An Italian translation is given by Bianca (ed), Le condizioni generali di contratto, vol. I, Milano 1979, p. 325-345.

18. Most notably Von Hippel. Präventive Verwaltungskontrolle Allgemeiner Geschäftsbedingungen? *Zeitschrift für Rechtspolitik* 1972, p. 110 as well as in a number of later publications.

19. M. Schatz-Bergfeld, Verbraucherinteressen im politischen Prozess: das AGB-Gesetz, Frankfurt 1984, p. 63 ff.

20. H. Kötz, Welche gesetzgeberische Massnahmen empfehlen sich zum Schutz des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen? Report to the Deutscher Juristentag, München 1974, A 1-A 100.

21. Vorschläge zur Verbesserung des Schutzes der Verbraucher gegenüber Allgemeinen Geschäftsbedingungen, Erster Teilbericht der Arbeitsgruppe beim Bundesminister der Justiz, Bonn 1974.

22. Vorschläge zur Verbesserung des Schutzes der Verbraucher gegenüber Allgemeinen Geschäftsbedingungen, Zweiter Teilbericht der Arbeitsgruppe beim Bundesminister der Justiz, Bonn 1975.

23. Referentenentwurf, published as annex to the *Betriebs-Berater* 1975.

24. Schatz-Bergfeld 1984, p. 71.

25. Schatz-Bergfeld 1984, p. 72.

26. Schatz-Bergfeld 1984, p. 71.

27. E. von Hippel, Verbraucherschutz, Tübingen 1979, p. 110; Schatz-Bergfeld 1984, 140-148.

28. J. Schmude (then Minister of Justice), Schuldrechtsüberarbeitung - eine Herausfordering an den Gesetzgeber, *Neue Juristische Wochenschrift* 1982, p. 2017-2021.

29. H. Kötz, Controlling unfair contract terms: options for legislative reform, *South African Law Journal* 1986, 405.

30. M.R. Will, Die alternde Schuldrechtsreform, *Kwartaalbericht Nieuw BW* 1987/4 (forthcoming), as well as H. Kötz, La Révision du Code Civil allemand - Expériences et projets, in: Memorialis François Laurent (forthcoming).

31. The one exception was the 1945 Civil Code, which in article 394 contained a provision on the interpretation of standard form contracts. This Code was in force for a number of months only, however.

32. But no longer the only one: in Athens there is the Committee for Quality of Life EPIZO and elsewhere the Consumers' Union of Volos, the Consumers' Union of Piraeus, the Consumers

Association of Rhodos, the Thessaloniki Consumer Protection Centre, etc.

33. Other government services dealing with consumer affairs are the Laboratory for the Inspection of Agricultural Pesticide Residues within the Ministry of Agriculture (1977), the Central Laboratory of Public Health (1977) and the National Organization of Pharmaceuticals (1983) within the Ministry of Health, Welfare and Social Security, the General Chemical Laboratory of the State within the Ministry of Finance and the Directorate of Market Police Control within the Ministries of the Interior and of Public Order.

34. See par. 35 in Chapter III.

35. Decree Nr 400 of 1970.

36. Information given by Mrs. Titika Nikea-Mouratoglou, Attorney at law, Athens.

37. M.H. Whincup, Consumer Legislation in the United Kingdom and the Republic of Ireland, Wokingham Berkshire 1980, 183.

38. Whincup, 184.

39. C.M. Bianca (ed), Le condizioni generali di contratto, 2 vols, Milano 1979/1981.

40. The text is given, among others, by G. Alpa, Diritto privato dei consumi, Bologna 1986, p. 232-234.

41. See G. Alpa and M. Bessone (eds), Tecnica e controllo dei contratti standards, Rimini 1984 and the publications by Bonell, Costanza, Jayme, Stanzione and Tondo, referred to in the Bibliography of this Report.

42. A German translation may be found in *Recht der Internationalen Wirtschaft* 1986, p. 602-603.

43. Chambre des Députés session ordinaire 1977-1978 No 2217.

44. Tweede Kamer 1981, Nr 16 983.

45. *Infra*, Nr. 39.

46. The movement started with the *Consumentenbond*'s issuing its own general conditions, to be used by members in their contracts with suppliers of goods and services - see my contribution 'Consumentenvoorwaarden', *Nederlands Juristenblad* 1975, p. 157-170.

47. Such as the *Raad voor het Midden- en Kleinbedrijf* (Retail Council).

48. Advies inzake het vraagstuk van de toepassing van standaardvoorwaarden bij transacties met de consument, The Hague 1978, Nr. 7.

49. See my contribution 'Recodification of the law in The Netherlands/The New Civil Code experience', 29 *Netherlands International Law Review* 348-367 (1982).

50. See my contribution 'Operatie stofkam: rol van rechter in Nieuw BW wordt teruggedrongen', *Kwartaalbericht Nieuw BW* 1984, p. 2-6.

51. Tweede Kamer Nr 17 931, 5 (Van der Grinten Commission).

52. See my contribution 'Van deregulering naar herregulering/ Ontmanteling van het Nederlands consumentenrecht gaat niet door', *Tijdschrift voor Consumentenrecht* 1985, p. 67-76.

53. *Handelingen Tweede Kamer* 1984-1985 Uitgebreide Commissie Vergadering 5, October 1, 1984.

54. See G.J. Rijken, Het wetsvoorstel algemene voorwaarden door de Tweede Kamer aanvaard, *Kwartaalbericht Nieuw BW* 1985, p. 79-80.

55. See H.C.F. Schoordijk, Een onverwachte zinsnede in het regeerakkoord, *Nederlands Juristenblad* 1986, p. 882-883.

56. See the extracts of the Minister's speech at the installation of the commission in *Nederlands Juristenblad* 1986, p. 1102-1103.

57. See the press release in *Nederlands Juristenblad* 1987, p. 126-128.

58. See *NRC Handelsblad* December 16, 1986 and January 6, 1987.

59. *Staatsblad* 1987, 327.

60. For more examples of specific legislation see J. Simões Patricio, Clauses contractuelles abusives, in : C. Ferreira de Almeida, J. Simões Patricio and M. Neto, L'examen détaillé de la législation portugaise à l'égard des consommateurs, Bruxelles 1986, 251-285.

61. Law 26/1984.

62. A slightly different English translation is given by I. de Uriarte y Bofarull, Consumer Legislation in Spain, Bruxelles 1987, p. 241-260. A German translation is given by E. von Hippel, Verbraucherschutz, 3d ed, Tübingen 1986, p. 401-413.

63. M.A. López Sánchez, La tutela del consumatore in Spagna, *Rivista trimestrale di diritto e procedura civile* 1986, p.960.

64. As to the legislative history of the General Consumer Protection Law in general see I. Uriarte Bofarull, The Spanish Act on the Protection of the Rights of Consumers and Users, *Journal of Consumer Policy* 1985, 169, 170-171, who observes that this was the first occasion on which a Government proposal was supported by the Opposition. As to the legislative history of the provisions on general contract terms see J. Sanroma Aldea, El debate parlamentario del

proyecto de la ley texto comparado con la ley, *Estudios sobre Consumo* 1984/3, 171, 177-179, who informs us of the role which Professor García Amigo, the writer of an earlier textbook on the subject (see the Bibliography), played in the parliamentary discussions.

65. *Anteproyecto de Ley sobre condiciones generales de la contratación*, published by the Ministry of Justice in 1984. The draft was submitted by Professors Duque and Rodríguez Artigas. In 1987, the two Professors from Valladolid submitted a second version of their draft bill, in which they have tried to bring their text in harmony with art. 10 of the General Consumer Protection Law.

66. M.A. López Sánchez, The Law-Making Power of Enterprises and the Protection of Consumers in Spanish Contract Law, *Journal of Consumer Policy* 1985, p. 389, 402.

67. See I. de Uriarte y de Bofarull, Consumer Legislation in Spain, Bruxelles 1987, p. 18-27.

68. Apart from the Basque Statute of the Consumer, mentioned in the text, these are the Law 12/1984 of April 9, 1984 approving the Galician Consumer Statute, the Andalucian Law 5/1985 of July 8, 1985 for the Defence of Consumers and Users, and the Law 2/1987 of April 9, 1987, aproving the Consumers' and Users' Statute of the Community of Valencia. The Canary Islands, Catalonia and Navarra are the three autonomous regions with legislative power which so far have not enacted consumer legislation.

69. See A. Borrás Rodríguez, La protección de los consumidores: España en la C.E.E., Saarbrücken 1987, p. 14-22 and J.A.Santamaría, La regulación normativa de la distribución competencial, *Estudios sobre Consumo* 1984/3, p. 161-170.

70. Buying Problems: Consumers, Unsatisfactory goods and the Law, National Consumer Council, 1984.

71. Sale and Supply of Goods, the Law Commission, Working Paper no 85 and the Scottish Law Commission, Consultive Memorandum no 58, 1983.

72. C.J. Miller and B.W. Harvey, Consumer and Trading Law Cases and Materials, London 1985, p. 65.

73. G.Woodroffe, Goods and Services - The new law, London, 1982, p. 121.

74. A general duty to trade fairly. A discussion paper of the Office of Fair Trading, August 1986, p. 11-12.

B. OTHER EUROPEAN COUNTRIES

20. Austria. - 21. Eastern Europe. - 22. Finland. - 23. Norway. - 24. Sweden. - 25. Switzerland.

20. Austria

On October 1, 1979, the Federal Act of March 8, 1979, on Consumer Protection (*Konsumentenschutzgesetz*)[1] entered into force. The Act itself contains a number of provisions on unfair contract terms in consumer transactions. It also gives a number of important amendments to the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch: ABGB*). Since the Civil Code provisions, as amended, are at the basis of the control system, they will be given first.

Par. 864a contains a clause dealing with unusual standard contract terms. It reads as follows:

Bestimmungen ungewöhnlichen Inhaltes in Allgemeinen Geschäftsbedingungen oder Vertragsformblättern, die ein Vertragsteil verwendet hat, werden nicht Vertragsbestandteil, wenn sie dem anderen Teil nachteilig sind und er mit ihnen auch nach dem äusseren Erscheinungsbild der Urkunde, nicht zu rechnen brauchte; es sei denn, der eine Vertragsteil hat den anderen besonders darauf hingewiesen.	Unusual terms in general conditions or standard form contracts, which a party has used, do not become a part of the contract when they are disadvantageous to the other party and the other party, taking into consideration the circumstances and especially the appearance of the contractual document, did not have to reckon with the terms, unless the user has explicitly pointed them out to the other party.

The basis of the new control system is found in par. 879 of the Civil Code, as amended, the third section of which now reads:

Eine in Allgemeinen Geschäftsbedingungen oder Vertragsformblättern enthaltene Vertragsbestimmung, die nicht eine der beiderseitigen Hauptleistungen festlegt, ist jedenfalls nichtig, wenn sie unter Berücksichtigung aller Umstände des Falles einen Teil gröblich benachteiligt.	A term in general conditions or standard form contracts, which does not lay down one of the main duties of the two parties, is in any way void if, all the circumstances of the case taken into consideration, it is grossly disadvantageous to the other party.

These Civil Code provisions, which apply to all contracts, are

supplemented by a number of provisions in the Consumer Protection Act, which apply to consumer transactions only. The first of these provisions is par. 6, which sets out two list of clauses which are deemed to be void under par. 879 Civil Code:

Unzulässige Vertragsbestandteile	Contract terms which are not allowed
§ 6	§ 6
(1) Für den Verbraucher sind besonders solche Vertragsbestimmungen im Sinn des § 879 ABGB jedenfalls nicht verbindlich, nach denen	(1) The consumer is in particular not bound in the sense of § 879 Civil Code by contract terms whereby
1. sich der Unternehmer eine unangemessen lange oder nicht hinreichend bestimmte Frist ausbedingt, während deren er einen Vertragsantrag des Verbrauchers annehmen oder ablehnen kann oder während deren der Verbraucher an den Vertrag gebunden ist;	1. the supplier stipulates an unduly long or insufficiently precise period, during which he may accept or reject the consumer's offer or during which the consumer is bound by the contract;
2. ein bestimmtes Verhalten des Verbrauchers als Abgabe oder Nichtabgabe einer Erklärung gilt, es sei denn, der Verbraucher wird bei Beginn der hiefür vorgesehenen Frist auf die Bedeutung seines Verhaltens besonders hingewiesen und hat zur Abgabe einer ausdrücklichen Erklärung eine angemessene Frist;	2. a certain conduct of the consumer is considered a declaration or the failure to have made one, unless this is pointed out to the consumer at the beginning of the period which has been set therefore and he has a reasonable period for issuing an express declaration;
3. eine für den Verbrauder rechtlich bedeutsame Erklärung des Unternehmers, die jenem nicht zugegangen ist, als ihm zugegangen gilt, sofern es sich nicht um die Wirksamkeit einer an die zuletzt bekanntgegebene Anschrift des Verbrauchers gesendeten Erklärung für den Fall handelt, daß der Verbraucher dem Unternehmer eine Änderung seiner Anschrift nicht bekanntgegebn hat;	3. a declaration of the supplier to the consumer, which is of legal significance, is considered to have reached him, when this is not the case, in so far as this does not concern the effectiveness of a declaration sent to the last-mentioned address of the consumer, when the consumer has not given the supplier notice of his change of address;

4. eine vom Verbraucher dem Unternehmer oder einem Dritten abzugebende Anzeige oder Erklärung einer strengeren Form als der Schriftform oder besonderen Zugangserfordernissen zu genügen hat;

4. a notification or declaration which the consumer shall address to the supplier is made subject to stricter form requirements than writing or which contains special requirements as regards their receipt;

5. dem Unternehmer auf sein Verlangen für seine Leistung ein höheres als das bei der Vertragsschließung bestimmte Entgelt zusteht, es sei denn, daß die für die Erhöhung maßgebenden Umstände im Vertrag umschrieben sind und ihr Eintritt nicht vom Willen des Unternehmers abhängt;

5. the supplier may claim a higher price for his performance than was agreed at the conclusion of the contract, unless the grounds for the increase are stated in the contract and they are not dependent upon the will of the supplier;

6. das Recht des Verbrauchers, seine Leistung nach § 1052 ABGB bis zur Bewirkung oder Sicherstellung der Gegenleistung zu verweigern, für den Fall ausgeschlossen oder eingeschränkt wird, daß der Unternehmer seine Leistung nicht vertragsgemäß erbringt oder ihre Erbringung durch seine schlechten Vermögensverhältnisse, die dem Verbraucher zur Zeit der Vertragsschließung weder bekannt waren noch bekannt sein mußten, gefährdet ist, indem etwa das Leistungsverweigerungsrecht davon abhängig gemacht wird, daß der Unternehmer Mängel seiner Leistung anerkennt;

6. the consumer's right to refuse his performance under § 1052 Civil Code until the other performance has been brought about or is guaranteed, is excluded or limited in the case a supplier does not perform or his performance is threathened by his bad financial position which at the time the contract was concluded was neither known nor should be known to the consumer, to the extent that the consumer's right to refuse performance is made dependent upon a recognition by the supplier that his performance shows defects;

7. ein dem Verbraucher nach dem Gesetz zustehendes Zurückbehaltungsrecht ausgeschlossen oder eingeschränkt wird;

7. a consumer's legal right of retention is exempted or limited;

8. das Recht des Verbrauchers, seine Verbindlichkeiten durch Aufrechnung aufzuheben, für den Fall der Zahlungsunfähigkeit des Unternehmers oder für Gegenforderungen ausgeschlossen oder eingeschränkt wird, die im rechtlichen Zusammenhang mit der Verbindlichkeit des Verbrauchers stehen, die gerichtlich festgestellt oder die vom Unternehmer anerkannt worden sind;

8. the right of the consumer of set-off is excluded or limited in case the supplier is unable to pay or in case of counterclaims which are legally connected with the consumer's claim, which have been established by a court or which have been recognized by the supplier;

9. eine Pflicht des Unternehmers zum Ersatz eines Schadens für den Fall ausgeschlossen wird, daß er oder eine Person, für die er einzustehen hat, den Schaden vorsätzlich oder grob fahrlässig verschuldet hat;

9. the supplier's liability for intentionally or grossly negligently caused damages by himself or by someone for whom he stands is excluded;

10. der Unternehmer oder eine seinem Einflußbereich unterliegende Stelle oder Person ermächtigt wird, mit bindender Wirkung für den Verbraucher darüber zu entscheiden, ob die ihm vom Unternehmer erbrachten Leistungen der Vereinbarung entsprechen;

10. the supplier or an institution or person who is under his domain of influence is empowered to decide, with binding force vis-à-vis the consumer, whether or not the supplier's performance is in conformity with the agreement;

11. dem Verbraucher eine Beweislast auferlegt wird, die ihn von Gesetzes wegen nicht trifft;

11. the burden of proof is imposed upon the consumer, when the law does not do so;

12. die Rechte des Verbrauchers auf eine Sache die der Unternehmer zur Bearbeitung übernommen hat, in unangemessen kurzer Frist verfallen.

12. the consumer's rights, pertaining to an object which the supplier has taken receipt of in order to work on it, expire in an unduly short period;

(2) Sofern der Unternehmer nicht beweist, daß sie im einzelnen ausgehandelt worden sind, gilt das gleiche auch für Vertragsbestimmungen nach denen

(2) Insofar as the supplier does not prove that they have been negotiated individually, the same applies to contract terms whereby

1. der Unternehmer ohne sachliche Rechtfertigung vom Vertrag zurücktreten kann;

1. the supplier may retreat from the contract without real justification;

2. dem Unternehmer das Recht eingeräumt wird, seine Pflichten oder den gesamten Vertrag mit schuldbefreiender Wirkung einem Dritten zu überbinden, der im Vertrag nicht namentlich genannt ist;	2. the right is reserved for the supplier to hand over his obligations or the whole contract, with liberating force, to a third party who is not mentioned in the contract by name;
3. der Unternehmer eine von ihm zu erbringende Leistung einseitig ändern oder von ihr abweichen kann, es sei denn, die Änderung beziehungsweise Abweichung ist dem Verbraucher zumutbar, besonders weil sie geringfügig und sachlich gerechtfertigt ist;	3. the supplier may alter the performance to be rendered by him or deviate from it unilaterally, unless the alteration or deviation may be attributed to the consumer, notably while it is insignifant and justified;
4. dem Unternehmer auf sein Verlangen für seine innerhalb von zwei Monaten nach der Vertragsschließung zu erbringende Leistung ein höheres als das ursprünglich bestimmte Entgelt zusteht;	4. the supplier may claim for his performance, to be rendered within two months of the conclusion of the contract, a higher price than was originally agreed upon;
5. eine Pflicht des Unternehmers zum Ersatz eines Schadens an einer Sache, die er zur Bearbeitung übernommen hat, ausgeschlossen oder beschränkt wird.	5. the supplier's obligation to compensate damages to an object which he has received for work is excluded or limited.

When comparing these lists with those of the German Act, it must be taken into account that the Austrian Law also contains a number of mandatory provisions which cover the same area as the German black lists. Thus, § 15 of the *Konsumentenschutzgesetz* deals with the length and the cancellation of long-term contracts, a matter which in the German Act is only treated from the point of view of contract terms (§ 11 Nr 12).

The second Chapter of the Austrian Law provides for an abstract control procedure:

II. Hauptstück	Second Chapter
Verbandsklage	Collective action
Unterlassungsanspruch	Injunction
§ 28	§ 28

Wer im geschäftlichten Verkehr in Allgemeinen Geschäftsbedingungen, die er von ihm geschlossenen Verträgen zugrunde legt, oder in hierbei verwendeten Formblättern für Verträge Bedingungen vorsieht, die gegen ein gesetzliches Verbot oder gegen die guten Sitten verstoßen, kann auf Unterlassung verklagt werden.	He who in commercial trade in general conditions, which he uses in the contracts concluded by him, or in forms used thereby lays down clauses, which are contrary to a legal prohibition or to public policy, may be sued for a cease and desist order.
Klageberechtigung	Right of action
§ 29	§ 29
Der Anspruch kann von der Bundeskammer der gewerblichen-Wirtschaft, dem Österreichischen Landarbeiterkammertag, der Präsidentenkonferenz der Landwirtschaftskammern Österreichs, dem Österreichischen Gewerkschaftsbund und dem Verein für Konsumenteninformation geltend gemacht werden.	The action may be instituted by the National Chamber of Commerce, the Austrian Labour Council, the Austrian Farm Labourer's Council, the Conference of Austrian Agricultural Boards, the Austrian Trade Union and the Association for Consumer Information.

21. Eastern Europe

Eastern Europe has a long tradition in the use of general contract terms, even when one bears in mind that not all so-called general conditions of the East would qualify as such in the West. The COMECON General Conditions for instance are not contract terms at all, but rather constitute a Convention comparable to the Hague Conventions on the International Sale of Goods or the Vienna Convention on the same subject. Still, general contract terms in our terminology also play an important role in Eastern Europe[2]. On the other hand, the need for specific consumer protection has long been denied in the East. Consumers should be protected from capitalists and since there is no capitalism in socialist countries, no consumer protection is needed either. This way of thinking is now considered out of date and East European lawyers and politicians have accepted that the consumer movement is something which pervades all societies which have reached a certain development stage[3]. Here, however, lies another problem when comparing East and West. As a Polish author has pointed out, the East is a group of economies where supply of goods and services is still scarce[4].

As a result, consumers will hardly be satisfied with indemnifications but will prefer specific performance.There are of course more reasons to be rather hesitant when comparing developments as to unfair contract terms in consumer contracts in East and West. I shall therefore limit myself to mention some provisions in recently enacted statutes.

First of all, article 209 of the 1977 Civil Code of Hungary reads as follows[5]:

1. If a legal person, when concluding a contract, uses unilaterally established general conditions which ensure him unwarranted unilateral benefit, the State agency or social organization empowered by a special rule may impugn the prejudicial term thereof before the court.
2. If the impugnment is justified, the court may declare the prejudicial term void *erga omnes*. The declaration of voidness does, however, not affect contracts already performed.
3. If a contract concluded on the basis of general contract conditions grants a unilateral unwarranted benefit to a legal person, the party thereby suffering prejudice may impugn the contract.

Another example is art. 143 of the Act of Obligations 29/1978 of Yugoslavia, which came into force on October 1, 1978[6]:

1. Provisions in general conditions which are contrary to the very purpose of a concluded contract or to good business practices are invalid even if the general conditions therein have been approved by the competent authorities.
2. The court can reject the application of specific provisions in general conditions which deprive the other party of the right to objection, or those whereby the other party loses rights laid down in the contract or its terms, or which are otherwise unfair or too rigid.

Art. 100 of the Act codifies the well-known *contra proferentem* rule[7]:

In a case in which a contract has been entered into under conditions printed in advance or the contract has been prepared in another manner and proposed by one of the contracting parties, unclear provisions of the said contract are to be interpreted in favour of the other party.

22. Finland

Finland has a modern consumer protection law since 1978. Chapter 3 of the Law of January 20, 1978, Nr. 38 comprises four sections on contract terms. The text given below is in Swedish, one of the official languages of Finland. The text closely follows the draft

text, set out in my 1977 Report; only some slight grammatical changes have been made.The English translation is mine[8]

1 §
Näringsidkare får ej vid utbud av konsumtionsnyttigheter använda avtalsvillkor, som med beaktande av priset för konsumtionsnyttighet och av övriga på saken verkande omständigheter bör anses som oskäligt mot konsumenterna.

§ 1
A merchant offering consumer goods may not make use of any contract term which, taking into account the price of the article and other circumstances which are relevant, is to be considered unfair towards consumers.

2 §
Näringsidkare kan, om det med hänsyn till konsumentskyddet är erforderligt, förbjudas att använda avtalsvillkor, som strider mot 1 §, eller ånyo använda sådant eller därmed jämförbart avtalsvillkor. Förbudet skall förstärkas med vite, om ej detta av särskilt skäl är obehövligt. Förbudet kan, om särskilt skäl därtill föreligger, meddelas att gälla även person, som är anställd hos ovan i 1 mom. avsedd näringsidkare, eller annan, som handlar för dennes räkning.

§ 2
A merchant may be ordered, if this is necessary from a consumer protection point of view, to cease and desist from using any contract term, which is contrary to par. 1, or from using such contract term or a term similar thereto again. The prohibition-order shall be reinforced by the conditional imposition of a fine, unless for a special reason this is unnecessary. The prohibition-order may, if there is a special reason also be imposed on a person employed by the merchant, referred to the first alinea,or to some other person acting on his account.

3 §
Förbud, som avses i 2 §, meddelas av marknadsdomstolen. Marknadsdomstolen kan även meddela förbud temporärt, varvid förbudet gäller tills saken är slutligt avgjord.

§ 3
The prohibition-order referred to in par. 2 is given by the Market Court. The Market Court may also give a temporary prohibition-order, whereby the prohibition is valid until the matter has been settled finally.

Konsumentombudsmannen kan meddela i 2 § avsett förbud eller meddela förbud temporärt i enlighet med vad som är stadgat i lagen om konsumentombudsmannen (40/78).

The Consumer Ombudsman may issue the prohibition-order referred to in par. 2 or give a temporary prohibition in accordance with the Consumer Ombudsman Act (40/78).

4 §

§ 4

Med hänsyn till konsumentskyddet övervakas användningen av avtalsvillkor av konsumentombudsmannen. Om marknadsdomstolen och behandlingen av ärenden i denna är, förutom vad ovan sagts, stadgat i lagen om marknadsdomstolen (41/78).

From a consumer protection point of view the use of contract terms is supervised by the Consumer Ombudsman. The Market Court and the procedure following complaints before it, apart from what is said above, are regulated in the Market Court Act (41/78).

The control system closely follows the Swedish model, which will be discussed shortly. A difference is that in its Chapter 4 the Finnish Act also contains a general clause (par. 1), which reads as follows:

Är pris, vilket grundar sig på avtal som avses i denna lag, oskäligt med hänsyn till konsumtionsnyttighetens kvalitet och den allmänna prisnivån, kan det jämkas. Är annat avtalsvillkor i sådant avtal oskäligt mot konsumenten, kan det jämkas eller lämnas utan avseende.
Har i 1 mom. avsett avtalsvillkor sådan betydelse för avtalsförhållandet, att det icke skäligen kan fordras att avtalet, sedan villkoret jämkats, förblir i kraft i övrigt oförändrat, kan avtalet även i annat hänseende jämkas om det icke helt skall förfalla.

If the price in a contract envisaged in this Act, taking into account the price of the article or service and the general price level, is unfair, it may be adjusted. If any other term in such contract is unfair towards consumers, it may be adjusted or disregarded.

If a contract term envisaged in subsection 1 of this section is of such importance to the contractual relationship that it cannot reasonably be required that after the adjustment of a term the remainder of the contract will be in force unaltered, the contract may also be adjusted in other respects,if not held totally null and void.

In 1982, the Contracts Act was amended, so as to include another quite similar general clause, par. 36, this one not limited to consumer contracts. This clause reads as follows:

Är villkor i rättshandling oskäligt eller skulle dess tillämpning leda till oskälighet, kan villkoret antingen jämkas eller lämnas utan avseende. Vid prövning av oskäligheten skall beaktas rättshandlingens hela innehåll, parternas ställning, förhållandena då rättshandlingen företogs och därefter sam övriga omständigheter.	If a contract term is unfair or if its application would be unfair, the term may either be adjusted or disregarded. When considering whether the term is unfair, there shall be taken into account the whole contents of the contract, the situation of the parties, their conduct at the time the legal act was concluded and thereafter as well as the other circumstances.
Är i 1 mom. avsett villkor sådant att det till följd av jämkningen av villkoret inte är skäligt att avtalet i övrigt oförändrat förblir i kraft, kan avtalet jämkas även till övriga delar eller förordas att förfalla.	If a contract term envisaged in the first subsection is such that because of the adjustment of the term it is not fair that the remainder of the contract keeps its force, the remainder of the contract may be adjusted or the contract may be avoided.
Såsom villkor i rättshandling betraktas även utfästelse om beloppet av vederlag.	Just like a contract term in a legal act shall be treated an obligation to the extent of the other party's performance.

In the Explanatory Memorandum a number of clauses is given, which are always to be considered unfair[9]. This list has been inspired by the Council of Europe Resolution's list of clauses. By Act of May 23, 1986, Nr 385, the Consumer Protection Act (*Konsumentskyddslag*) was amended in order to encompass a Chapter on consumer credit. The new chapter has no direct effect on the control of contract terms. An earlier amendment extending the Act's scope of application to small houses and other dwellings used for did have an effect upon the chapter on contract terms.

23. Norway

Norway introduced a control system for unfair contract terms in its legislation by Act of December 18, 1981, Nr. 90. The Act has resulted in the incorporation of two new paragraphs and the amendment of three others in the Marketing Practices Act (*Markedsføringslov*) of June 16, 1972, Nr. 47 as well as in the change of the name of the Act into the Act relating to Control of Marketing and Contract Terms and Conditions (*Lov om kontroll med*

markedsføring og avtalevilkår).

The paragraphs concerned, together with the official English translation, read as follows:

Kapittel II. Kontroll med avtalevilkår.	Chapter II. Supervision of contract terms and conditions.
§ 9a. Urimelige avtalevilkår.	§ 9a. Unreasonable contract terms and conditions.
Vilkår som nyttes eller tilsiktes nyttet i naeringsvirksomhet overfor forbrukere kan forbys når de finnes urimelige overfor forbrukere og det finnes at forbud tilsies av allmenne hensyn. Ved rimelighetsvurderingen skal det legges vekt på hensynet til balanse mellom partenes rettigheter og plikter og på hensynet til klarhet i kontraktsforhold.	Terms and conditions which are used or are meant to be used in the conduct of business with consumers may be prohibited if the terms and conditions are deemed unreasonable in relation to consumers and if general considerations call for such prohibition. When evaluating whether a contract's terms and conditions are unreasonable, emphasis shall be placed upon the balance between the parties' rights and obligations, and whether the terms and conditions are clearly defined.
§ 9b. Virkeområde	§ 9b. Scope of application
Bestemmelsene i dette kapittel gjelder ikke for lønns- og arbeidsvilkår i tjeneste hos andre. Kongen kan gi naermere regler om at bestemmelsene i dette kapittel heller ikke skal gjelde for andre spesielle kontraktsforhold.	This chapter does not apply to labour and wage conditions between employer and employee. The King may decide that the rules in this chapter shall not apply to other special contractual obligations.

The substantive law provision of par. 9a is supplemented by a control procedure laid down in the following paragraphs:

§ 12. Markedsrådets vedtak.	§ 12. Decisions by the Market Council.

Markedsrådet kan forby en handling som rådet finner er i strid med en bestemmelse gitt i eller i medhold av kapittel I, når det finner at inngrep tilsies av hensyn til forbrukerne, eller, i forhold til § 1 annet ledd, av hensyn til likestilling mellom kjønnene. Markedsrådet kan også forby part for Markedsrådet å bruke vilkår som nevnt i kapittel II eller foreta handlinger som tilsikter slik bruk. Markedsrådet kan gi påbud om de tiltak rådet finner er nødvendige for å sikre at forbudet overholdes.
Markedsrådet er vedtaksført når formannen eller varaformannen og minst 4 andre medlemmer eller varamenn er til stede. Vedtak treffes ved alminnelig flertall. Ved stemmelikhet er formannens stemme avgjørende.
Vedtak skal grunngis samtidig med at det treffes.
Markedsrådets vedtak kan ikke påklages.

The Market Council may prohibit an act which the Council deems a violation of a provision laid down in or pursuant to Chapter I, if it finds that such intervention is necessary in the interests of the consumers or, pursuant to § 1, second paragraph in the interest of equality of the sexes. The Market Countil may also forbid the party for the Market Council to use terms and conditions envisaged in Chapter II or to engage in actions aimed at such use. The Market Council may order such measures as it deems necessary to ensure that the actions come to an end and the prohibition is respected.
The Market Council forms a quorum when the chairman or the vice-chairman and at least 4 other members or deputies are present. Decisions are made by simple majority. In the event of a tie, the chairman shall have the casting vote.
The Market Council shall state reasons when adopting a decision. There is no administratieve appeal against the decisions of the Market Council.

§ 13. Forbrukerombudet.

Forbrukerombudet skal, ut fra hensynet til forbrukerne, føre tilsyn med at det ikke skjer markedsmisbruk i strid med en bestemmelse gitt i eller i medhold av kapittel I.
Forbrukerombudet skal videre ut fra hensynet til likestilling mellom kjønnene, særlig med vekt på hvordan kvinner framstilles, føre tilsyn med at bestemmelse i § 1 annet ledd ikke overtres.

§ 13. The Consumer Ombud

The Consumer Ombud shall in the interest of the consumers seek to prevent market abuses that infringe the provisions prescribed by or pursuant to Chapter I of this Act. Further, the Consumer Ombud shall, in the interests of equality between the sexes, with particular emphasis on how women are portrayed, ensure that the provisions in § 1, second paragraph, are not violated.

Ombudet skal av eget tiltak eller på grunnlag av henvendelser fra andre søke å påvirke alle næringsdrivende til å innrette sin virksomhet etter disse bestemmelser. Forbrukerombudet skal også føre tilsyn med, og gjennom forhandlinger med næringsdrivende eller deres organisasjoner bidra til, at vilkår som nevnt i kapittel II, ikke nyttes til skade for forbrukerne.

The Consumer Ombud shall, acting on own initiative, or on the basis of communications from others, urge all entrepreneurs to conduct their operations in conformity with the provisions of this Act. The Consumer Ombud shall also ensure that the terms and conditions envisaged in Chapter II are not used in any way injurious to consumers, and through negotiations with the entrepreneurs or their organizations, contribute to this.

Dersom frivillig ordning ikke oppnås, kan Forbrukerombudet forelegge saken for Markedsrådet til avgjørelse etter § 12. Beslutter Forbrukerombudet ikke å bringe en sak inn for Markedsrådet, kan den bringes inn av en næringsdrivende eller person som berøres av handlingen eller vilkåret, eller av en sammenslutning av næringsdrivende, forbrukere eller lønnstakere.

In cases where voluntary compliance is not obtained, the Consumer Ombud may submit the case to the Market Council for decision in accordance with § 12. Where the Consumer Ombud decides not to submit a case to the Market Council, it may be submitted by an entrepreneur or a consumer who is affected by the act or by the terms and conditions, or by an association of entrepreneurs, consumers or wage-earners.

§ 14. Forbrukerombudets vedtak

§ 14. Decisions by the Consumer Ombud

Dersom Forbrukerombudet ikke oppnår frivillig ordning og ombudet for en sak etter kapittel I eller kapittel II antar at det vil medføre ulempe eller skadevirkning å påvente Markedsrådets vedtak, kan Forbrukerombudet treffe vedtak om forbud som nevnt i § 12 første og annet punktum. Det samme gjelder for sak etter kapittel II dersom Forbrukerombudet anser vilkåret i det vesentlige identisk med et vilkår som Markedsrådet tidligere har ansett for urimelig.

Where the Consumer Ombud cannot obtain a voluntary arrangement and in a case pursuant to Chapter I or Chapter II he deems that inconvenience or harmful effects would result from waiting for a decision by the Market Council, the Consumer Ombud may lay down a prohibition as mentioned in § 12, sentences 1 and 2. The same applies for a case pursuant to Chapter II if the Consumer Ombud deems the term and condition to be essentially similar to a term and condition which the Market Council previously has deemed unreasonable.

Forbrukerombudet skal grunngi vedtaket samtidig med at det treffes. Ombudet skal underrette Markedsrådet om vedtaket. Vedtaket kan påklages til Markedsrådet. Markedsrådet kan kreve at Forbrukerombudet bringer nærmere bestemte saker inn for Markedsrådet.	The Consumer Ombud shall give his grounds at the same time as he makes a decision. He shall notify the Market Council of his decision. The decision may be appealed to the Market Council. The Market Council may request the Consumer Ombud to submit specific cases to the Market Council.

The new law as it now reads, differs only slightly from the draft bill submitted by the Broch Commission in December 1986[10]. I have given the text of the draft bill, together with my own translation into English, in my 1977 Report.

As in the other Nordic countries, the contracts law has been amended later. Par. 36 of the *Avtaleloven* of 1918 now reads[11]:

1. En avtale kan helt eller delvis settes til side eller endres for så vidt det ville virke urimelig eller vaere i strid med god forretningsskikk å gjøre den gjeldende. Det samme gjelder ensidig bindende disposisjoner.	1. A contract may wholly or partially be set aside or adjusted in so far as it would be unfair or would be contrary to practices of fair conduct to enforce it. The same applies to unilaterally binding dispositions.
2. Ved avgjørelsen tas hensyn ikke bare til avtalens innhold, partenes stilling og forholdene ved avtalens inngåelse, men også til senere inntrådte forhold og omstendighetene for øvrig.	2. In applying this provision consideration shall not only be given to the contents of the contract, the position of the parties and the circumstances at the time the contract was concluded, but also to later relations and to other circumstances.
3. Reglene i første og annet ledd gjelder tilsvarende når det ville virke urimelig å gjøre gjeldende handelsbruk eller annen kontraktrettslig sedvane.	3. The first and the second subsection apply also when it would be unfair to enforce current commercial usages or other elements of contract law.

Norway is now awaiting the entry into force of a new Sale of Goods Act[12].

24. Sweden.

Sweden has long been acknowledged as a nation with an advanced

consumer protection. This holds true in the area of unfair contract terms anyway. In 1971 a control system was introduced, which was then novel for Western Europe - although Israel may have paved the way[13]. The other Nordic countries - Denmark, Finland, Norway - have all taken Swedish legislation as an example. Indirectly, the Swedish control system may also have inspired other legislation in Western Europe, among others through the Council of Europe resolution (76) 47 on unfair contract terms. The Swedish control system served as a model for this resolution, which has influenced legislation in among others Austria, France, Luxemburg, the Netherlands and Portugal.

In my 1977 Report, I have provided detailed information as to the control system, the Consumer Ombudsman (*Konsumentombudsman*) and the Market Court (*marknadsdomstolen*), as well as the general clause, which in Sweden was enacted at a later stage. In this report, for sake of clarity, I shall give the text of the 1971 Act prohibiting unfair terms in consumer contracts as amended, as well as the general clause.

The scope of the Swedish control legislation is limited to consumer transactions. This is apparent from art. 1 of the Act of 30 April 1971 prohibiting improper terms of contract[14]:

Är villkor, som näringsidkare i sin yrkesmässige verksamhet använder vid erbjudande av vara, tjänst eller annan nyttighet till konsument för huvudsakligen enskilt bruk, med hänsyn till vederlaget och övriga omständigheter att anse som oskäligt mot konsumenten, kan marknadsdomstolen, om det är pakallat fran allmän synpunkt, meddela näringsidkaren förbud att framdeles i liknande fall använda samma eller väsentligen samma villkor. Förbud skall förenas med vite, om-ej detta av särskilda skäl är obehövligt.

If a supplier, when offering a commodity, a service or another object to a consumer for personal use, applies a term which, in regard to the payment and other circumstances, is to be considered unfair towards the consumer, the Market Court may, if this is called for from a public point of view, issue an injunction prohibiting the supplier from using that term or in the main the same term in similar cases in the future. The injunction shall be issued under penalty of a fine, insofar as such action is not considered unnecessary in view of special reasons.

Första stycket äger motsvarande tillämpning pa villkor som näringsidkare i sin yrkesmässiga verksamhet använder vid förmedling fran näringsidkare eller annan av erbjudande som avses i första stycket.	The provisions of the first paragraph shall apply correspondingly if an entrepreneur offers a consumer the right of use of personalty against payment.
Förbud kan meddelas även anställd hos näringsidkaren och annan som handlar på dennes vägnar.	An injunction may also be issued to an employee of a supplier and to any other person who is acting on his behalf[15].

This section has been amended several times since 1971. The first time was to change the adjective "otillbörlig" (improper) into "oskäligt"[16]; it was considered that this change might leave the Consumer Ombudsman more freedom in his negotiations with trade organizations[17]. The second amendment, by Act of 9 June 1977, added the words "eller annan nyttighet" (or another object) in the opening sentence[18]. This change is of importance, since it means that real property - included in the concept of "nyttighet"[19] - now also falls within the scope of the Act.
A limitation of the scope of the Act will be found in article 2, according to which the Act shall not apply to activities which are under the supervision of the Bank Inspection Board or the National Private Insurance Supervisory Service in Sweden; at the occasion of the introduction of the Consumer Insurance Act in 1980, a further extension of the scope of the Act of 1971 to insurance conditions has been discussed but finally been rejected. A further limitation of the field of application is that the *prices* of goods and services are not covered by the Act[20].

Art. 1 does not give a *definition* of standard terms; indeed it has not been necessary for the legislature to lay down a precise definition, since the enforcement of the Act is left to public officials who have a wide discretionary power. Still art. 1 does not seem to allow an injunction prohibiting the use of an *individual* term: the words "if so is called for from a public point of view" would not but exceptionally permit an injunction against the use of such a term[21].
Questions concerning the issuing of an injunction under Article 1

shall be considered upon application. Such an application shall be made by the Consumer Ombudsman. If in a certain case the Consumer Ombudsman decides not to file an application, any association of entrepreneurs, consumers or employees may file an application (art. 3).
Under art. 3a, as amended by the 1977 Act, the supplier shall give the Consumer Ombudsman the information he wants.
Decisions concerning the issuing of an injunction shall constitute no obstacle to reconsideration of the matter, when changed conditions or other special reason give cause for it (art. 4). If special reasons give cause for it, an injunction may be issued also in respect of the period before a final decision is reached (art. 5).
Questions concerning the issuing of an injunction in cases which are not of great importance, may be tried by the Consumer Ombudsman by submitting to the entrepreneur a cease and desist order for acceptance.
If such an order has been accepted it shall have the effect of an injunction issued by the Market Court. An acceptance which takes place after the expiration of the time set out in the order submitted, however, is null and void. Further provisions governing cease and desist orders are issued by the King-in-Council (art. 6). Proceedings for the imposition of a fine shall be instituted in an ordinary Court of Law by the prosecutor. Such proceedings may be instituted only after notification by the Consumer Ombudsman or by any other person who has applied to the Market Court for the injunction (art. 7).
For the sake of completeness, it should be mentioned that in 1984 legislation similar to the 1971 Act has been enacted for commercial contracts[22]. At this occasion, the name of the 1971 Act was changed into "Lag om förbud mot oskäliga villkor i avtal med konsumenter" (Act prohibiting unfair terms in consumer contracts). The "Lag om förbud mot oskäliga villkor i avtal mellan näringsidkare" (Act prohibiting unfair terms in contracts between businessmen) provides the following.

Under section 1, if a tradesman, when he concludes or intends to conclude a contract with another tradesman, demands a contract term which is to be considered as improper on the part of the other tradesman, the Market Court may issue an injunction prohibiting the tradesman from using that term or in the main the

same term in similar cases in the future. An injunction may also be issued to any employee of the tradesman or to any other person who is acting on his behalf.

The provisions of the first paragraph shall not apply to activities which are under the supervision of the Bank Inspection Board or the National Private Insurance Supervisory Services.

In pursuance of section 2, when deciding whether or not a term is to be considered as improper special consideration shall be given to the need for protection of the person who assumes an inferior position in the contract relationship.

An injunction shall be issued only if it is called for from a public point of view.

Questions concerning the issuing of an injunction shall be considered upon an application, according to section 3.1 Such an application shall be made by an association of tradesmen or by an individual tradesman against whom the term in question had been directed.

Decisions concerning the issuing of an injunction shall constitute no obstacle to reconsideration of the matter in question, where altered circumstances or other special reasons give cause for it (section 4).

An injunction shall be issued under penalty of a fine, unless for special reasons this is deemed unnecessary.

Proceedings for the imposition of a fine shall be instituted in an ordinary court of law by the person who has applied for the injunction (section 5).

Consumer Ombudsman

One of the major innovations of Swedish consumer protection legislation has been the establishment - in 1970 - of a Consumer Ombudsman, a public official who watches that the consumer protection legislation does not remain a law-in-the-books. In the area of standard terms this means that he actively engages himself in negotiations of standard terms with trade organizations in order to obtain better terms for consumers. Swedish legislation contains surprisingly few provisions dealing with the Consumer Ombudsman.

Art. 11 of the Market Court Act of 29 June 1970 merely declares: For questions concerning restraint of competition there shall be a Freedom of Commerce Ombudsman (*Näringsfrihetsombudsman*), and for questions concerning marketing practices, there shall be a Consumer Ombudsman (*Konsumentombudsman*). Each Ombudsman shall be appointed by the King-in-Council for a specified term and shall be legally

qualified. More is to be found in the *Instruktion för Konsument-ombudsmannen*[23]. This instruction leaves the Consumer Ombudsman a large measure of freedom; only in cases of a fundamental nature or of large practical interest shall he turn directly to the Market Court. In 1976 the institutions Consumer Ombudsman and National Board for Consumer Policy (*Konsumentverket*) were integrated. Accordingly, the Consumer Ombudsman instruction was amended[24]. The Consumer Ombudsman should not be mixed up with the Parliamentary Ombudsman (*Justitieombudsman*), who is a public official appointed by *Parliament* to look after the observance of the law by other public officials and magistrates -including the Consumer Ombudsman. This institution, which dates from 1809[25], has proven so succesfull that it has been copied in several unrelated areas. The new Ombudsmen differ from *the* Ombudsman in that they are nominated - and may be dismissed - by the King. The Consumer Ombudsman is also different in this regard that he does not deal with individual cases, but only with collective problems. Unlike his Finnish counterpart, the Consumer Ombudsman may not even take an individual case to court when the general interest would require this.

Market Court

Unlike the Consumer Ombudsman the Market Court, its composition, its competence, its procedural rules, are extensively dealt with in the Market Court Act[26]. The most important provisions are those set out in articles 1-10.

In my 1977 Report, I have provided a full translation of the Market Court Act. Meanwhile, the Court has been entrusted with new powers concerning contract terms in commercial contracts. This has necessitated a change in the text of the law, which however does not affect the Court's control of consumer contracts[27]

The Market Court is not a completely novel institution. The composition is borrowed from the Labour relations court, which ever since its establishment in 1928 has employer-members and employee-member. The direct predecessor ot the Court, the Board for restrictive trade practices (1968), was also composed along such lines. The Market Court itself was first called Market Board, but partly in order to enhance its standing the name was change to

Market Court.

Civil law effect

The 1971 Act does not contain any provisions dealing with the civil law effects of a cease-and-desist order. By Act of 22 April 1976 several private law acts were amended so as to provide such effects. The most important change is the addition of a new article 36 to the Swedish Contract Law[28]. This provision, which in an earlier form was drafted by the Hellner committee[29], reads as follows:

36 § 1 . Avtalsvillkor får jämkas eller lämnas utan avseende, om villkoret är oskäligt med hänsyn till avtalets innehåll, omständigheterna vid avtalets tillkomst, senare inträffade förhållan om omständigheterna i övrigt. Har villkoret sådan betydelse för avtalet att det icke skäligen kan krävas att detta i övrigt skall gälla med oförändrat innehåll, får avtalet jämkas även i annat hänseende eller i sin helhet lämnas man avseende.	1. A contract clause is set aside or regarded as unwritten when the clause is unfair, taking into consideration the contents of the contract, the circumstances concerning the conclusions of the contract, later negotiations and other circumstances. If the clause is of such importance for the contract that it would not be fair to demand that the remainder of the contract shall be valid with unchanged contents, the contract may also be modified in other regards or be left out of consideration.
2.Vid prövning enligt första stycket skall särskild hänsyn tagas till behovet av skydd för den som i egenskap av konsument eller eljest intager en underlägsen ställning i avtalsförhållandet.	2. As to the investigation in accordance with the first subsection special attention shall be paid when one of the parties is a consumer or someone who finds himself in an underlying position.
3. Första och andra styckena äga motsvarande tillämpning i fråga om villkor vid annan rättshandling än avtal.	3. The first and the second subsection also apply to clauses in other legal acts.

At first sight it will not be clear that this general clause has been drafted with especially unfair *standard* terms in mind. From the preparatory report however it is apparent that the clause is meant to enable the ordinary court to do what the Market Court is empowered to do under the 1971 Act. The report mainly goes into the case when the ordinary court has to decide on the validity of

a clause which has been prohibited by the Market Court. The report presumes that the ordinary court will follow such decisions of the Market Court, even when the Market Court prohibition concerns the general conditions of a different supplier.

25. Switzerland

Whereas in my 1977 Report I could refer to Switzerland as the only West European country which expressly had adopted a policy of not introducing legislation specifically aimed at controlling unfair contract terms, this situation has since changed. The newly adopted *Loi fédérale contre la concurrence déloyale* (Unfair Trading Practice Act) of December 19, 1986, FF 1987, I, 27, as a result, contains some provisions on standard form contracts which will be set out below.

In a motion introduced in Swiss Parliament by the representative Alder on December 13, 1978, the introduction into the Swiss Law of Obligations (*Obligationenrecht*) of a new title on standard form contracts was requested. In line with its suggestions in the policy statement made in answer to Parliamentary questions as to the implementation of the Council of Europe's resolution 76 (47) on unfair contract terms, the Swiss government had already hinted instead at the possibility of amending the Unfair Trading Practices Act. A commission of experts then submitted a draft bill in 1980, which envisaged a general clause on unfair contract terms, to be incorporated in the Unfair Trading Practices Act, as well as an injunction by consumers' organizations. In 1983, the Swiss government submitted a bill to Parliament, in which the experts' recommendations were basically followed, apart from the fact that in the government bill only the content of the standard form contracts was to play a role and not the question whether or not the other party is aware of this. In 1985, it was suggested to limit the scope of application of the provisions on unfair contract terms to consumer transactions. This suggestion was rejected. As will be seen, the text is limited to standard form contracts (which, however, the Act does not give a definition of).
The relevant provisions read as follows:

Art. 8. Utilisation de conditions commerciales abusives.

Agit de façon déloyale celui qui, notamment, utilise des conditions générales préalablement formulées, qui sont de nature à provoquer une erreur au détriment d'une partie contractante et qui:
a. Dérogent notablement au régime légal applicable directement ou par analogie, ou
b. Prévoient une répartition des droits et des obligations s'écartant notablement de celle qui découle de la nature du contrat.

Section 2: Qualité pour agir

Art. 9. Principe

1. Celui qui, par un acte de concurrence déloyale, subit une atteinte dans sa clientèle, son crédit ou sa réputation professionnelle, ses affaires ou ses intérêts économiques en général ou celui qui en est menacé, peut demander au juge:
a. De l'interdire, si elle est imminente;
b. De la faire cesser, si elle dure encore;
c. D'en constater le caractère illicite, si le trouble qu'elle a créé subsiste.

2. Il peut en particulier demander qu'une rectification ou que le jugement soit communiqué à des tiers ou publié.

3. Il peut en outre, conformément au code des obligations, intenter des actions en dommages-intérêts et en réparation du tort moral, ainsi qu'exiger la remise du gain selon les dispositions sur la gestion d'affaires.

Art. 8. Use of unfair commercial terms.

Acts unfairly he who in particular uses general conditions formulated in advance, which are of a nature to bring the other party into an error and which:

a. Derogate notably from the law which is applicable directly or by way of analogy, or
b. Provide for a repartition of rights and obligations which notably departs from what follows from the nature of the contract.

Section 2: Quality to file an action

Art. 9. Principle

1. He who by an act of unfair trading suffers a loss of customers, in his credit rating or his professional reputation, his affairs or his economic interests in general, or he who is threatened in this regard, may request the court:
a. For an injunction, if the act is imminent;
b. For an order of cessation, if the act still continues
c. To declare the act illegal, if the disadvantage which it has created subsists.

2. In particular he may request a rectification or the communication to third parties or the publication of the Court's decision.

3. He may also, in conformity with the Code of Obligations, file an action for damages and for reparation of moral damages, as well as for delivery of the profits according to the provisions on business practices.

Art. 10. Actions de clients et d'organisations.

1. Les actions prévues à l'article 9 peuvent aussi être intentées par les clients dont les intérêts économiques sont menacés ou lésés par un acte de concurrence déloyale.

2. Les actions prévues à l'article 9, 1er en 2e alinéas, peuvent en outre être intentées par:
a. Les associations professionnelles et les associations économiques que leurs statuts autorisent à défendre les intérêts économiques de leurs membres;
b. Les organisations d'importance nationale ou régionale qui se consacrent statutairement à la protection des consommateurs.

Art. 10. Actions of clients and of organizations.

1. The actions envisaged in article 9 may also be instituted by clients the economic interests of whom are menaced or infringed by an act of unfair competition.

2. The actions envisaged in article 9, paragraphs 1 and 2, may also be instituted by:

a. The professional organizations and the economic organizations, the statutes of which authorize them to protect the economic interests of their members;
b. The organizations of national or regional importance, which under their statutes devote themselves to consumer protection.

1. *BundesGesetzblatt* 1979, Nr 140.

2. See the survey in my thesis Standaardvoorwaarden, Deventer 1978, Nrs 103-108.

3. E. Łetowska, Control of illegal and irregular practices from the point of view of consumer protection policy, in: Rapports polonais présentés au douzième congrès international de droit comparé, Vrocław 1986, 55.

4. *Ibidem.*

5. The translation is taken from G. Eörsi, Le condizioni generali di contratto nell'esperienza ungharese, in: C.M. Bianca (ed.), Le condizioni generali di contratto, vol, I, Milano 1979, 245, 250.

6. The translation is taken from P. Sarcević, Standard forms and general conditions, in: C.C.A. Voskuil and J.A. Wade (eds), Hague-Zagreb Essays 4/on the law of international trade, The Hague 1983, 135, 138.

7. Sarcević (previous note) at 139.

8. A commercial English translation by the Helsinki Law Office Arne Therman & Co has been published in 1978 by Keijo Heinonen Ky, P.O.Box 176, 00251 Helsinki 25, Finland.

9. Reg. prop. 247/1981, p. 14.

10. Standardkontrakter, Norges Offentlige Utredninger, Oslo/Bergen/Tromsø 1976: 61.

11. See Formuerettslig lempningsregel, Norges Offentlige Utredninger, Oslo/Bergen/Tromsø 1979: 32; and Ot prp nr. 5 (1982-93).

12. Ot prp nr. 80 (1986-87), A. Kjøpslov. B. Lov om samtykke til ratifikasjon av FN-konvensjonen om kontrakter for internasjonale løsørekjøp.

13. In several discussions with Scandinavian lawyers who have participated in the preparation of unfair contract terms legislation, I have questioned about any Israeli influences. All denied any such influence. Still, one cannot deny that the Israeli Standard Contracts Law 1964, the predecessor of the present Act, must have been known among well-informed jurists. See O. Lando, Standardkontrakter, et forslag og et perspektiv, *Tidsskrift for restvetenskab* 1966, p. 3435-365 (translated into English in *Scandinavian Studies in Law* 1966, p. 127-148).

14. *Lag om förbud mot oskäliga avtalsvillkor, Svensk författningssamling (SFS)* 1971: 112, as amended.

15. Official translation, where necessary amended by the author to take into consideration the later amendments. It should be mentioned that the author was somewhat at a loss as to the

exact meaning of the word "nyttighet" in the first sentence.

16. *SFS* 1973: 878.

17. U. Bernitz, Consumer protection and standard contracts, *Scandinavian Studies in Law* 1973, p. 11-50; J.E. Sheldon, Consumer protection and standard contracts: the Swedish experiment in administrative control, 22 *American Journal of Comparative Law* 17-70 (1974).

18. *SFS* 1977: 452.

19. *Prop.* 1976/77: 110, *NU* 49, rskr. 353.

20. Bernitz 1973, 45.

21. Bernitz 1973, 42; Sheldon 1974, 34.

22. SFS 1984: 292, as amended SFS 1985:220. See also the report of the preparatory commission Avtalsvillkor mellan näringsidkare, Delbetänkande av konsumentköpsutredningen, Statens offentliga utredningar 1981: 31, Stockholm 1981.

23. *SFS* 1970: 587, as amended.

24. *SFS* 1976: 429.

25. Cf. A. Legrand, L'ombudsman scandinave, Paris 1970, 23.

26. Act of 29 June 1970, *SFS* 1970: 417, amended by Act of 15 December 1972 *SFS* 1972: 732 (change of the *marknadsråd* into *marknadsdomstol*-market *court*).

27. The text as it presently reads, is set out by U. Bernitz and J. Draper, Consumer protection in Sweden/Legislation, institutions and practice, 2nd ed. Stockholm 1986, p. 341-345.

28. *SFS* 1976: 185 ff.

29. Generalkausul i förmögenhetsrätten, Betänkande av Generalklausulutredningen, Statens offentliga utredningar 1974: 83, Stockholm 1984.

C. NON-EUROPEAN COUNTRIES

26. Australia

The former British dominions are sometimes still thought of as belonging to the same common law family as does England and as a consequence are not dealt with separately in comparative surveys. To some extent this is justified in that the decisions of the House of Lords and the Court of Appeal still are of considerable importance in Commonwealth countries, such as Australia and New Zealand. British legislation has often been followed as well, but in more recent years this is no longer the case. In the area of consumer protection, anyway, a country like Australia has gone its own legislative way, or rather ways. Australia is a federal country and consumer protection laws are passed by the state governments rather than by the federal government.

Still, Australian legislation on unfair contract terms actually was inspired by a development which started in Canberra, the national capital. In 1973, the then Attorney-General and Minister for the Capital Territory established a working party to review the consumer protection laws in the Australian Capital Territory, which they regarded as a 'social laboratory' for Australia[1]. One of the working party's products was a *Memorandum Relating to Harsh and Unconscionable Contracts Ordinance for the ACT* (1975), which however had no direct results. In 1976, New South Wales commissioned Professor John Peden of Macquarie University to examine the question. The Peden Report on Harsh and Unconscionable Contracts (1976) included a draft bill which was the model for the Contracts Review Act 1980 of New South Wales. The central provision of this Act is section 7 (1), which reads:

> Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result (...).

Section (4) 1 of the Act defines 'unjust' to include 'unconscionable, harsh or oppressive'.
Once a contract or a provision thereof has been found to be unjust, the court is vested with very wide remedial powers[2].

The original Contracts Review bill applied to all contracts, regardless of who the parties were. Because of opposition from business circles, however, the scope of application was then reduced to consumer contracts.
The main problem with the 1980 Act is that its enforcement is left to the parties to the contract. By contrast, section 52A of the (federal) Trade Practices Act 1986 provides:

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

The concept of unconscionableness is not defined in the Act, but section 52A does set out a number of factors which may be taken into consideration (the list is not considered to be exhaustive):
(a) the relative strengths of the bargaining position of the corporation and the consumer;
(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
(c) whether the consumer was able to understand any documents relating to the supply of possible supply of the goods or services;
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

Section 52A has deliberately been confined to 'unconscionable' rather than 'unfair' conduct, by way of compromise since 'unconscionable' was considered to suggest that only relatively extreme instances of unfairness will be covered[3].
The Trade Practices Act entrusts enforcement not only to private parties, but also to the Trade Practices Commission.
The Act's scope of application is not limited to consumer

contracts. Only 'corporations' are covered, however. This stems from Australia's Constitution, which empowers the federal parliament to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'[4].

27. Canada

In Canada, consumer protection is a task both for the federal government and for the provinces. The federal government has enacted a number of laws on product liability and products information[5]. Most provinces have adopted Consumer Protection Acts, as well as Unconscionable Transactions Relief Acts[6]. Under these Acts, Consumer Protection Officers have been established.

An example is Québec with its *Office de la protection du consommateur*, which in 1986 employed 233 full-time equivalents[7]. Québec has enacted a number of specific consumer protection laws as well as a general Consumer Protection Law[8], which regulates consumer contracts and trading practices. This Law contains a general provision on unfair contract terms as well as a number of provisions as to specific terms. The general clause (article 8) reads as follows[9]:

Le consommateur peut demander la nullité du contrat ou la réduction des obligations qui en découlent lorsque la disproportion entre les prestations respectives des parties est tellement considérable qu'elle équivaut à de l'exploitation du consommateur, ou que l'obligation du consommateur est excessive, abusive ou exorbitante.	The consumer may invoke the nullity of the contract or the reduction of the ensuing obligations when the imbalance between the respective performances of the parties is so considerable, that it is the equivalent of exploitation of the consumer or that the consumer's obligation is excessive, unfair or exorbitant.

The Law also contains a provision on offer and acceptance, which may be used to cover the incorporation of contract terms (article 9):

Lorsqu'un tribunal doit apprécier le consentement donné par un consommateur à un contrat, il tient compte de la condition des parties, des circonstances dans lesquelles le contrat a été conclu et des avantages qui résultent du contrat pour le consommateur.	When a court has to consider whether a consumer has accepted a contract, it shall take into account the quality of the parties, the circumstances under which the contract has been concluded and the advantages resulting from the contract for the consumer.

These general provisions are followed by a number of articles which prohibit specific contract terms, such as the clause whereby a supplier disengages himself from the consequences of his own act or that of his employees (art. 10), the clause which reserves for the supplier the right to decide unilaterally (a) that the consumer has not performed one or more of his obligations, (b) that a fact or a situation has presented itself (art. 11), clauses which in case of non-performance by the consumer impose upon him the payment of anything other than interests (art. 13), clauses providing for the application of foreign law (art. 19), etc. The Québec Consumer Protection Law also contains a number of substantive law provisions. In its art. 17 it has laid down the well-known *contra proferentem* rule. The Law has been implemented by several decrees, one of which - the *Règlement d'application de la Loi sur la protection du consommateur* - for instance provides for specific minimum type for obligatory mentions (art. 26-28).

The 1977 Draft Civil Code of Québec equally introduces the concept of unfair contract terms, which under art. 76 of Book V may be avoided.

28. Israel

Israel has been one of the first legislations to enact a comprehensive law on standard form contracts. The Standard Contracts Law 1964[10] has been the focus of international attention and may have served as a source of inspiration for West European legislators, In practice, the Law did not fail to show some major flaws[11]. In 1982, a revised version of the Standard Contracts Law was therefore enacted[12]. The new act, in its authorised translation from the Hebrew, reads as follows:

Chapter One: Basic Provisions

Object of Law.

1. The object of this Law is to protect customers from unduly disadvantageous conditions of standard contracts.

Definitions

2. In this Law
"standard contract" means the text of a contract all or part of the conditions of which have been determined in advance by one party in order to serve as conditions of many contracts between him and persons undefined as to number or identity;

"condition" means a stipulation in a standard contract and includes a stipulation referred to therein, as well as any other stipulation which is part of the engagement, but does not include a stipulation specially agreed upon by a supplier and a customer for the purposes of a particular contract;

"supplier" means a person who proposes that an engagement with him shall be in accordance with a standard contract, irrespective of whether he is the giver or the recipient of anything;

"customer" means a person to whom a supplier proposes that an engagement between them shall be in accordance with a standard contract, irrespective of whether he is the recipient or the giver of anything;

"Tribunal" means the Standard Contracts Tribunal established under this Law.

Unduly disadvantageous conditions and annulment thereof.

3. A court and the Tribunal shall, in accordance with the provisions of this Law, annul or vary any condition of a standard contract which - having regard to the totality of the conditions of the contract and to other circumstances - involves an undue disadvantage to customers or an unfair advantage to the supplier likely to lead to a deprivation of customers (any such condition hereinafter referred to as an "unduly disadvantageous condition").

Presumptions.

4. The following conditions shall be presumed to be unduly disadvantageous:
(1) a condition relieving the supplier, fully or partially, of a responsibility he would have to bear under law but for that condition or unreasonably restricting the responsibility he would have to bear by virtue of that contract but for that condition;
(2) a condition conferring on the supplier an unreasonable right to rescind, or to suspend or defer the performance of, the contract or to alter any material obligation imposed on him by the contract;
(3) a condition conferring on the supplier the right to transfer his responsibility to a third party;
(4) a condition conferring on the supplier the right to alter

unilaterally, after the contract has been made, a price or any other material obligation imposed on the customer, unless the alteration arises out of factors over which the supplier has no control;
(5) a condition unreasonably requiring the customer to resort to the supplier or to some other person or otherwise limiting the customer's freedom to enter or not to enter into an engagement with another person;
(6) a condition denying or limiting a right or remedy available to the customer under law or unreasonably restricting a right or remedy available to him by virtue of the contract or making any such right or remedy conditional on giving notice in unreasonable form or within an unreasonable time or on any other unreasonable requirement;
(7) a condition imposing the onus of proof on a person who would not have to bear it but for that condition;
(8) a condition which, save as part of a customary arbitration agreement, denies or limits the customer's right to make certain pleas before judicial authorities or to take any other legal proceedings;
(9) a condition prescribing an unreasonable place of jurisdiction or confers on the supplier the right to choose unilaterally the place of jurisdiction or arbitration where a dispute is to be settled;
(10) a condition prescribing referral of a dispute to arbitration when the supplier has greater influence than the customer on the designation of the arbitrators or the place of arbitration.

Limitation of right to apply to judicial authorities.

5. A condition in a standard contract denying or limiting the customer's right to apply to judicial authorities shall be void.

Chapter Two: Standard Contracts Tribunal

Tribunal and members thereof.

6. (a) There is hereby established a Standard Contracts Tribunal.
(b) The number of the members of the Tribunal shall not exceed twelve.
(c) The President and Deputy President of the Tribunal shall be Judges of a District Court appointed by the Minister of Justice in consultation with the President of the Supreme Court.
(d) The other members of the Tribunal shall be appointed by the Minister of Justice and shall include at least two representatives of consumer's organizations. The number of the members who are State employees shall not exceed one third of the number of the members appointed by the Minister under this subsection.
(e) The period of tenure of the members of the Tribunal shall be three years.
(f) Notice of the appointment of the members of the Tribunal shall be published in *Reshumot*.

Bench of Tribunal

7. (a) The Tribunal shall hear cases by a bench of three, but the President or Deputy President of the Tribunal may, before the

commencement of the hearing of a particular case, direct that it shall be heard by a greater uneven number of members.
(b) The President or, if he is unable to do so, the Deputy President of the Tribunal shall select the bench thereof. Every bench shall consist of the President or Deputy President of the Tribunal and other members at least half of whom are not State employees and one of whom is a representative of a consumers' organization.

Conflict of interests.

8. A person whose other activities might create a conflict of interests with his functions as a member of a bench of the Tribunal in a particular proceeding or who has a personal interest in any proceeding shall not be a member of the bench in that proceeding.

Evidence and procedure

9. (a) The Tribunal shall not be bound by the rules of evidence, except the rules relating to the immunity of witnesses or to privileged evidence under Chapter Three of the Evidence Ordinance (New Version), 5731-1971[13].
(b) For the purposes of the summoning of witnesses and the taking of evidence, the President and the Deputy President of the Tribunal shall have the powers of the chairman of a commission of inquiry under sections 9 to 11 of the Commissions of Inquiry Law 5719-1968[14].
(c) The Tribunal shall apply rules of procedure made by the Minister of Justice; in the absence of such rules, it shall proceed in the manner deemed by it to be most conducive to a just and speedy decision.

Appeal

10. A party who considers himself aggrieved by a decision of the Tribunal may appeal against it to the Supreme Court within forty-five days from the day on which he becomes aware of it.

Register of Decisions and publication

11. (a) The Tribunal shall keep a Register of Decisions, which shall be open to inspection by the public.
(b) Where the Tribunal annuls or varies an unduly disadvantageous condition, it shall publish its decision or an abstract thereof in at least two daily newspapers or in any other manner prescribed by regulations. Other decisions may be published by the Tribunal in such manner as it deems appropriate in the public interest.

Chapter Three: Approval of Standard Contract

Application for approval of standard contract.

12. (a) A supplier may apply to the Tribunal to approve a standard contract into which he is entering or intends to enter with customers, certifying that it contains no unduly disadvantageous condition.

(b) The respondents to the application for approval shall be the Attorney-General or his representative, persons designated as respondents by regulations and a person the Tribunal sees fit to summon as a respondent.
(c) Where the State files an application under subsection (a) and, in the opinion of the Tribunal, the respondents under subsection (b) should not, in the circumstances of the case, be regarded as sufficient, the Tribunal may appoint an advocate who is not a State employee to appear and plead before it as a respondent, and he may appeal against its decision as provided in section 10. His remuneration and expenses, as determined by the Tribunal, shall be paid by the Treasury.

Approval of contract

13. The Tribunal may approve a standard contract or may refuse to approve it by reason of an unduly disadvantageous condition which it shall specify. A condition found unduly disadvantageous by the Tribunal shall be deemed annulled by it.

Validity of approval

14 (a) The period of validity of the approval of a standard contract shall be five years from the date of the approval or a shorter period prescribed by the Tribunal.
(b) In the period of validity of the approval, the Tribunal shall not hear a plea that the standard contract contains an unduly disadvantageous condition, and a court shall not hear such a plea in respect of a contract made in accordance with that standard contract even if that contract was made before the approval.
(c) Notwithstanding the provisions of subsection (b), the Tribunal may, on the application of the Attorney-General, annul a condition of an approved standard contract even during the period of validity of the approval if it finds that special reasons justify the annulment.

Indication of approval

15. Where the Tribunal has approved a standard contract, the supplier may indicate such fact on the face of the contracts made by him in accordance therewith; if he does so, he shall also indicate the expiry date of the approval.

Chapter Four: Annulment of Unduly Disadvantageous Condition

Application to Tribunal for annulment of unduly disadvantageous condition.

16. (a) The Attorney-General or his representative, the Commissioner of Consumer Protection under the Consumer Protection Law, 5741-1981[15], any customers' organization approved by the Minister of Justice for a particular matter may apply to the Tribunal for the annulment of an unduly disadvantageous condition of a standard contract.
(b) The Minister of Justice may prescribe conditions for the filing of applications with the Tribunal by a customers' organization or public authority designated under subsection (a).

(c) The respondent to the application shall be the supplier entering or intending to enter into a standard contract; moreover, a representative organization of suppliers, or some other agency concerned in the matter may, with the approval of the Tribunal, join the case as a respondent.

Annulment or variation of condition by Tribunal

17. Where the Tribunal finds that a condition is unduly disadvantageous, it shall annul it or shall vary it to the extent necessary to eliminate the undue disadvantage involved.

Effect of annulment and variation by Tribunal

18. (a) A condition annulled by the Tribunal shall be deemed to be void in any contract made in accordance with the standard contract concerned after the date of the Tribunal's decision; a condition varied by the Tribunal shall apply as so varied in any contract as aforesaid.
(b) The Tribunal may make the annulment or variation applicable also to contracts made before the date of its decision and not yet fully performed, and it may attach conditions to the application: Provided that the annulment of variation shall not apply to any part of the contract performed before the date of decision.

Annulment and variation of condition by court

19. (a) Where a court, in a proceeding between a supplier and a customer, finds that a condition is unduly disadvantageous, it shall annul it in the contract between them or vary it to the extent necessary to eliminate the undue disadvantage involved.
(b) In exercising its power under subsection (a), the court shall have regard to the totality of the conditions of the contract and to other circumstances and also to special circumstances of the matter tried before it.

Notice of plea

20. Where a plea is made in any court that a condition in a contract made in accordance with a standard contract is unduly disadvantageous, the court shall give notice of such plea to the Attorney-General.

Concurrent proceedings

21. (a) A proceeding in the Tribunal concerning a standard contract on which a decision has not yet been given shall not derogate from the power of a court to consider the plea that a condition in a contract made in accordance with that standard contract is unduly disadvantageous.
(b) A proceeding in a court concerning the plea that a condition in a contract made in accordance with a standard contract is unduly disadvantageous shall not prevent the Tribunal from considering that standard contract or any of its conditions; but the Tribunal may, if it deems it right in the circumstances of the case, postpone the condition of the proceeding before it until judgment is given by the court.

Chapter Five: Miscellaneous Provisions

Status of the State

22. For the purposes of this Law, the State shall be treated like any other person.

Restrictions on applicability

23. The provisions of this Law shall not apply to
(1) a condition determining the monetary consideration to be paid by the customer;
(2) a condition conforming with conditions laid down or approved by an enactment;
(3) a condition conforming with conditions laid down by an international agreement to which Israel is a party;
(4) a collective agreement under the Collective Agreements Law 5717-1957[16], whether it has been submitted for registration under that Law or not, including another collective arrangement, provided it has been made in writing and prescribes rates of wages.

Saving of laws

24. The provisions of this Law shall not derogate from the provisions of any law under which a contract or a condition in a contract may be void or voidable and shall not bar a plea against a contract or a condition in a contract.

Implementation and regulations

25. (a) The Minister of Justice is charged with the implementation of this Law and may make regulations for its implementation, including regulations as to
(1) the procedure in the Tribunal, the enlargement of times for the filing of appeal, and the continuity of proceedings;
(2) persons and organizations who or which may plead in favour of a party or be respondents before the Tribunal;
(3) modes of appointing an advocate where the State seeks the approval of a standard contract;
(4) the payment of expenses and loss-of-working-time allowances to witnesses in proceedings before the Tribunal;
(5) the form of the indication under section 15 on the face of contracts;
(6) the imposition on a supplier of the duty to furnish to the Attorney-General or the Commissioner of Consumer Protection, upon his request, a copy of a standard contract into which he is entering or intends to enter.

Revocation

26. The Standard Contracts Law, 5724-1964[17] (hereinafter referred to as "the previous Law") is hereby repealed.

Commencement, application and transitional provisions

27. (a) This Law shall come into force six months from the date of its publication in *Reshumot*.

(b) The previous Law shall continue to apply to contracts made before the coming into force of this Law; for the purpose of application, the renewal of a contract shall be deemed to be the making thereof.
(c) Where the Restrictive Trade Practices Board began a hearing under the previous Law before the coming into force of this Law, it shall complete the hearing under the previous Law even after the coming into force of this Law.
(d) The approval of a standard contract by the Restrictive Trade Practices Board shall have effect until the expiration of the period for which it was given.
(e) Notwithstanding the provisions of subsection (b), a decision of the Tribunal under section 18(b) shall apply also to contracts made before the coming into force of this Law.

29. United States

By and large, American law with regard to unfair contract terms has not changed very much in the last decade. The basis for judicial intervention is to be found in Par. 2-302 of the Uniform Commercial Code (UCC)[18], which reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Although Par. 2-302 in its terms governs only 'transactions in goods', it is also applied to many other kinds of contracts, either by way of analogy or as an expression of general doctrine[19].
This doctrine is stated in Par. 208 of the Restatement of Contracts Second. Par. 2-302 UCC is not restricted to consumer transactions. Reported case-law rather suggests that purely commercial contracts are more often subjected to the overt control, which Par. 2-302 has introduced.
Although the provision is formulated in very general terms, it is clear from its legislative history that it has been drafted with standard form contracts in mind[20]. Llewellyn, the 'father' of the UCC, has called Par. 2-302 'perhaps the most valuable section in

the entire Code'[21].

The UCC is the most important uniform law, but by no means the only one. Other uniform laws which many bear on unfair contract terms are the Uniform Consumer Credit Code, the Uniform Sales Practices Act, the Uniform Residential Landlord and Tenant Act, the Uniform Land Transactions Act, the Uniform Simplification of Land Transfers Act, the Uniform Condominium Act, the Model Real Estate Time-Share Act, the Uniform Planned Community Act, the Model Real Estate Cooperative Act and the Uniform Common Interest Ownership act. Several of these model laws have been enacted only in a small number of states[22].

The UCC contains no provisions dealing with a control machinery for standard terms. However, the use of unfair standard contract terms may be considered an 'unfair or deceptive act or practice in or affecting commerce' in the sense of section 5 (a), first subsection, of the Federal Trade Commission Act.

State laws may also lay down control procedures; by way of example I mention a Statement of Policy and Guidelines for Use in Preparing New Policy Forms, adopted by the administration of the State of Pennsylvania with a view to have insurance policies drafted in a 'layman's language'[23]. A number of states has set up consumer protection offices, which in some cases are empowered to police contract terms.

1. J. Goldring, L.W. Maher, Consumer protection law in Australia, 2d ed. Sydney etc. 1983, nr. 306.

2. Ph. Clark, Control of unfair or unconscionable practices, with special reference to consumer protection, in: A.E.S. Tay (ed), Law and Australian Legal Thinking in the 1980's, Sydney/Melbourne 1986, p. 141-161.

3. D.J. Harland, Consumer law in Australia - some recent developments, *Tijdschrift voor Consumentenrecht* 1988/1-2 (forthcoming).

4. Harland 1988, *ibidem*.

5. See N. L'Heureux, Droit de la consommation, 3d ed. Montreal 1986.

6. See the survey in my 1977 Report, p. 70.

7. Office de la protection du consommateur, Rapport annuel 1985-1986 p. 12.

8. Chapter P-40.1

9. The English translation of the following articles given is by the author, who did not have at his disposal the authentic English text.

10. The text is set out in my 1977 Report.

11. See Chapter III, nr. 51.

12. Law of December 7, 1982, *Sefer Ha-Chukkim*, Nr 1068.

13. Dinei Medinat Yisrael (Nusach Chadash) no. 18, p. 421; NV vol. II, p. 198.

14. Sefer Ha-Chukkim of 5729, p. 28; LSI vol. XXIII, p. 32.

15. Sefer Ha-Chukkim of 5741, p. 248; LSI vol. XXXV, p. 298.

16. Sefer Ha-Chukkim of 5717, p. 63; LSI vol. XI, p. 58.

17. Sefer Ha-Chukkim of 5724, p. 58; LSI vol. XVIII, p. 51.

18. The Uniform Commercial Code is not a federal law, but a model code drafted by the National Conference of State Commissioners on Uniform Laws which has been adopted by 49 of the 50 States of the Union; only the civil law state Louisiana has refused to adopt the UCC. Two states have incorporated par. 2-302 in their legislation separately: California (which has a similar provision in its legislation: par. 3391 California Civil Code) and North Carolina.

19. E.A. Farnsworth, Contracts, Boston/Toronto 1982, p. 308, who points out that some courts have declined to apply Par. 2-302 to contracts that come under (other) articles of the Code on the ground that Par. 2-302 is part of the sales article, not part of the general provisions of the UCC.

20. See Spanogle, 117 *University of Pennsylvania Law Review* 931, 936-942 (1969); Leff, 115 *University of Pennsylvania Law Review* 485, 489-501, 509-516 (1967).

21. Quoted by Spanogle, 117 *University of Pennsylvania Law Review* 931, 939 (1969).

22. See the survey by Ph.I. Blumberg, Consumer Protection in the United States: Control of Unfair or Unconscionable Practices, American Report to the XIIth Congress of the International Academy of Comparative Law, Melbourne/Sydney 1986.

23. W.C. Erxleben, The FTC's Kaleidoscopic Unfairness Statute: Section 5, 10 *Gonzaga Law Review* 333, 343-347 (1975).

III THE LAW IN ACTION

30. Scope of this Chapter.
A. Member countries of the European Communities.
31. Belgium - 32. Denmark - 33. France - 34. German Federal Republic - 35. Greece - 36. Irish Republic - 37. Italy - 38. Luxemburg - 39. The Netherlands - 40. Portugal - 41. Spain - 42. United Kingdom.
B. Other European countries
43. Austria - 44. Eastern Europe - 45. Finland - 46. Norway - 47. Sweden - 48. Switzerland.
C. Non-European countries
49. Australia - 50. Canada - 51. Israel - 52. United States.

30. Scope of this Chapter.

Studying the text of new legislation on unfair contract terms tells us little, if anything, about its impact on legal practice. Are unfair contract terms held to be void by the courts? Do consumers' organizations go to court or engage in negotiations with trade organizations? Are government agencies of the Consumer Ombud type equipped to deal with general contract terms?
In this Chapter, I will try to describe the experiences with the new legislation so far. This has proven to be more difficult than I had anticipated. The impact of the new laws on the legal profession varies very much from one country to the other. None of the various attorneys in Portugal and Spain whom I consulted about the provisions on general contract terms in their legislation had ever heard of these (in Portugal this may partially be explained by the fact that the Decree of 1985 is still quite recent). On the other hand, every German attorney will have heard about the *AGB-Gesetz* and legal writing on this law abounds.

As far as legal writing is concerned, I have already observed that empirical research is still quite rare. I therefore have also collected some evidence through interviews with lawyers in consumers' organizations and trade organizations, as well as with civil servants. I have not been able to apply this time-consuming method to all countries mentioned in Chapter II.

A. Member countries of the European Communities

31. Belgium

Since Belgium so far has introduced no specific legislation on standard contract terms in general[1], little can be said about any experience with such legislation. A survey of traditional judicial techniques for dealing with such contract terms learns that of the three main instruments which have been developed in countries such as the German Federal Republic and The Netherlands one such instrument, the outright control of the contents of standard form contracts in pursuance of art. 1134 section 3 and 1135 Civil Code, is absent. This is partially remedied by an active use of the offer and acceptance requirement and an occasionally imaginative use of the contra proferentem construction[2].

As far as the activities of consumers' organizations and government agencies with regard to standard contract terms are concerned, mention may be made of the contracts which have been drafted by the consumers' organization Test-Achats[3] and especially of those which have been negotiated between consumers organizations - in all but one cases Test-Achats - and suppliers' organizations in the field of textile cleaning, the sale of durables, immovables, furniture and travel[4].

Under the present Marketing Practices Act, consumers' organizations have already been given the right to request an injunction - although not yet with regard to standard form contracts. Only on two occasions have consumers' organizations used this right, in a case of misleading advertising and in one of forced sales. Both actions were successful. Less successful has been the Minister of Economic Affairs, who however has made a more extensive use of his right to go to court: 22 times between 1951 and 1979 alone[5].

32. Denmark

How has the Danish control of unfair contract terms fared so far? In order to answer this question, we shall have to look into the Consumer Ombudsman's activities under the Marketing Practices Act

as well as into the case law which the courts and the Public Complaints Board have developed on the basis of par. 36 of the Contracts Act.

A picture of the daily activities of the Consumer Ombudsman may be obtained from the (bi)annual reports (*Beretning*), which his office has issued. In the 1977-1978 Report, a number of standard form cases are mentioned. An insurance company had issued an announcement to its clients that certain damages were to be excluded from the company's liability policy as of the next year. Some policy holders who did not have the right to cancel the insurance contract because they had mortgaged their house to a bank connected with the company complained to the Consumer Ombudsman. The insurance company then agreed to revoke its announcement (1977-1978, p. 19). The Consumer Ombudsman declared unfounded the complaint of a newspaper subscriber, who was charged the full subscription price, although the newspaper was delivered late (1977-1978, p. 21-22). Agreement was reached with *Danmarks Automobilforhandler Forening* as to the sales conditions for motor vehicles (1979-1980, p. 23). In this Report, mention is also made of an agreement as to the telephone subscription conditions - in the negotiations with the telephone companies trade association the Consumer Council (*Forbrugerrådet* also took part (1979-1980, p. 25-29). The Consumer Ombudsman also commented on the conditions for the supply of electricity (1979-1980, p. 29-31).He negotiated new sales contracts for the sale of kitchens (1979-1980, p. 31-33) and of '*lystbåder*' (1979-1980, p. 33-34). He also succeeded in having the contract terms of book clubs changed (1979-1980, p. 42-44).
In the 1980-1981 Report, agreement with a company offering a combination of sale and rent of musical instruments is mentioned (1980-1981, p. 27-28). The same applies to the guarantee offered by the seller of rust removers for automobiles (1980-1981, p. 30-31).
The 1983 Report mentions a number of agreements reached on the basis of the new Credit Sales Act (1983, p. 14-15 and ff). The 1984 and 1985 Reports contain no detailed information about contract terms negotiations.

Not always does the Consumer Ombudsman succeed in his primary task

of inducing suppliers to change their contract terms through negotiations. He has gone to court on a number of occasions.The most important cases which have been reported are the Commercial and Maritime Court's decisions of July 14, 1977, *Ugeskrift for Retsvaesen* 1977, 986 (FO/Standard Forlaget) with comment by J.H. Hansen, *Ugeskrift for Retsvaesen* 1978, 110, August 30, 1977, *Ugeskrift for Retsvaesen* 1977, 995 (FO/Dansk Vagttjeneste) and January 21, 1980, *Ugeskrift for Retsvaesen* 1980, 582 (FO/Jens P. Koch & Co) as well as the Supreme Court's decision of February 4, 1982, *Ugeskrift for Retsvaesen* 1982, 327 (Jens P. Koch).

Par. 1 of the Marketing Practices Act is the most important, but not the only provision of the Act which serves as a basis for the Consumer Ombudsman's activities. Par. 4 on guarantees is also used in a number of cases. The Consumer Ombudsman has issued guidelines with regard to the contents of guarantees issued by manufacturers and importers of durable consumer goods. Under the guidelines, defects must be cured without expense to the consumer, the supplier must bear the costs of spare parts, wages and transport. The certificate of the guarantee must indicate which company provides the guarantee, the period of the guarantee, and how the consumer should exercise his rights under the guarantee. The guarantee must take effect as of the date of the sale. The guarantee stays with the product, even when it is transferred to a third party. The maintenance provisions should be given in the Danish language. Finally, the certificate should state expressly that the guarantee does not restrict the consumer's ordinary rights under the Sales Act[6]. At present, new Guidelines are in the course of making[7].

How is the Marketing Practices Act to be evaluated with regard to unfair contract terms in consumer contracts? In my 1977 Report, I concluded from the then brief experience with the Act that so far results were not very satisfactory - unlike the situation in Sweden, where the similar control system yielded more promising results. Why this difference between two similar systems? I offered four possible explanations: (a) shortcomings in the listing of priorities owing among others to the lack of an effective monitoring system and the fact that the remedy against unfair contract terms is hidden in the general clause on marketing practices, (b)

the absence of substantive law provisions which may serve as a standard, (c) lack of funding, and (d) the different personalities of the office holders. In 1981, Dahl has confirmed my first two suggestions, observing that a major weakness in the control mechanism so far was the absence of a systematic and active investigation into the use of unfair standard terms and that par. 36 of the Contracts Act should be supplemented by supportive standards. Dahl also argues that the effectiveness of control by the Consumer Ombudsman would be improved by requiring that he be supplied with copies of all standard form contracts which are brought into use and that the case-by-case method of present legislation should be supplemented by a provision authorizing the Minister of Commerce to declare null and void specific contract terms, after negotiations with both consumers' organizations and trade organizations[8].

The Consumer Ombudsman himself considers his activities in the area of unfair contract terms one of his most important ones (1979-1980 Report, p 22). However, he is not completely satisfied with the control which he has exercised. Looking back at ten years of Marketing Practices Act, he argues that the results are satisfactory but that other more urgent tasks have kept him from a more thorough overhaul of Danish standard form contracts (1984, p. 10). Earlier, he complained about lack of funding (1979-1980, p. 23) and about insufficient standardization on the side of the suppliers (1981-1982, p. 25).

The Reports confirm that so far the activities of the Consumer Ombudsman have been more dictated by external elements, such as consumers' complaints, than by his own priorities. However, this seems to have been the case especially in the early years of the office, when the Consumer Ombudsman was invaded by complaints about book clubs and correspondence courses. One also may observe that consumer complaints may be themselves very well serve as one of the elements for drawing up a list of priorities.
Another point which the Reports confirm is that substantive law provisions were dearly missing in the beginning. Whenever new consumer legislation was passed, one sees an upsurge of cases on contract terms which are at variance with the new law. In such cases the Consumer Ombudsman is more serving as a policeman than

as negotiator.

The number of cases in which individual consumers have invoked par. 36 of the Contracts Act is not very large. As Dahl argues, it is important that the Act is applied not only by the courts but also by the Consumer Complaints Board[9]. This Board has set aside provisions such as a cut-off clause in a conditional sales agreement, a term requiring the consumer to file his complaint within eight days, a price-index adjustment clause in a correspondence school contract. It has even set aside complete sets of standard terms, such as for the sale of diving equipment and the door-to-door sale of books. This is in conformity with the decisions of the Danish Supreme Court[10]. Danish writers are not in agreement as to the value of par. 36 Contracts Act. According to Gomard, the new provision has added nothing to what already existed[11].
Dahl however argues that par. 36 is quite important because it is used by the courts[12], unlike the earlier general clauses which Gomard invokes.

Dahl acknowledges that par. 36 would be ineffective without the Consumer Complaints Board. The effect is even greater because of the existence of a control procedure under the Marketing Practices Act. This may be demonstrated by the following example. In one of the cases mentioned above, the Maritime and Commercial Court issued an injunction against a provision in a subscription contract for a 44-volume book set, whereby the seller reserved the right to increase the price of subsequent volumes upon late payment. Earlier, the Consumer Complaints Board had set aside this clause in a number of individual cases, on the basis of par. 36 Contracts Act[13]. Thus, the two Acts seem to co-exist without problems[14].

33. France

The control system which France has established in 1978 is unique among the methods which have been thought out for dealing with unfair contract terms. It is therefore interesting to find out how the system works in practice. The results so far are disappointing. After being in force for nearly ten years, the system's impact on legal practice is small. This does not condemn the system - it

does however suggest that the French control system should be supplemented by new elements such as those proposed by the *Commission de refonte*.

Nine years of the Commission on unfair contract terms have brought us twenty recommendations, many of these far-reaching. However, only a single decree has been the result of these twenty recommendations. And the most important provision of the decree was subsequently annulled by the Council of State. The other nineteen recommendations have no direct influence on court decisions and do not appear to have had a large impact on legal practice either.

In the 1978-1986 period, the Commission has issued five general recommendations and fifteen with regard to specific contracts[15]. The five general ones bear on:

- guarantee terms (Bulletin Officiel des Services des Prix: BOSP June 13, 1979);
- jurisdiction clauses (BOSP June 13, 1979);
- delivery periods (BOSP November 26, 1980);
- terms which declare the consumer's offer binding and the supplier's offer not-binding (BOSP January 16, 1981);
- terms which in case of non-performance impose penalties on the consumer and not on the supplier (BOSP January 16, 1981).

Recommendations as to specific contracts concern, among others:

- the sale of furniture (BOSP November 26, 1980);
- construction of prefabricated dwellings (BOSP January 16, 1981);
- furniture removals (BOSP March 27, 1982);
- kitchen installment (BOCC December 22, 1982);
- liquid gas distribution (BOCC November 20, 1984);
- land transport of travellers (BOCC December 5, 1984);
- water distribution (BOCC January 17, 1985);
- sale of automobiles (BOCC November 4, 1985);
- rent contracts with an option to buy (1986).

In its recommendations, the Commission does not limit itself to declare unfair the use of contract terms, it also may oblige a supplier to insert certain clauses in his contract terms. This latter possibility is not mentioned explicitly in the 1978 Act[16].

The one decree which so far has been issued on the basis of a recommendation by the Commission on unfair contract terms is the decree 78-464 of March 24, 1978. The decree was issued only weeks after the Act came into force. A world speed record for a newly created commission? Not really: the Government, apparently eager for a quick application of the new law, had presented to the Commission a draft-decree which only needed the Commission's approval and this was given within a short period.

The 1978 decree deals with four situations. First, reference in a contract to contract terms which are lodged elsewhere is declared unfair (art. 1). Art. 2 prohibits the use of a clause restricting or eliminating the consumer's right of reparation in case of breach of contract by the seller. This confirms case-law to the same effect prior to the 1978 Act. It should be noted that this provision applies only to the sale of goods. It was thought that the supply of services is so varied in nature that this precludes a general prohibition of restrictive or exemption clauses[17]. Art. 3 of the 1978 decree declares unfair the use of clauses whereby the supplier reserves for himself the unilateral right to modify goods to be delivered or services to be rendered. Under certain conditions, technical innovations are allowed, however. Art. 4 finally obliges the seller in case of a contractual guarantee to the buyer to state clearly that, no matter what the circumstances may be, the legal guarantee remains applicable. When this obligatory mention is omitted, a supplier may be fined from 1000 tot 2000 francs.

Of these four provisions, the first had the widest scope of application. In legal writing, it had already been pointed out that the prohibition of reference to terms lodged elsewhere would be very difficult to apply to the sale of real property and to insurance contracts[18]. The prohibition even was said to be at variance with existing legislation. A number of insurance companies then requested the Council of State to repeal art. 1. The request was granted by decision of December 3, 1980[19]. The administrative court decided that government had no right to prohibit all references. The 1978 Act limits governmental powers and these had been transgressed. Art. 1 therefore was declared null and void.

Two arguments are given by the Council of STate. First, art. 35 of the 1978 Act lists the clauses which may be regulated by decree. This is not an enumeration by way of example, but a limitative list. The reference clause does not fall into any of the categories mentioned in the list. Second, the Council argued that a reference clause does not in all cases imply an abuse of economic power by the supplier, nor does it necessarily provide the latter with an undue advantage. Since art. 35 defines unfair terms as those which appear to be imposed on non-professionals or consumers through the abuse of economic power, providing the latter with an undue advantage, the prohibition of the clause transgressed governmental powers.
Legal writers have not contested the first argument. The second argument, on the other hand, has been criticised for crippling the implementation of the 1978 Act. As the President of the *Commission de refonte* has put it: 'No clause exists which is automatically, in all cases, unfair; even the most 'serious' clauses, such as those which allow total exemption from liability, could be considered under certain circumstances to be fair (one can suppose that the clause was included as compensation for a reduction in price). If the Council of State maintains its position, not one decree based on the 1978 Act will be protected from repeal'[20].

The Council of State has not yet received an opportunity to maintain its 1978 position or to retreat, for the simple reason that since 1978 not a single recommendation by the Commission on unfair contract terms has been transformed into a decree. The question may be raised whether a recommendation may have any other effect.

The 1978 Act only regulates the situation where a decree has been issued. Art. 35, section 2 declares void a clause which has been incorporated into a contract, although it is prohibited by a decree[21]. But what about a recommendation which has not (yet) been followed by a decree? In at least one such case, a civil court has refused to declare a clause void[22]. Does this mean that all the work of the Commission has been in vain? Not quite - there exists evidence of some impact on the drafting of general contract terms. The Commission has the right to give its opinion as to such terms

and it is obvious that such opinions will be in line with the Commission's recommendations.

On the whole, though, experiences with the 1978 Act have proved to be disappointing. Apart from the more technical criticism of the drafting of the Act: why the difficult terminology of consumers and non-professionals[23], what is unfair[24], why should art. 35 be constructed in a limitative way when the text seems to imply otherwise[25], why is the civil law effect of the Commission's recommendations not regulated, there is the criticism of the implementation: only one decree, which in practice often remains unobserved[26], no inducement to the draftsmen of general contract terms to police their clauses in the absence of any 'black list'. It should be added that experiences under the Socialist government and under the Conservative government have been similarly disappointing.

What then may be expected from the proposals of the Commission de refonte? As we have seen in Chapter II (Nr 10), these proposals may be divided into four categories: those dealing with collective agreements, with unfair contract terms, with collective actions, and with substantive consumer law.
As far as collective agreements are concerned. France already has some experience[27]. First, the Delmon agreements of 1973 were aimed at improving the position of the tenant. These agreements were at the basis of title III of the Loi Quillot of June 22, 1982, which regulates the organization of collective agreements between landlord and tenant[28].
In the area of insurance, a collective agreement was reached at on February 27, 1977, between consumers' organizations and the *Institut National de la Consommation* on the one hand, and the *Fédération française des Sociétés d'assurance* on the other. This agreement, which at first was not observed by two insurance companies[29], has since been partially integrated in the Act 81-5 of January 7, 1981[30].

Another agency which has been active in the area of general contract terms, is the *Association Française de Normalisation* (AFNOR). In co-operation with the organizations of consumers, distributors,

producers and, in the latter case, the Commission on unfair contract terms, the norms NF X 50-001 and NF X 50-002 on the presentation of guarantees and after-sales service for domestic electrical appliances have been developed[31].

Dissatisfied with the results of previous negotiations, eleven consumers' organizations on January 11, 1980 announced their intention to refrain from any negotiations with suppliers' organizations as long as no institutional framework had been worked out[32]. The Ministry - at present State Secretariate - of Consumer Affairs has tried to overcome this problem. With the novel concept of 'contracts for the improvement of quality', the State has promoted a number of negotiations which have resulted in a series of contracts[33]. The contracts deal with consumer affairs in general; they may include provisions as to contract terms.

Apart from these collective agreements to which the consumers' organizations have given their consent, suppliers' organizations have also undertaken attempts to police their branch of trade by way of self-regulation. An example is the used car trade, traditionally a source of consumer complaints. The trade organization concerned, the *Chambre syndicale nationale du Commerce et de la Réparation automobile*, has published a number of model contracts. In these contracts the advisory opinions of the Commission on unfair contract terms and of the *Institut National de la Consommation* have been taken into account, although not completely, which is the reason why the consumers' organizations have not entered into an agreement with the suppliers' organization[34].

The second and the fourth categories of proposals of the *Commission de refonte* deal with unfair contract terms and with substantive law. There is no doubt that enactment of these proposals would improve the position of French' consumers, even though some of the various provisions are not novel but rather contain a codification of case-law, of existing legislation and of earlier recommendations of the Commission on unfair contract terms. French courts have long made an imaginative use of the contra proferentem rule, which has been developed on the basis of articles 1162 and 1602 Civil Code[35], and of the offer and acceptance requirement. They have not

developed a direct control, although several general clauses would have provided a basis therefor[36]. However, it should be added that French courts have showed themselves very unsympathetic towards specific clauses, such as exemption clauses and arbitration clauses. This has resulted in a form of consumer protection which is unknown in other European countries. Moreover, there are many mandatory provisions in French legislation which deal with situations which elsewhere have been taken into account in the legislation on unfair contract terms. By way of example, mention may be made of the decree 78-75/P of June 30, 1978, which requires a three-month price guarantee coupled with a right to cancel in case of price increases after that period to be mentioned on all contractual documents concerning the sale of new automobiles[37]. In the German Federal Republic, for instance, this 'price-of-the-day clause' is dealt with in the *AGB-Gesetz*[38]

The second category of proposals also has to do with the Commission on unfair contract terms. Perhaps it should be stressed here that the disappointing experience with the Commission so far has nothing to do with the composition and the activities of the Commission itself. Rather, they have to do with the limited powers of the Commission. The proposals appear to remedy this effectively.

Finally, the *Commission de refonte* proposes to extend existing collective actions to unfair contract terms. This extension is to be recommended for two different reasons. First, it would bring the French control system in line with the systems which have been introduced in most other member countries of the EC. Second, France already has a record of active court intervention on the request of consumers' organizations[39].

34. German Federal Republic

The enactment of the *AGB-Gesetz* has had a large impact upon German legal practice. Thousands of court decisions have been reported, hundreds of German lawyers have been attracted by this magnet to write about specific elements of the Act or about recent case-law. There is less certainty about the Act's impact on society. Have unfair contract terms disappeared from general contract conditions?

In this Report, I cannot go into all the questions which the courts and legal writers have discussed. Instead, I will try to sketch some of the major issues. After an introduction, I shall go into some of these issues and the lessons to be derived from them and I shall then offer some conclusions.

On April 1, 1987 the *AGB-Gesetz* celebrated its first decade of being in force. German legal opinion is still divided as to the effectiveness and the scope of the Act. Whereas in some circles it is argued that general contract terms are at present more balanced than ten years ago[40], others consider the Act inappropriate to protect consumers[41]. Some authors appreciate the so-called 'ergänzende Vertragsauslegung'[42], whereas others deplore it[43]. This split in opinion goes back to the genesis of the Act, when the German left argued for more government intervention in the control of unfair terms[44]. After the enactment of the *AGB-Gesetz*, the discussion tended to focus on its scope of application and on its interpretation.

According to German legal writers, the Act has had the largest impact on large companies, which by and large have accepted the Act's provisions. Small companies on the other hand, do not seem to care very much[45]. The activities of the consumers' organization are different from what I had anticipated in my 1977 Report. Not only do they negotiate with large representative trade organizations, they also act as policemen, enforcing the mandatory provisions of the law. The latter part of their activities seems to be more important than the first part.

I will now discuss, on an article by article basis, some of the issues which have arisen over the Act. First, as to par. 1 section 1, the *Bundesgerichtshof* (Supreme Court) has decided that model contracts drafted by a notary public fall within the scope of the definition of general contract terms in par. 1[46]. Similarly, when intermediaries use general contract terms which have been drafted by themselves and not by their principals, the question whether these terms have been 'put' in the sense of par. 1 section 1 has been answered in the affirmative[47]. Bilaterally concluded general

contract terms, such as the General Construction Conditions (VOB), are also held to fall within the scope of par. 1[48], although in this special case paragraphs 10 and 11 are not applied because of this bilateral nature[49].

As far as the second section of par. 1 is concerned, the courts do not consider a contract term which has been negotiated but which already appeared in the general conditions of the supplier to be an individual term which falls outside the Act's scope of application[50].

Paragraphs 2-5 have perhaps played a less important role in practice than might have been expected on the basis of pre-1977 case-law. The reason for this may be that prior to 1977 offer and acceptance and interpretation or construction were often used by the courts as an indirect means of controlling unfair terms. Since 1977, such indirect control no longer is necessary. Anyway, par. 2 has not been used by German courts to set higher requirements as to the drafting of contract terms in understandable wording or to control whether the other party has in fact understood such terms[51]. Case-law only gives some examples of courts which require that the contract terms be legible[52].

Likewise, par. 3 on surprising terms has only been applied in a limited number of cases[53].
Par. 4 has been used by the courts to fight the so-called *Schriftformklausel*, requiring subsequent agreements to be in writing[54].
Par. 5 is rarely invoked; rather the court tries to establish the true meaning of a clause, before reverting to the contra proferentem rule[55].

One of the main controversies over the application of the *AGB-Gesetz* has arisen over the interpretation of par. 6. First, there is the question whether or not standard contract clauses may be held partially void[56]. An important issue is whether a court should replace a contract term which violates the *AGB-Gesetz* by a term which would not do so. The German courts have refused to do so. Although at first glance this seems rather harsh, one should bear in mind that total nullity of the clause will be a far better

incentive for the draftspersons of general contract terms to draft equitable terms at once. However, this incentive is to a large extent taken away because of the doctrine that in case of nullity of a clause, the court does have the power and the obligation to fill in the ensuing gaps by non-mandatory law. A famous example is the case-law concerning a German automobile manufacturer's price of the day clause. The clause read as follows:

Price changes are admissible only if the period between the conclusion of the contract and the stipulated date of delivery exceeds 4 months; in that case the seller's price current on the day of delivery shall apply.

It is clear that this clause is not considered unfair under par. 11 Nr 1. However, the Supreme Court held the clause to be unfair under par. 9, the general clause[57]. Since under German law the Supreme Court's decision was by some writers held to have retroactive effect as of the date the *AGB-Gesetz* entered into force, they figured that the decision would cost German automobile manufacturers more than 100 million DM. Their predictions proved to be false. In a later case, the Supreme Court did apply non-mandatory law to replace the void contract clause, and this amounted to the same effect as an application of the void contract term[58].

Par. 7 has not given rise to major issues. Par. 8 is applied in a very restrictive way, in the sense that contract terms are not often held to embody legal provisions[59].

Paragraphs 9, 10 and 11 are of crucial importance in the application of the *AGB-Gesetz*. Actually, the paragraphs should be read in a reverse way. If a contract does not fall within the scope of par. 11, then we turn to par. 10 which gives the court a more discretionary power. Finally, paragraph 9 may be invoked. This, the Supreme Court has done in a large number of cases. As a consequence, the earlier paragraphs on incorporation and construction of general contract terms have become of less importance[60]. The two black lists of paragraphs 10 and 11 are not used as a contrario arguments for the fairness of contract terms. An example may be found in the current price decision of the Supreme Court, mentioned above.

The courts usually do not distinguish between alinea's 1 and 2 of par. 9[61]. In the rare cases in which a decision is based on alinea

1, arguments based on alinea 2 are usually taken into account[62]. The same confusion reigns where the two sub-sections of alinea 2 are concerned[63]. The use of the words 'in doubt' are interpreted as a reversal of the burden of proof as to the nullity of the contract terms.

As has already been mentioned, paras. 9-11 have come to play a very important role in the control of general contract terms. As a result, the importance of the other paragraphs - such as those on the incorporation and construction - has become relatively smaller.

Since 1977, hundreds of procedures in pursuance of par. 13 have been initiated. In many cases, the supplier concerned was willing to sign a declaration stating that in the future he would refrain from using the contract term in question. Unlike in the case of the fair trading law[64] and environmental protection, the practice of requiring such declarations has not led to any abuses.

Most proceedings are initiated by the *Verbraucherschutzverein* (VSV) in Berlin. This association was founded in 1966 by the federal and the provincial consumers' organizations. It is financed 100% by the State.
In the period November 1, 1984 - December 31, 1985, the VSV asked for 174 declarations, of which it received 110. In 34 cases the VSV went to the courts. Half of the cases were won, and half of them were still pending by the end of the year (two cases were lost)[65]. Professional organizations hardly make use of the possibility of going to court.

Two provinces have made use of the possibility of par. 14 to indicate a specific court for unfair contract term cases: Bavaria and Nordrhein-Westphalen[66].

The register kept at the *Bundeskartellamt* in Berlin in pursuance of Par. 20 contained 1,469 entries in September 1986, among which 562 judicial decisions[67].

After ten years of *AGB-Gesetz*, there is little doubt that the new law plays a considerable role in German legal practice. Hundreds

of judicial decisions -ably reported in annual surveys by H.J. Bunte - give this law further shape. Although the German law has produced dozens of books and hundreds of law review articles of unfair contract terms, there is still a scarcity of empirical evidence. Still, it may be suggested that contract terms which are promoted by large, national professional associations have by and large been brought into line with the law. Small suppliers tend to go on using unfair contract terms, most probably unaware of the law's requirements. What happens with businessmen in the intermediate range, is subject of speculation[68].

35. Greece

As was mentioned in Chapter II, Greek courts have to apply the general provisions of the Civil Code, whenever a case involving unfair contract terms arises[69]. Among the techniques which are customary in courts on the European continent, it is mainly interpretation which the Greek judiciary has used to exert some control of unfair standard terms. Much less has been made out of the possibilities offered by offer and acceptance (incorporation of standard contract terms) and an outright control, which - in theory - would have been possible under articles 179 (*laesio enormis*), 281 and 371-372.

A special means of consumer protection which the Greek Code of Civil Procedure is considered to offer, may be found in articles 393-394. Under these provisions, a supplier can only provide evidence of contracts with a monetary value of 120,000 drachmes by writing (readjusted by law as of September 16, 1987)[70]. Since most unfair contract terms are incorporated in standard contract terms, which more or less by definition are written, this means of consumer protection does not appear to be particularly appropriate as far as control of unfair contract terms is concerned.

36. Irish Republic

The impact of law in general, and of consumer law in particular, appears to be small in the Irish Republic. Few civil law cases, and very few consumer cases, are reported in the Irish Law Reports.

As far as could be ascertained, no use has been made of the provisions in the Sale of Goods and Supply of Services Act, 1980 to require written contract terms to include certain particulars. No prosecutions have been taken in relation to the use of prohibited terms in consumer contracts but the use of such prohibited terms is increasingly rare (they arise most often in notices in shops, especially during 'sale' periods). When such terms have been brought to the attention of the Director of Consumer Affairs, either by way of complaint or through monitoring exercises, he has secured their removal by informal means, short of prosecution.

This seemingly poor record does not necessarily imply that Irish consumers need more protection. As one writer has pointed out, Irish consumers are less mobile than the consumers in other European countries. They therefore keep better contacts with suppliers of goods or services. Social contacts for that reason play a larger role in solving consumer grievances than elsewhere[71].

This observance may be true, but once the Irish economy becomes more integrated into the Common Market, standard form contracts of foreign suppliers are certain to unsettle the rural charm of the Republic, sketched by the writer quoted earlier.

37. Italy

Italy's provisions on unfair contract terms, at the time a very modern piece of legislation, no longer are considered sufficient as a means of control. It therefore is not necessary to give a survey of the plethora of Italian judicial decisions in this regard.

This case-law discusses many of the questions which nowadays arise under more recent legislation and therefore is still of interest. Is it possible to extend to the 'black list' by way of analogy to other contract terms? No, says Italian jurisprudence, but it is possible to give an extensive interpretation of the clauses on the list[72]. Does the legislation apply to bilateral contracts? Yes, is the Italian answer. Should clauses whereby the primary obligations of the supplier are restricted (exclusion clauses) be treated like

exemption clauses? The answer is a partial yes.

These are the type of questions which courts, when applying modern unfair contract terms legislation, may face. The 45-year Italian experience may prove to be of great interest in this regard.

38. Luxemburg

The Consumer Protection Act of 1983 has been the subject of a number of law review articles - see the Bibliography. The provisions of the Act have been invoked in a considerable number of court cases. Since none of these have been reported, a brief description will be given here. First, the general clause of art. 1 has been invoked in a number of cases. In the case of Crédit Industriel d'Alsace et de Lorraine v. Berlin-Ester, involving the robbery of Eurocheques, the court decided that since the bank's exemption clause had been accepted by the client prior to the entry into force of the Consumer Protection Act, this Act did not apply[73].

In an earlier case, Nobilis-Play-Time, Ocean Videothek Nobilis v. Sefraoui, the Tribunal de paix had already declared null and void, on the basis of art. 1, a penalty clause[74]. This clause set a penalty of Lux.frs. 5.000 on not returning a rented video-film within seven days. The judge took into consideration that there was an imbalance to the profit of the supplier, who under this clause could claim more than three times the price of a month's video rent (Lux.frs. 1.500). The judge relied on Belgian precedents, which so far had not yet been followed in Luxemburg.

The case of Wolfgang Stark GmbH et Co KG v. Brandenburger concerned a contract term, whereby a supplier declared unbinding for himself any agreement, which had not been confirmed in writing by the supplier. The Tribunal d'arrondissement contrasted this with the term declaring the client's signature binding. This combination of clauses was considered by the court to be manifestly imbalanced and was therefore held to be null and void in pursuance of art. 1[75]. In a similar case, the same Tribunal more recently (with only one different judge) arrived at a similar result, by a very dis-

similar way - the court considered the clause null and void under art. 1174 Civil code (*conditio potestativa*)[76].

In Esther s.à.r.l. v. Gindt, the Tribunal de paix of Esch-sur-Alzette held a series of clauses in a marriage broker's contract to be null and void under art. 1. The clauses in effect prevented the consumer from cancelling the contract[77].

The latter case not only relies on art. 1 of the Consumer Protection Act, but also on art. 2 under 8°.
There is also a number of cases, in which the court relied exclusively on the black list of art. 2. Thus, in Banque Générale de Luxembourg v. Brayeur, the Tribunal de paix de Luxembourg held null and void under art. 2 No. 2 the bank's clause which provided for fixed damages to the amount of 15% of the principal, with a minimum of Lux.frs. 500, in case it would have to resort to a law suit[78]. It may be observed that in several other countries, such clauses are considered perfectly fair[79]. In Garlinskas v. SOREC, a similar clause, in my view correctly, was held to be valid and not contrary to articles 1 and 2 under 10°[80].

The Luxemburg courts consider the Consumer Protection Act to be of public order and they apply it directly, regardless whether or not the consumer invokes one of its provisions[81].

The Civil Code amendments have not yet resulted in court decisions, as far as could be ascertained. A recent case which was decided on the basis of the classic Civil Code provisions, seems to be worth mentioning, however. In Zuccolo-Rochet & Cie v. Gerouville, it was decided that exorbitant terms are not admitted, unless the general contract terms are explicitly accepted or are specifically pointed out to the other party at the time the contract is concluded[82].

39. Netherlands

The Dutch law on general contract terms has only recently (June 1987) been published in the Official Journal and it may take another five years before this regulation, which is part of the New Civil Code, will enter into force. It therefore may seem

premature to say something about its application in practice. This is not the case. First, part of the law is a codification of existing case-law. Ever since 1967, the Dutch Supreme Court has accepted a direct control of contracts concluded on the basis of general contract terms[83]. In practice, this control has not been exercised very often[84]. Indeed, there are the familiar problems of taking small claims to court, of decisions which are of little value from the point of view of setting precedents, of the lateness of decisions[85].

Second, the Dutch Supreme Court has developed a tradition of anticipating upon the New Civil Code, which by now has a very long parliamentary history: the first draft bills were presented in 1954[86]. A problem which haunts Dutch lawyers, is that it has proved very difficult to forecast in which cases the Supreme Court will anticipate upon the new code and in which cases not[87]. In the case of the bill - as it then was- on general contract terms this has worked out in a surprising way. In two decisions handed down on the same day, the Supreme Court chose different ways for substantive law and procedural law provisions of the bill. As far as substantive law is concerned, the Supreme Court quite clearly anticipated on the introduction of a list of clauses which, unless the contrary is proved, are held to be unfair[88]. In a later decision[89], the Supreme Court backed away somewhat from this innovative case.

In the other decision handed down on April 25, 1986, the Supreme Court refused to give the *Consumentenbond*, the Netherlands' largest consumers organization with some 500.000 members, standing to sue[90]. One of the arguments was that the Court did not want to intervene in the legislative process. With the Act safely in the Official Journal, it remains to be seen whether the Supreme Court will repeat its decision. The *Consumentenbond* anyway has started a new test-case to try this out.

The consequences of the recent Supreme Court decisions is that Dutch draftsmen of general contract terms are well advised to take the new law into consideration, even though its formal entry into force will take some more years.

One of the aims of the new law is to bring about negotiations between professional organizations and consumers' organizations. Under the auspices of the Commission for Consumer Affairs of the Social and Economic Council, such negotiations have in fact already taken place during the last ten years[91]. Several of the negotiations, most notably with regard to general contract terms for public utilities, banks, and repair, have met with success. Others, in the absence of any 'stick-behind-the-door', have failed. Even in the case of success, this has often only been arrived at after painstakingly long sessions. This has caused some anxiety in circles of consumers' organizations, which will find trouble in raising funds to finance the negotiations. A simple, rapid procedure such as the German *Abmahnungsverfahren* would fill a gap.

40. Portugal

The 1985 decree on general contract terms obviously is of too recent a date to have engendered any case-law yet. It has inspired legal writers, however[92].
Before 1985, some courts already made an imaginative use of the offer and acceptance doctrine to protect consumers against unfair contract terms[93].

41. Spain

As far as general contract terms are concerned, the general Consumer Protection Law of 1984 so far appears to have had no effect at all, yet. The rather vague art. 20, which might give consumers' organizations the right to go to court, has not (yet) been implemented by decree. It must be admitted though, that the Spanish government here has some problems at hand. Should all - national and local - consumers' organizations have the right to go to court? Spain currently has more than 200 of such organizations[94]. Even at the national level, there is a wide choice: the *Asociación de Consumidores y Usuarios de España* (ACUDE), the *Asociación General de Consumidores* (ASGECO), the *Federación de Asociaciones de Amas de Casa y del Consumo Familiar* (Federation of Associations for Housewives and Family Consumption), the *Organización de Consumidores y*

Usuarios (OCU), the *Unión Civica de Consumidores y Amas de Casa* (UNAE: Civil Union of Consumers and Housewives), the *Unión Federal de Consumidores* (UFC) and the *Unión General de Consumidores* (UGC)[95]. An alternative might possibly be to entrust the *Instituto Nacional de Consumo*[96] with the enforcement of the provisions on general contract terms.

Articles 8 and 10 of the General Consumer Protection Law do not need any implementation by decree. They are to be applied directly by the courts. So far no cases have been reported in which the courts have made use of their new powers. This was to be expected, if only since the Spanish courts suffer under a huge backlog of cases, witness the fact that the olive oil scandal was only heard in court in 1987, six years after the calamity.

Under the pre-1984 law, Spanish courts have showed little imagination in extending consumer protection on the basis of the 1889 Civil Code (*Codigo Civil*)[97]. The most important general clause used to protect consumers was the well known *contra proferentem* rule of art. 1288 Civil Code. Only under the influence of art. 51 of the new Constitution, some changes could be discerned[98]. It will therefore be understood that, as far as general contract terms are concerned, the 1984 Act has been heralded as the most important change in Spanish contract law after the enactment of the Civil Code[99].

42. United Kingdom

As was mentioned earlier, unfair contract terms may under the Unfair Contract Terms Act be (a) void ab initio, (b) void ab initio, accompanied by criminal penalties if the supplier continues to use such terms, and (c) voidable by being subject to a test of reasonableness.
The Consumer Transactions Order 1986 is still the only order by the Secretary of State with respect to standard terms. Part II of the Fair Trading Act (1973) deals with (control) procedure. The reason that only one order was given, is the technically restrictive way in which a consumer trade practice and the effects for consumers are defined. In addition, the procedure is complex

and time-consuming and the end result is a new criminal offence. It does not do anything directly to help individual consumers to obtain satisfaction. The Office of Fair Trading does not see the greater use of Part II in the fight against unfair trade practices[100].

I shall now first discuss the problems with category a) void terms. Secondly I will take a look at the fight against void terms the use of which is a criminal offence, category b). Thirdly, I will analyze the case-law concerning the reasonableness test, category c). Finally, I will comment upon the problems of enforcement.

Void terms

During the year 1983, just over 50 individual firms and several trade associations were asked to stop using a number of exclusion clauses revealed by the Office's investigations[101]. Although their use (representing an attempt by traders to restrict or exclude certain liabilities) in itself is not a criminal offence, it might mislead consumers - contracts of this kind were made void five years ago by the Unfair Contract Terms Act (1977). The clauses related to one or other of the following liabilities:

for death or personal injury resulting from negligence;

for the quality, fairness, ect. of goods supplied on hire or under a contract for work and materials;

in the case of a guarantee from a manufacturer or distributor, for loss or damage due to his negligence.

Most responses to the Office's approach were positive but a watch was to be kept on the practice.

G. Vaughan Davies has described the Director-General's battle against the mere existence of void terms as follows:

"There is no power to prosecute in respect of void terms whose use is not a criminal offence, but since 1978 the Office of Fair Trading has attempted to discourage the use of void terms in two ways. First, by making it clear that the Director-General regards the use of void terms as an unfair business practice under s. 25(2)(d) of the Consumer Credit Act 1974. In some cases, where the terms are used with deliberate intent to mislead, the Director-General may regard their use to be deceitful or oppressive business practices under the same subsection. This enables the Director-

General to take into account the use of void clauses when considering applications for consumer credit licenses, or when considering whether to revoke licenses already held. Even in cases where, after hearing representations from a trader a licence is not refused or revoked, the Director-General may require that the use of void clauses be discontinued whether their use is a criminal offence or not, provided there is a business practice as described above.

Secondly, the Director-General has jurisdiction to consider standard terms and conditions recommended by trade associations once they have been registered under the Restrictive Trade Practices Act 1976. Cases involving significant restrictions must be placed before the Restrictive Practices Court, but the Secretary of State for Trade may, under s. 21(2) of the Act, give directions discharging the Director from taking proceedings before the court if it appears to the Secretary of State, upon the Director's representation, that the restrictions accepted are not of such significance as to call for investigation by the court. The recommendation of standard terms and conditions is regarded as not involving significant restrictions where the conditions are as fair as may be between the parties, not likely to cause confusion and give opportunity for variation in appropriate cases. In deciding whether a case is suitable for a representation under s 21(2), the Director-General takes into account the use of void clauses as being likely to mislead and asks the trade association to remove them so that the case may then be considered as one not involving significant restrictions."[102]

Criminal Offenses

When no criminal conviction has been obtained by the Trading Standards Officers, the Director-General may seek to obtain written assurances from traders under Part III of the Fair Trading Act to refrain from continuing a course of conduct involving the use of void terms which are made criminal offenses by the 1976 order. In one case, an assurance was obtained relating to the use in invoices of the statement 'Cash refunds cannot be issued under any circumstances'. The Part III powers cannot be used in respect of void terms which do not involve criminal offenses, since the use of such void terms cannot be said to be a breach of the civil or criminal law which is required before Part III of the Fair Trading Act (1973) can be operated. The Director-General has powers to take civil proceedings against traders who refuse to give assurances, or break assurances once given.

During the year 1985[103], 39 assurances were given by traders who had persistently broken their obligations to consumers. In two cases those obligations concerned the use of standard terms[104].

Since the introduction of the sanction a total of 522 assurances, court undertakings and orders (including three contempts of court) had been obtained by the end of 1985[105].

To date some 500 traders have given assurances under Part III; only some five per cent of these have subsequently given rise to problems of sufficient significance to require legal action for breach of assurance or contempt of court. It seems fairly certain that in the absence of Part III procedures or something similar, these traders would have been much more likely to continue their misconduct.

Part III is, however, intended to deal with those traders who have persistently broken the law and it follows that the procedures can begin to be brought to bear only when a trader's breaches of law have reached a sufficient level to be defined as a persistent course of conduct. Further, the lengthy procedures arising from the provisions of the Act and legal proceedings generally mean that traders who are approached for assurances, and have to be taken to court because they refuse to give them, can effectively continue their misconduct while the case is being prepared and heard. This means that a long period, perhaps several years, can elapse since the start of the deliberate or reckless misconduct by a trader.

There is no provision in the Act for the Director General to obtain an interim order to prevent a trader's misconduct at an earlier stage, and there are no penalties, financial or otherwise, for the trader until the final stage of contempt of court (although the costs of civil proceedings can, of course, be considerable). There is thus no disincentive to prevent traders from continuing their misconduct for as long as possible if it is profitable for them to do so.

No aspect of the Part III procedures facilitates the obtaining of redress in individual cases.

With regard to void terms which are void ab initio and which are subject to criminal penalties, the following statistics of convictions may be of interest.

Number of convictions under the consumer transactions (restrictions on statements) order 1976:

Year	no. of convictions
1977	2
1978	3
1979	24
1980	26
1981	26
1982	31
1983	41
1984	49
1985	40
total	242

These prosecutions are brought by the Trading Standards Departments of local authorities. The Office of Fair Trading is not certain whether the statistics are definitive.

The reasonableness test

It will be recalled that some contract terms are voidable, i.e. subject to a test of reasonableness. The Supply of Goods (Implied Terms) Act renders void and ineffective all such clauses as exclude liability where the negligence has resulted in death or personal injury. So far, it has not become unlawful actually to insert such clauses into a contract or to attempt to use them to avoid liability. In those cases where the result of an act of negligence was anything but death or personal injury, damage to property, for instance, the criterion is the test of reasonableness. It should be noted that the status of the injured party, whether or not he was a consumer or acting in the course of a business, is irrelevant.

The Unfair Contract Terms Act states that if an agreement is on written standard terms, or is between a business and a consumer, the test of reasonableness is imposed on the following categories of contract clauses: those which seem to allow a substantially different performance from that which was reasonably expected, and those which seem to allow no performance at all.

Let us take a view at the reasonableness test in consumer cases. In Waldron-Kelly v. Marshall (Stockport county court, March 17, 1981), a suitcase was sent by British Rail at owner's risk from

Stockport to Haverfordwest. The charge was £ 6.03 and British Rail were only to be liable if any loss or delay was caused by their wilful misconduct. The cage was last seen at Crew and British Rail invoked a clause limiting their liability to a sum based on the weight of the goods, this realising a sum considerably less than the real value of the contents. Judge Brown had no doubt that this clause did not satisfy the test of reasonableness.

In Woodman v. Photo Trade Processing Ltd. (Exeter county court, May 7, 1981) a reel of film had been given to the defendants for processing. The subject matter was a wedding. Most of the snaps were lost and the defendants pleaded reliance on this clause: "All photographic materials are accepted on the basis that their value does not exceed the cost of the material itself. Responsibility is limited to the replacement of the films. No liability will be accepted consequential or otherwise, however caused".

The view of Judge Clarke was that the exclusion clause was unreasonable.But before he was prepared to come to a final decision, he felt obliged to consider whether there were alternative means by which the customers needs could have been met. The judge had recognised that this factor, which appears in the guidelines contained in schedule 2 to the Act (UCTA), was necessarily only to be applied, according to the strict wording of the Act, to contracts for the sale, supply or disposition of goods. Judge Clarke fairly rationalised its application to the case in hand, which involved a contract of services, on the ground that the matters contained in the schedule were such matters as would usually be taken into account in differing categories of case as well.

The crucial point was that the code of practice for the Photographic Industry, as agreed with the Office of Fair Trading, clearly recognised the possibility of a two-tier system of trade: the lower tier would be the present way of trade, with full exclusion of liability; the other possibility would be a more expensive service, but with the processors accepting a greater degree of liability. Such an approach, the judge concluded, was not 'only reasonable but practicable'. For that reason, the defendants, upon whom the burden lay, failed to persuade him that the clause 'satisfies the statutory test of reasonableness'.

The UCTA assumes that a contract is a consumer contract unless the profferers can show that he was not acting in the course of a

business, did not so hold himself out, and did not contract with a party who was himself acting in the course of a business.
In the Rasbora case (Rasbora v. JCL Marine Ltd (1979)2 Lloyd's Rep 645), Mr. Justice Lawson held that where a company was buying for the private use of its proprietor, with no intention of the boat being hired out, that was a consumer contract[106].

In a commercial case (Stag Line Ltd v. Tyne Ship Repair Group Limited and Others (1984) 4 *Times Law Reports* 33) Judge Staughton considered:

"It can scarcely have been the intention of Parliament that a clause in a ship repairer's standard terms would be fair and reasonable one week - when the yard had no work and was willing go make concessions if asked - but unfair and unreasonable the following week, when the yard was busy. Relative bargaining power must surely be judged by somewhat broader considerations".

With respect to the judge, Lawson cannot support this view[107]. For one thing, the wording of section 11 (1) of the UCTA plainly points the other way:

"In relation to a contract term, the requirement of reasonableness ... is that the term shall have been a fair and reasonable one to be including 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."

Note the concluding words: "when the contract was made". This may be illustrated by the case of Marton v. Southwestern General Property Co. (May 6, 1982) which is centred on a person who bought property for his own use at an auction. He pleaded that certain terms and conditions in the particulars of sale failed the test of reasonableness. The judge considered in the defenders note that the vendors were not concerned with sales to people like the present purchaser in particular, but were also catering for spectators who buy land 'without inquiry simply on their nose for good bargains':

"What I have to consider is whether these conditions were reasonable to incorporate in a contact, not with property speculators in which case they might very well be reasonable, but in a case such as a householder like Mr. Marton who is very clearly concerned, if

he wants to buy for himself, with planning matter ... I have to deal with this contract, with the parties to this contract and the circumstances in which this contract was made".

Lawson arrives at the following conclusions:
First it is perfectly possible, and clearly recognized, that the self-same clause may be reasonable in some cases and not in others, depending on all the circumstances of the individual case. To this extent, therefore, there can be no precedents. Second, the guidelines contained in schedule 2 are, directly or indirectly, applicable to all cases where reasonableness is an issue. Third, the question of reasonableness is considerably influenced by the amount of time there was available to a party to negotiate on, or consider the implications of, a particular clause. Fourth, a crucial factor will be the impracticality of complying with the disputed clause. It is almost a rule of law that a clause will be deemed unreasonable when there was no way that the party against whom it was deployed could not be fairly expected to observe its terms as a matter of practicality. Finally, the courts are keen to stress that in business contracts, the parties are best left to sort things out for themselves with no interference from the courts[108].

Enforcement
Once more, I give a (long) quotation from an article by G. Vaughan Davies:

"In spite of the use of existing powers it became obvious to the Office of Fair Trading in 1982 that void clauses were still being used in certain fields. In March 1983 the Director-General,Sir Gordon Borrie, again called upon traders to stop using such terms in their contracts with consumers. He said, 'Today, five years after the Unfair Contract Terms Act became law, too many traders are still using terms in contracts, notices, brochures, etc. which are void and unenforceable. As these words have no legal backing, I can only suppose that such traders are either unaware of the law or else deliberately try to mislead the public, hoping that many will be deterred from seeking redress by phrases which appear to be a legally-based denial of their rights. At this stage I am seeking to end the use of these contract terms by persuasion. I shall review the effects of my approaches and see whether further action is called for perhaps by the creation of fresh criminal offences'.

Numerous examples of void terms have been identified by the OFT with the help of local authority Trading Standards Departments and include:

1. wildlife parks who try to disclaim responsibility for negligence if visitors are injured by animals;

2. a ferry company which says it will not accept responsibility for injury to passengers, even if the crew is negligent or the vessel unseaworthy (void under the Athens Convention on the Carriage of Passengers and their Luggage by Sea (1974");

3. a home improvements firm which attempts to accept the responsibility for faulty materials only if defects are pointed out by the customer within seven days of the work being done;

4. car hire firms who say they will not accept responsibility for loss, damage or delay due to mechanical or other defect in the vehicles they supply; and

5. car wash operators who try to shift the blame for injury to their customers, even if their machinery is defective.

It was found that home improvement contractors and car hire firms were the most frequent offenders in using void clauses.

In many cases where it has not been possible to use formal powers the Director-General has written to traders pointing out that they appear to be using such void clauses. As a result, some traders agreed to discontinue their use, others have indicated that old invoices or notices are still being used and promise to discontinue using them. A few appear to think that the use of void clauses, when their use is not a criminal offence, is a legitimate way of discouraging claims from the public.

The Director-General has recently stated that he is unwilling to advocate stronger remedies, such as making the use of void terms a criminal offence (in cases where this is not already so), without having a clearer idea of the extent of the economic detriment at present caused to consumers by the practice. It is, of course, not easy to obtain direct evidence to show to what extent consumers are prevented from exercising their legal rights because they read and were deterred by a void clause. In theory the most serious cases are those involving exclusion of liability for death or personal injury caused by negligence; but it has been argued that these are the cases where the consumer or his personal representatives are more likely to take legal advice, when it is to be hoped that the ineffective nature of the clause will be exposed. Against that some consumers may be deterred from going to a solicitor if they believe the exemption clauses are valid.

The low level of prosecution under the Consumer Transactions (Restrictions on Statements) Order 1976 is not a conclusive argument against extending the criminal law, since Trading Standards Officers are able to warn traders that an offence has been committed, and in most cases the offending notice or clause will be discontinued. Where the void clause is not subject to a criminal sanction the Officer has no statutory basis for intervention.

A strong argument in favour of extending the criminal law is that it is anomalous that the use of void clauses in contracts for sale of goods and hire purchase is a criminal offence, whereas their

use in contracts for work and materials and hire is not. In this field the old distinction between sale, and work and materials, is still important. Furthermore the fact that under the Supply of Goods and Services Act 1982 the relevant implied terms have been clarified and made statutory by ss. 2 to 5 in the case of contracts for work and materials, and by ss. 7 to 10 in the case of contracts of hire, would make it easier to subject the use of void clauses exempting liability under those implied terms to criminal sanctions".[109]

Codes of Practice

The Director General has a duty under section 124 (3) of the Fair Trading Act 1973 'to encourage relevant associations to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers in the United Kingdom'. The term 'relevant associations' is usually applied to a trade or services supply association. The Office of Fair Trading has also encouraged codes in sectors where its statutory duties do not strictly apply, such as those of the area electricity boards and for postal and telecommunications services. At the moment 20 Office-sponsored codes are in operation.
The Office has concentrated its limited resources on encouraging codes of practice in those sectors where there has been a high level of consumer complaints; where the trade association or associations concerned represent firms whose sales account for the majority of that market; and where the trade association or associations have the resources and authority to support the code and to ensure that their members abide by the code's provisions. In other sectors the Office is ready to give general advice on the provisions which can usefully be incorporated in codes of practice. The Office has developed a set of criteria which must be satisfied before a code may receive the Director General's endorsement. These include the avoidance of any significant restrictions on competition, and a clear statement of consumers existing rights under the general law as they effect transactions in the relevant sector (for example the Unfair Contract Terms Act). The Office will also look to the code to confer additional rights and benefits on consumers which may be desirable because of problems peculiar to that sector. Trade associations are, moreover, expected to provide a conciliation service in the event of disputes, and a cheap, speedy, and independent redress scheme, should conciliation prove abortive.

The effectiveness of a code also very much depends upon the extent of public awareness of it. For this reason, the Office publishes a series of leaflets which include a summary of the provisions of the main codes and are designed to bring the existence of the codes and their principal features to the attention of consumers (and their advisers). Those codes with the highest public profile achieved through promotion by the associations and the media as well as by the Office (the Association of British Travel Agents (ABTA) codes for example) tend to be those which are most successful in raising trading standards in their sector and helping consumers with their individual complaints.

Codes are essentially voluntary self-regulatory documents, and thus without statutory backing. If, however, a trader states that he or she intends to comply with the provisions of a code but has no intention of so doing, that amounts to a false statement as to the provision of a service under section 14 of the Trade Descriptions Act 1968. There has been an instance of a successful prosecution on these grounds citing breaches of the motor industry code. A code has also been used to interpret the reasonableness test under section 2 of the Unfair Contract Terms Act (1977).[110]

B. Other European Countries

43. Austria

The introduction of the Consumer Protection Act (*Konsumentenschutzgesetz*) has been considered a major event by most Austrian commentators. As one critic puts it, the occasion is as important as the introduction of the Commercial Code (*Handelsgesetzbuch*)[111]. It is understandable therefore, that the Act has attracted considerable attention in Austrian legal writing[112], although by no means as much as the German *AGB-Gesetz* in the Federal Republic.

Case law on the Act is still limited, most certainly when compared with German case law. However, it should be taken into account that in Austria fewer court cases are reported: in general only decisions of the *Oberste Gerichtshof* (Supreme Court) are reported[113].

Group actions are rare in Austria. According to one author, some 30 group actions have been instituted from 1979 to 1986[114]. Two or three of these actions have come up before the *Oberste Gerichtshof*[115]. However, according to the same author, the preventive effect of the Act should not be underestimated: many general conditions have been changed upon the demand of the social partners[116].

44. Eastern Europe

No data as to the application of the legislation referred to in Nr 21 have been collected.

45. Finland

Since the Finnish legislation on unfair contract terms closely follows the Swedish model, this Report will only devote a few paragraphs to the Finnish experience.

The experience of Finland with unfair contract terms in consumer transactions is described in the annual reports of the Consumer Ombudsman (*Konsumentombudsman*). In 1979, the Consumer Ombudsman negotiated new contract terms for the sale of used cars and for the rent of summer cottages. He also took part in the negotiations on the supply of electricity, which took place under the auspices of the Minister of trade and industry (who lays down the contract terms for the supply of electricity). The Consumer Ombudsman also reviewed standard contract terms for other automobile contracts, for boats, for travel contracts, for building elements as well as for cleaning contracts (1979 Report, p. 21-22).

In the following year a number of the negotiations mentioned above were succesfull: in the automobile and boat trades new contract terms were approved of. The Consumer Ombudsman also negotiated contract terms for the installation of telephone equipment, the damages for non-returned films to be developed, the door to door sale of grave stones,and the travel contract (1980 Report, p. 35-40).

1981 only brings us a new standard contract for building materials (1981 Report, p. 24). In 1982 new contract terms for motor vehicle repair, for renting cars and for hire-purchase agreements were negotiated (1982 Report, p. 25-27).Finally, in 1985 - I did not have at my disposal the 1984 annual report - standard contract terms for the rent of video films and for the supply of natural gas were worked out (1985 Report, p. 30-31).

As will be seen from the diminishing record, the Finnish Consumer Ombudsman's activities in the area of unfair contract terms apparently have slowed down.
On the other hand, the general clause in the Contracts Act seems to be quite popular in Finland - in any case it has engendered a large number of court decisions, many of these by the Finnish Supreme Court. Here it should be bourne in mind, that par. 36 is not limited to standard contract terms nor to consumer contracts. A survey of case-law on par. 36 is given by Wilhelmsson[117], who devotes separate sections of his book to price clauses (p. 92-93), clauses which unilaterally give the supplier rights (p. 93), clauses on cancelling the contract (p. 93), clauses whereby the consumer is bound for an unreasonably long period (p. 93-94), liability clauses (p. 95), contractual penalties (p. 95-97), exemption clauses (p. 97-98), exclusion clauses (p. 98-99), clauses whereby the period for claims is limited (p. 99) and clauses as to the settlement of disputes (p. 100).

46. Norway

The Norwegian Market Council has so far handed down four decisions with regard to par. 9 a of the Act relating to Control of Marketing and Contract Terms and Conditions. A fifth case may soon come up[118].

The first four decisions involve the following contract terms. In 1983 an insurance clause was found not unreasonable (MR Nr 1/83). Consumer Ombud Avholdsfolkets Gjensidige bilforsikringsselskap 'Varde' (MR Nr 5/83) deals with a clause in an insurance policy. Under the clause, the insurance company accepts no liability for car accidents in case of alcohol consumption by the policyholder,

regardless whether there is a causal relation between the alcohol consumption and the accident or not. The Market Council did not find the clause unfair.

In Consumer Ombud v A/S Norrønafly (MR Nr 6/82) a jurisdiction clause, providing for the court of Baerum, the business address of the supplier of aerial photographs, to be the sole jurisdiction, was held to be a violation of the Act.

The most important of the four cases is Consumer Ombud v Norges Bilbransjeforbund (MR Nr 7/86), in which a price of the day clause was at stake. The Market Council does allow such a clause which authorizes car dealers to increase the price of an automobile after the contract was concluded. However, the price may only be increased before delivery and the increase should be less than the present 8%, with a differentiation between the various causes of the increase, such as tariffs and duties, fluctuations in the rate of exchange and price increases by the producer.

The next step now is to negotiate new contract terms for the sale of automobiles. A number of other terms in the contract, which is in use both for new and for used cars, heave already been negotiated between the Consumer Ombud and Norges Bilbransjeforbund and been included in the contract forms which are now being used. For example, better guarantee conditions were agreed upon and the time of delivery is now to be fixed when the contract is signed.

Within the Consumer Ombud office, approximately three out of twenty positions are related to the work on standard contract terms[119]. In 1986, the Consumer Ombud and the Norwegian Cable TV Association reached agreement as to a new standard contract for cable TV. The contract limits the company's freedom to increase the rates agreed upon, gives the consumer the right to eliminate undesirable programmes, and provides the opportunity to enter service agreements for one's own cable with companies other than the distributor.

Other areas in which the Consumer Ombud office is active at the moment are housing - standard contract term for the purchase of pre-fabricated houses and standard contract terms for the sale and

marketing of old and new housing through an agent/lawyer/banker/housing co-operative, etc. - , the public sector - standard contract terms for the telecommunication administration, standard contract terms for the electricity boards - and financial services. The standard contract terms of the banks and finance companies are at present being considered by the Market Council. At issue is the clause which authorizes the bank to change the interest rate on loans freely. While the case is pending, a mutual understanding has at least been reached as to the principle that such changes must have a specific reason, such as a government decision or a circumstance influencing the costs of the credit institution.

No research has as yet been done with regard to the effectiveness of the Consumer Ombud's work in the standard contracts area. However, the new Consumer Ombud as of January 1, 1987, Ms Kjersti Graver, is now occupied with the task of finding methods for such evaluation.
Par. 36 of the Contract Law is now often invoked in contract disputes, both in consumer and commercial contracts. Cases where par. 36 has led to changes, alterations or additions to contracts are less numerous. So far, the Supreme Court has not yet been in a position to apply par. 36 in a clear- cut case.[120]

As far as lower courts are concerned, the cases which have been reported deal with a price increase for the supply of water[121], a leasing contract[122], mortgage[123,124], and price adjustment in the sale of real estate[125]. A remarkable arbitration decision in the most commercial of commercial areas is the Mascot Award of July 1, 1985, in which par. 36 was successfully invoked for the adjustment of a currency clause in a bare boat charter party. The interesting fact is that the arbitrators, Professor Sjur Braekhus, Supreme Court Justice J.C. Mellbye and Attorney Ole Lund (formerly director of the Nordic Shipowners' Defence Club), are considered influential in Norway, which gives the award a larger importance.

47. Sweden

Sweden's control system of unfair contract terms is generally considered to be succesfull. This is mainly due to the activities

of the *Konsumentombudsman*, who ever since the legislation came into force in the early 1970's has emphasized the value of negotiating general contract terms which professional organizations. In doing so, he has set priorities as to which contract forms are most important from the consumer point of view. The negotiations as to general contract terms in the first ten years of the control have been described in detail in a series of articles in the review *Konsumenträtt & ekonomi* by Th. Utterström. This series has also appeared as a *särtryck* (offprint)[126].

In his paper for the Second European Workshop on Consumer Law, held in Louvain-la-Neuve in 1982, U. Bernitz gives a survey of the decisions of the Market Court with regard to unfair contract terms[127]. Bernitz first points to the important role which the new control system plays with regard to mandatory law. The Contract Terms Act introduced in Swedish law the possibility to eliminate from general contract terms the clauses which violate mandatory law provisions. This has given mandatory law an impact which is considerably larger than it was previously.

Other clauses which have been held improper include price increase clauses, force majeure clauses, forfeiture of down payments, withholding of payment, and misleadingly presented clauses.[128]

All the time it should be borne in mind that court action represents only a small part of the Consumer Ombudsman's activities.

As of 1976, Swedish consumers may invoke par. 36 of the Contracts Act to set aside an unfair contract term. This possibility also exists for commercial contracts and it is not limited to standard contract terms. It now happens quite often that Swedish courts apply par. 36. In *Konsumenträtt & ekonomi* 1985/2, p. 13-20, T. Håstad gives a survey of this case-law. The author devotes attention to arbitration clauses, clauses whereby the supplier may unilaterally decide what his obligations are, exemption clauses, forfeiture of down payments, penalty clauses, and price and index clauses. He concludes that the Supreme Court has had surprisingly little influence on the development of case law[129]

At the outset, the Consumer Ombudsman had very few provisions on consumer contracts in Swedish legislation at his disposal. At present, thanks among others to new legislation with regard to consumer insurance[130] and consumer services[131], this situation has changed. In order to make the Swedish control system still more effective, it has been urged to give the Consumer Ombudsman the power to represent individual consumers with regard to their claims before the ordinary courts[132], and to give the Supreme Court the power to sort out cases, where there is a need for precedent, in order to decide these in first and last instance[133]

48. Switzerland

It is too early yet to provide an evaluation of the recent Swiss legislation on standard contract terms. The legislation has generally been welcomed by Swiss legal writing[134]. It is in line with most proposals made in earlier legal writing[135], although an administrative approval system occasionally has also been argued for[136].

Although legal writers are sympathetic towards the idea of legislation on standard form contracts, nonetheless several shortcomings of the new law are signalled:
- the general clause should be supplemented by a list of clauses which are considered to be unfair[137];
- the civil law consequences of an infringement of the Unfair Trading Practices Law should be regulated[138];
- the financial and personal possibilities for consumers' organizations to act are not guaranteed[139];
- the law should provide for an action to revoke a recommendation of unfair contract terms[140];
- the law should provide for a pre-trial 'Abmahnungsverfahren'[141].

Meanwhile, traditional case-law concerning unfair contract terms has little to add to what we know from German law in the pre-*AGB-Gesetz* era; unlike German courts, Swiss courts have until recently not seen fit to introduce an open control of the contents of standard form contracts[142]. A recent decision by the *Bundesgericht* (Supreme Court), however, appears to open possibilities for an

open equity control of standard contract terms[143].

C. Non-European Countries

49. Australia

The federal Trade Practices Act's section 52A is still too recent (1986) to be evaluated. The New South Wales Contracts Review Act 1980 has engendered a number of critical comments as well some case-law[144].

50. Canada

In Chapter II, for reasons of brevity, I have limited the description of Canadian consumer protection law to one province, Québec. The Annual Reports of the Office de la protection du consommateur do not provide any clues as to possible activities of the Office with regard to unfair contract terms. The general clause contained in art. 8 of the Consumer Protection Law has given rise to a very limited number of cases: no more than fifteen over a fifteen-year period[145], when we include its predecessor, art. 118 of the 1971 Act.

51. Israel

Four years have now elapsed since the Standard Contracts Law, 5743-1982, came into force (June 7, 1983). Perhaps this is somewhat early for an evaluation. Still, two observations may already be made. First, the new law seems better equipped to exercise a lasting influence on legal practice. Second, there are some indications that the new law is indeed applied far more often than the 1964 Standard Contracts Law.

The 1982 Law is better equipped to deal with daily life on a number of counts: it is not limited to a list of restricted terms but rather contains a general clause (section 3); the new Act declares ten types of terms presumptively prejudicial (section 4); consumers' organizations may now institute injunction proceedings before the new Standard Contracts Tribunal (section 16); and the

Tribunal itself has been reinforced, as compared with its predecessor under the 1964 Law (sections 6-8).

Although the new Law still has some weaknesses[146], the first experience shows that it is far more effective than the Standard Contracts Law 1964. In four years some 80 standard contracts have been submitted to the Tribunal for approval, ten of them by consumers' organizations[147]. This is as much as under 18 years of the old Act (when, however, no injunction proceedings were instituted by consumers' organizations). The 'voluntary' submittal of standard contracts is promoted by among others the Ministry of Housing, which requires contractors to work on approved contract terms. Among the contracts which have been checked by the Tribunal are the general banking conditions.

It is estimated that at the Ministry of Justice/Attorney General's office three lawyers are working on standard contract terms most of their time. At the Histradut Consumer Protection Authority one out of two lawyers is occupied with standard contracts most of the time.

The new Law has not yet led to cases which have been reported. During the last years, Israeli courts have decided a number of cases on the basis of the old Act, however. These cases deal with contract terms for banking, construction and repair of automobiles. In the same period,the Israel Supreme Court handed down a decision in a leading case involving dry-cleaning conditions.

52. United States

Par. 2-302 Uniform Commercial Code, the controversial unconscionability provision,continues to engender case-law[148], as well as case notes[149], while American writers are continuing to comment on the contract of adhesion doctrine[150]. Both the federal government and state governments have enacted consumer protection statutes, which among others provide for institutional protectional and private remedies[151]. However, the catchword 'unfair contract terms' or 'standardized contract' has not quite become as popular as in other parts of the world. It should be emphasized, in this regard,

that no systematic study was made of state practice as to the control of unfair contract terms.

1. Although there is legislation on unfair contract terms in specific contracts such as insurance - Law of July 9, 1975 and Decree of March 12, 1976 - and public utilities - see the reports by Th. Bourgoignie, Les clauses abusives dans les secteurs de la distribution de l'électricité en basse tension et du gaz, Centre de droit de la consommation 1/1979; Les clauses abusives dans les conditions de distribution de l'eau alimentaire à usage domestique, 3/1980; Les conditions d'abonnement et d'usage du service téléphonique en Belgique, 1/1981.

2. See the survey of case-law by M. Bosmans, *Tijdschrift voor Privaatrecht* 1984, p. 33-94.

3. Th. Bourgoignie, Le contrôle abstrait des abus dans les rapports de consommation, in: Rapports belges au XIIe Congrès de l'Académie internationale de droit comparé, Anvers/Bruxelles 1986, p. 136 at p. 177 (Note 77).

4. J. Stuyck, *Journal of Consumer Policy* 1984, 125 at 131, as well as H. De Coninck, Belgique: les accords négociés entre organisations de consommateurs et secteurs commerciaux, *BEUC Actualités Juridiques* 1983, No 5, p. 2-4.

5. J. Stuyck and W. van Gerven, Handelspraktijken, Gent 1985, p. 19.

6. Dahl, Consumer Legislation in Denmark, p. 67.

7. Letter of Ms. Saucant of the Forbrugerombudsmanden.

8. Dahl, p. 57-59.

9. Dahl, p. 64.

10. *Ugeskrift for Retsvaesen* 1979, 225.

11. Gomard, *Revue internationale de droit comparé* 1982, 622.

12. Dahl, p. 65.

13. Dahl, p. 66.

14. As to the co-existence of the two Acts seen Madsen, *Ugeskrift for Retsvaesen* 1980, p. 117-121.

15. Calais-Auloy, Droit de la consommation, Paris 1986, No 124; Cas and Ferrier, Traité de droit de la consommation, Paris 1985, No. 92. A collection of 21 recommendations in 1978-1985 has been published by the Direction des Journaux officiels in 1986.

16. A. Sinay-Cytermann, La Commission des clauses abusives et le droit commun des obligations, *Revue trimestrielle de droit civil* 1985, p. 471, 507.

17. Calais-Auloy and Bihl, Valuation of legislative attempt on unfair contract terms in consumer contracts in France, in: Th. Bourgoignie (ed), Unfair terms in consumer contracts, Louvain-la-Neuve/Bruxelles 1983, p. 181, 182.

18. *Dalloz* 1981, Jur. 228 (note Larroumet), *Revue trimestrielle de droit commercial* 1981, p. 340 (note Hémard).

19. Ph. Malinvaud, Contrats en matière immobilière, and J. Bigot, Assurances, in: Les contrats d'adhésion et la protection du consommateur, Créteil 1978, p. 39-56 and p. 61-80 respectively.

20. Calais-Auloy, Droit de la consommation, Paris 1986, No 123. The quotation is from Calais-Auloy and Bihl in Th. Bourgoignie, Unfair terms in consumer contracts, p. 181, 184.

21. D. Nguyen Thanh-Bourgeais, *Dalloz* 1984, Chronique 91, 95 (the contract itself is not invalidated).

22. Cour d'appel Aix March 20, 1980, *Dalloz* 1982, 131 (note P. Delebecque). *Contra*: A. Sinay-Cytermann, *Revue trimestrielle de droit civil* 1985, p. 471, 515.

23. D. Nguyen Thanh-Bourgeais, note 21.

24. See the analysis by J. Bigot, note 19 supra.

25. The travaux préparatoires clearly show that art. 35 should be seen as a limitative list - Ghestin, Le contrat, Paris 1980, 497 - but the opposite view, based on the text of art. 35, does not seem untenable - see Bihl, *Juris Classeur Périodique* 1978, I, 2909.

26. Calais-Auloy, Droit de la consommation, Paris 1986, No 123.

27. See Cas and Ferrier, Traité de droit de la consommation, Paris 1985, Nos 187-195.

28. Cas and Ferrier, No 187.

29. Intervention by Ms Jacquot (*Institut National de la Consommation*), in: Les contrats d'adhésion et la protection du consommateur, Créteil 1978, p. 85-86.

30. Cas and Ferrier, No 188.

31. Cas and Ferrier, No 189.

32. Cas and Ferrier, No 190.

33. Cas and Ferrier, No 195, mention 28 such contracts which had been concluded by 1984.

34. Cas and Ferrier, No 158.

35. G. Berlioz, Le contrat d'adhésion, 2nd ed. Paris 1976, No 242.

36. Calais-Auloy, Droit de la consommation, Paris 1986, No 114, mentions four such possibilities: art. 1131 (obligation without cause - a provision which bears some resemblance to the common law concept of consideration), art. 1118 (*laesio enormis*), art. 1134 section 3 (execution of the contract in good faith) and the concept of *abus de droit*.

37. Cas and Ferrier, No 157.

38. See Nr 34 below.

39. A. Morin, L'action civile des associations de consommateurs, Paris (Institut National de la Consommation) 1983.

40. P. Schlosser, *Zeitschrift für Wirtschafsrecht* 1985, p. 449.

41. E. von Hippel, *Betriebs-Berater* 1985, p. 1629.

42. H.J. Bunte, *Neue Juristische Wochenschrift* 1984, p. 1145.

43. W. Löwe, *Betriebs-Berater* 1984, p. 492.

44. See Chapter II nr. 11.

45. H.J. Bunte, *Neue Juristische Wochenschrift* 1987, p. 921-928.

46. BGH (7th Senate) April 5, 1979, *BGHZ* 74, 205, *NJW* 1979, 1406, *BB* 1979, 1319.

47. M. Bartsch, *Neue Juristische Wochenschrift* 1986, p. 28 ff. is of the opinion that the party who benefits from the general contract terms must be considered the party who uses the terms in the sense of the law. See however for a different opinion F. Brych, *Betriebs-Berater* 1985, p. 158 ff.

48. BGH (7th Senate) December 16, 1982, *NJW* 1983, 816, *BB* 1983, 599, *ZIP* 1983, 325.

49. See P. Schlosser, *Zeitschrift für Wirtschaftsrecht* 1985, p. 453 ff. and P. Flach, *Neue Juristische Wochenschrift* 1984, p. 156 ff.

50. Schlosser, *Zeitschrift für Wirtschaftsrecht* 1985, p. 453.

51. BGH (8th Senate) March 1, 1982, *NJW* 1982, 1388, *MDR* 1982, 926, *WM* 1982, 444, *ZIP* 1982, 446.

52. BGH (2nd Senate) May 30, 1983, *NJW* 1983, 2772, *BB* 1983, 2074, *DB* 1983, 2759, *MDR* 1984, 121, *Versicherungsrecht* 1983, 1077, *ZIP* 1983, 1466.

53. See W. Bohle, H.W. Micklitz, *Betriebs-Berater* Beilage 11/1983.

54. BGH (8th Senate) October 31, 1984, *BB* 1985, 689, *DB* 1985, 1017, *NJW* 1985, 320, *WM* 1985, 24, *ZIP* 1984, 1485.

55. P.J. Witte, Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung Allgemeiner Geschäftsbedingungen, Münster 1983, p. 18 ff.

56. H. Schmidt, Vertragsfolgen der Nichteinbeziehung und Unwirksamkeit von Allgemeinen Geschäftsbedingungen, Heidelberg 1986.

57. BGH (8th Senate) October 7, 1981, BGHZ 82, 21, *BB* 1982, 146, *DAR* 1982, 62, *DB* 1982, 427, *MDR* 1982, 468, *JNW* 1982, 331, *WM* 1982, 9, *ZIP* 1982, 71.

58. BGH (8th Senate) February 1, 1984, *NJW* 1984, 1177, BGHZ 90, 69, BB 1984, 486 (notes Trinkner and Löwe),DAR 1984, 109, DB 1984, 657, *MDR* 1984, 750, *VRS* 1984, 252, *WM* 1984, 309, *ZIP* 1984, 330. See also H.J.Bunte, *NJW* 1984, 1145.

59. BGH (3rd Senate) April 5, 1984, *NJW* 1984, 2161, *BGHZ* 91, 55, *BB* 1984, 1003, *DB* 1984, 1519, *MDR* 1984, 738, *WM* 1984, 696, *ZIP* 1984, 676.

60. Schlosser, *Zeitschrift für Wirtschaftsrecht* 1985, 449.

61. BGH (8th Senate) *NJW* 1981, 1510, *BB* 1981, 934, *DB* 1981, 1129, *MDR* 1981, 750, *WM* 1981, 379.

62. Th. Becker, Die Auslegung des Par. 9 Abs. 2 AGB-Gesetz, Heidelberg 1986.

63. Becker, *ibidem*.

64. The fair trading law was amended in 1986 so as to exclude any further abuse.

65. Tätigkeitsbericht 1. November 1984-31. Dezember 1985, Berlin 1986.

66. Bohle and Micklitz, *Betriebs-Berater* 1983 Beilage.

67. Letter of September 2, 1986 from Dr. Seifert, of the Bundeskartellamt.

68. See however H.J. Bunte, Zehn Jahre AGB-Gesetz-Rückblick und Ausblick, *Neue Juristische Wochenschrift* 1987, p. 921-928.

69. See the survey by Jean Voulgaris, Grèce, in: Le contrôle des clauses abusives dans l'intérêt du consommateur dans les pays de la C.E.E., *Revue internationale de droit comparé* 1982, p 757-790, with further references to Greek-language sources.

70. Voulgaris, *Revue internationale de droit comparé* 1982, p. 757, 762.

71. J. Phillips, Irlande, in: Le contrôle des clauses abusives dans l'intérêt du consommateur dans les pays de la C.E.E., *Revue internationale de droit comparé* 1982, 791, 796.

72. See C.M. Bianca sub voce Condizioni generali di contratto in Enciclopedia Giuridica Italiana.

73. Tribunal d'arrondissement Luxembourg (civil chamber, first section) December 19, 1984, No 832/84.

74. Tribunal de paix Luxembourg January 24, 1984, No 207/84.

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76. Tribunal d'arrondissement Luxembourg (civil chamber, eighth section) March 25, 1987, No 167/87, Glueck Fenster Technik GmbH & Co KG v. Tenchini.

77. Tribunal de paix Esch-sur-Alzette December 9, 1986, No 1718/86, Esther s.à.r.l. v. Gindt.

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CHAPTER IV ANALYSIS

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53. Scope of application

In the two preceding Chapters, I have presented a survey of recent legislative developments with regard to unfair contract terms in consumer transactions and of the application of this legislation in practice. In this Chapter, I shall draw some conclusions from this survey.

The conclusions may be grouped under three headings. First, I shall try to describe the principal features of one or more control systems which on the basis of the last decade's experience seem to have the potential of serving the general interest best. I will then consider briefly some technical questions which have to be settled. Finally, I shall devote some attention to the possibilities of EC harmonization.

Comparing legislation of different countries always has its dangers[1]. The Channel still divides Europe in a common law and a civil law area. Traveling southward, legislation is increasingly

seen as the dominant source of law. But even between countries apparently so similar in legal culture like the German Federal Republic and The Netherlands[2], the general contract terms which are in use may vary greatly. Then there is the human element of course: in the absence of enforcement, the most perfect laws of the world are not worth the paper they have been printed on.

A. Towards an efficient control system

54. The need for legislation

There is one major conclusion to be drawn from the survey in Chapters II and III. All member countries of the EC now either have specific legislation as to unfair contract terms in consumer transactions - in force, as in Denmark, France, the German Federal Republic, the Irish Republic, Italy, Luxemburg, Portugal, Spain, the United Kingdom, or not yet in force, as in The Netherlands - , a government bill pending as is the case in Belgium, or are at least considering such legislation (Greece). The same applies to those other European countries which were covered in our survey: Austria, Finland, Norway, Sweden and Switzerland, which now all have specific legislation.

Apparently, the need for legislation is felt everywhere. Even the countries which a decade ago still were opposed to specific legislation (Switzerland) or which had political problems in getting a government bill enacted (The Netherlands) now have joined other countries.

Nor is there any trend towards repeal of this legislation. The wave of deregulation which has been sweeping over parts of Europe in the early 1980's has hardly affected the other trend towards specific legislation (although in The Netherlands it nearly succeeded in killing the bill - Nr 16 above).

In those countries, where there has been organized opposition against specific legislation, the two main arguments against such legislation usually were that there was no real need for it and that the necessarily wide scope of application would endanger

national and international commerce.

As far as the first argument is concerned, it has often been observed that little - if any - empirical evidence supports the need for legislation. It should be added: nor is there much evidence that legislation is not needed. Supporters of legislation and their adversaries have often waged full battles over the question which side should bear the burden of proof. Against the contention that those who propose legislation should prove their case, it has been observed that in this special case the 'legislationalists' only want a return to the law and therefore do not bear the burden of proof. But even if the necessity must be proven, there is sufficient secondary evidence, such as court reports, the use of standard form contracts, consumer complaints, that supports the case for legislation.

As for the second argument, it is true that some laws on unfair contract terms deal not only with consumer transactions but also with contracts between two persons or entities who are acting in the exercise of a profession or a trade. Consumer activism sometimes serves as a catalyst to legislative innovations which are not confined to consumers. In other cases, policy reasons require protection not only of consumers but also of small businessmen. In such cases, a legislator runs the risk that the provisions dealing with consumer contracts have to be watered down. Business interest will otherwise proclaim the act a danger to national and especially international commerce.

There is an easy solution to this problem, which may be found in several legislations. It consists in differentiating between the various provisions. Thus the procedural provisions are often limited in scope to consumer transactions. Likewise, the black lists are geared to consumer transactions. Other substantive provisions, however, may well play a limited role in purely commercial transactions as well. The one drawback of this solution is that it makes codification of the whole of consumer law in one single *Code de la consommation* more difficult.

55. Three generations

The legislation on unfair contract terms in consumer transactions may be seen as a set of waves. Among EC member countries, Italy is the only one which belongs to a first generation of jurisdictions which have introduced specific legislation. Italy actually was the pioneer of this wave, which did reach some other countries at the Mediterranean as well as I have described in my 1977 Report. The legislation was inserted in the Civil Code and it focused on individual contracts, not on the use of unfair terms as s marketing practice.

A second wave of countries approached the problem from this latter angle and no longer from the individual point of view. This involved setting up a control machinery. Sweden paved the way as a pioneer of the second wave.

Meanwhile, Sweden has moved into a third wave, in which the two approaches are combined or at least co-exist. Most member countries of the EC have opted for this solution. The exceptions are Italy and Spain, which are still in the first wave , and France, which finds itself alone in the second wave (Greece belongs to the lost generation).

The first generation often may be described as a codification of existing case-law. In the absence of any legislation, courts have sometimes arrived at similar solutions, which were possible by applying the general clauses of the Civil Codes. In the second wave this is far more difficult. The difference may be illustrated by referring to the two Dutch cable-television cases, both handed down on April 25, 1986. In one case, the Supreme Court anticipated on the introduction of the bill - as it then was - on unfair contract terms; in the other it refused to do so. The first case involved a substantive law provision, the second the procedural right of collective action[3]. In my view, the Supreme Court might as well have anticipated on this particular procedural provision, but I must admit that the powers of a court do have their limitations. Establishing a new court, a consumer ombud, or handing out subsidies to consumers' organizations are activities

which would require an even larger legal activism than we know already.

56. Basic features of a control procedure

What then are the basic features of the second wave control systems? As I have already described in my 1977 Report, these basic features consist of a two-layer control. On the first level, the consumer interest is represented by an entity, either public or private. This entity engages in negotiations with suppliers or their organizations in order to arrive at agreed contract terms. Two ways may get suppliers and their organizations around the negotiating table: the system of the stick and that of the carrot. The carrot comes later, now first about the stick.

The stick is provided by a court or court-like agency, neutral anyway, which may order a supplier to cease the use of particular contract terms. The stick will rarely have to be used, but the threat that it will must in itself be sufficient to make parties agree to an equitable result.

This is the model which I described as the most ideal one in my 1977 Report. Ten years later, on the basis of German experiences but also on the basis of my own, I must modify my ideas. Negotiations are not always the appropriate way of dealing with general contract terms. In the German Federal Republic, the *Verbraucher Schutz Verein* acts just as much as a policeman, looking for contract terms which violate the law. This of course is only possible, when the substantive law is explicit. A mere general clause will not be sufficient. Rather a black list or at least a number of mandatory law provisions are needed to provide the consumer representatives with sufficient back-up to exercise their watch-dog role.

One reason for my diminishing enthusiasm for the negotiation model - although it still appears to be the ideal model - is very down to earth: it costs quite a lot of money. From my own experience, I can give one example. Under the auspices of the Dutch Social and Economic Council's Commission for Consumer Affairs, negotiations

on contract terms have been taking place between consumers' organizations and suppliers' organizations as off the 1970's. As president of a working group on repair conditions, I have witnessed how a number of such organizations which all seemed very sincere in their wish to arrive at equitable terms needed eighteen half-day meetings to reach a conclusion. For the four consumers' representatives this must have meant at least eighteen full days of work each. Seventy-two days of work for one of hundreds of branches, this one showing willingness and being highly organized, involve a considerable expenditure from all organizations involved. It is not certain whether consumers' organizations can afford this model in the long run.

57. First-level: private organization or government agency

At the first level, the consumer interest may be represented either by a private consumers' organization or by a government agency (or both). In my 1977 Report I have scrutinized the arguments advanced in favour of government agencies. At the time, there were said to be four such arguments: (a) a public official has more authority than a private organization, (b) a public official is more representative for consumers in general than private organizations, (c) in the Consumer Ombudsman model there can be no fear of quarrels between different private organizations, (d) the Swedish experience has been quite successful, and (e) the German experience in the related area of unfair trading practices on the other hand has not been so successful. After an analysis of these arguments, only (a) came out to be somewhat persuasive. I based my argument with regard to (a) on the presumption that only a public official might impose fines and issue cease-and desist orders. This assumption has proven to be unfounded. German experience demonstrates that German consumers' organizations may well require suppliers to sign a declaration to the effect that they shall no longer use specific unfair contract terms and that they shall forfeit a penalty when they violate this undertaking. This procedure reminds one of the undertakings under Part III of the UK Fair Trading Act. Both the public and the private procedures have proven to be highly effective once an unfair contract term has been identified.

As for argument (b), I hope to have refuted this in my 1977 Report by putting the rhetoric question who is more representative for consumers: a public officer who is nominated and fired by government or a private organization with nearly half a million members, such as the Dutch *Consumentenbond*. I must add, however, that in some countries consumers' organizations have felt less inclined towards negotiations over contract terms than might be expected. The United Kingdom is an example.

Argument (c) does play a role in several member countries: Belgium, France, Spain. However, these countries have all solved this question in their legislation. Limiting the first level rights to those organizations which are represented in the National Consumer Council (Belgian bill on trading practices) is one such solution.

To argument (d) I opposed the Danish experience in my 1977 Report. Meanwhile, the picture of a successful Swedish control system and an unsuccesfull Danish one needs some reframing. The Danes appear to have become more adept in handling contract terms, whereas the Swedish model has lost some of its initial momentum. In 1977, I already predicted that the meager experience with German control of trading practices did not indicate that in the contract terms area results would be similarly disappointing (e). My argument was that there is a basic difference between unilateral trading practices and bilateral contract terms. Negotiations of the latter have a lasting result; as to unilateral trading practices agreements only deal with past practices - they do not warrant that suppliers will behave better in future. This black-and-white view needs some readjustment, especially since experience in the German Federal Republic shows that the watchman model has been more prevalent than I had anticipated. The watchman model is more geared to unilateral trading practices, which brings it more in line with control of other trading practices.

An element which has grown more important since 1977, is the growing disenchantment with public agencies in general in a number of member countries. Deregulation and privatisation have become

watchwords all over the EC. Concluding, we may therefore say that in the presence of strong consumers' organizations with a willingness to negotiate or police contract terms, it is preferable to entrust control to such organizations. In the absence of strong organizations or a willingness to act on their part, public officials should be entrusted with first-level control. A case might also be made for maintaining public agencies, which have shown to be effective in the control of contract terms, such as the UK Office of Fair Trading (which would however already qualify on the grounds of an absence of willingness to act on the part of UK consumers' organizations).

In case of harmonization of control systems in member countries, the various consumer environments and infrastructures should be taken into account. An important element in this is that although control of contract terms is an important task, it is by no means a task which requires massive investment and it therefore seems inappropriate to establish new institutions merely for this matter.

58. Second level: board or court

A basic element of the control system envisaged in this Report, is that at a second level a court or a board may issue cease and desist orders directed against the use of unfair contract terms. A number of countries have established special tribunals or boards for this purpose. Others have entrusted this power to the ordinary courts or to one specific ordinary court. In my 1977 Report, I showed a preference for the latter model. Although I maintain this preference, it must be admitted that there are no major discrepancies between the two systems. Discrepancies especially in the case-law between second level control boards and the ordinary courts cannot be discerned. The Supreme Civil Courts have the power to supervise this.

I maintain my argument that it is not necessary to appoint lay members on a board or court dealing with contract terms. Contracts belong to the daily case-load of judges, who need no special expertise in this matter from outsiders. In the previous

paragraph, I pointed out that establishing a special public official board merely for the purposes of controlling unfair contract terms might be too heavy a measure. Likewise, it may be argued that the establishment of a special board only with the task of controlling unfair contract terms at the second level appears to be unnecessary.

Our conclusion therefore is that on the second level, entrusting control to the ordinary courts seems preferable. However, entrusting control to special boards or courts which have been established for other purposes is an alternative. The main thing is that there be a second-level board or court.

59. Sanctions

The division of responsibilities in the two-level control model is that the major sanction of first-level control agencies or organizations is an application for a sanction to be awarded by a second level control board or court. The major sanction of such court or board is a cease-and-desist order directed against further use of the unfair contract terms concerned.

In practice, first-level agencies or organizations seem to be well served when they possess two subsidiary sanctions: one aimed at making suppliers submit a copy of their general contract terms, one obtaining from suppliers a declaration that they will cease to use specific contract terms and that a penalty will be forfeited in case of infringement. The latter system has been effective in the United Kingdom and particularly in the German Federal Republic.

As for the second-level board or court, sanctions to be applied may be distinguished along several lines. First, a distinction may be made with regard to the person or entity against whom the sanction will be applied. The main parties concerned are the one which employs contract terms, the one which has drafted contract terms and the one which has recommended or prescribed the use of contract terms. The publisher of contract terms as well as intermediaries may also be envisaged. The nature of the sanction

may be a cease-and-desist order, an order to revoke a recommendation or to refrain from recommending them in future, as well as subsidiary sanctions such as posting or publication of the decision. At the basis of the decision will be the declaration that a specific contract term or combination of such terms is to be considered unfair. This declaration may be retro-active or apply only to the future. Finally, the cease-and-desist order may envisage just the one contract term at issue or may be worded more broadly in order to encompass similar contract terms as well.

What to do if a cease-and-desist order is violated? Most member countries make it possible for a first-level organization or agency to request that in such case a penalty is forfeited either to the organization or agency concerned or to the State. In the latter case, there is not much difference with a criminal procedure. In this regard, the member countries of the EC have widely differing legal cultures. A majority of countries seems to be in favour of decriminalization, but it might be argued that such decriminalization should not be imposed from above.

60. General clause

As I mentioned in the previous paragraph, any cease-and-desist order will depart from the conclusion that a contract term or combination of such terms is unfair. How to arrive at that conclusion? In theory, several possibilities seem to present themselves to legislators: they may enact mandatory legislation on specific contracts, they may outlaw specific contract terms and they may lay down in their legislation a general clause. Denmark, the German Federal Republic, Luxemburg, Portugal and to some extent the Irish Republic and the United Kingdom have opted for the general clause. Belgium, Italy and to some extent France have refused to do so. As Italian case-law shows, it is not a good idea to provide merely for a black list of specific clauses which are outlawed. New distribution techniques or suppliers' inventiveness lead to the introduction of new contract terms which fall outside the scope of the black list. Moreover, black lists often provide only a minimum level of consumer protection and German experience shows that the use of a general clause may raise that level.

61. Black lists

Most legislators have backed up their general clause - if any - with a list of contract terms which are considered to be unfair. This may be a rebuttable or an unrebuttable presumption. This technique appears to have been quite effective. It provides the draftspersons of standard contract terms with a better idea of what the legislator has in mind than a mere general clause. It also provides consumers' organizations or public officials with a check-list of what will be considered unfair in any case. In the watchman model, such a check-list is a near-must.

An alternative to a black list is mandatory legislation for specific contracts. However, it should be borne in mind that such legislation will not cover specific contract terms which are used in other contracts. From a purely efficiency point of view, black lists therefore seem to be necessary.

62. Civil law effects

In theory it is possible that unfair contract terms legislation focuses only on the use of such terms as a trading practice and that sanctions have no civil law effect as to contracts concluded on the basis of unfair contract terms.

This appears to be a highly dissatisfactory model. Not only will individual consumers feel hurt in their sense of justice when contract terms which have been held to be unfair may still be invoked as against them. It also will deprive official first-level consumer representatives from helpful allies. It is true that I have argued earlier that consumers in the traditional judicial control system will usually come too late, that the access to the judiciary is limited and that the decisions are of too concrete a level, but this argument was only made in order to prove that new additional control systems are necessary, not to prove that the traditional model should be abolished.

The major sanction to be applied on the individual level is that the contract term concerned may be held null and void upon the demand of the consumer. Normally, this should not have as a consequence that the whole contract be held void, since that would give suppliers a free hand to introduce unfair contract terms and would refrain consumers from invoking the unfairness.

French experience shows that it is very important that a law on unfair contact terms may be applied directly by the courts, without the necessity of previous intervention by a commission or - especially- government.

63. Incorporation of contract terms

The very first legislation on unfair contract terms of the present EC member countries, the Italian Civil Code of 1942, was based on the assumption that adhering parties should be informed as to the contents of the contract terms. Once the adhering party was informed, he would naturally refrain from entering into an unfair contract. The assumption, as we have seen, has proven to be wrong. Modern legislation instead focuses on the contents of contract terms. This is very apparent in the Explanatory Memorandum to the Dutch Law on Standard Contract Terms. The Dutch government here explicitly states that since the Act introduces a far-reaching control of the contents of standard contract terms, control of their incorporation into the contract need not be as strict.

On the other hand, many recent acts, as does the Dutch Law, still contain some provisions on the incorporation of standard contract terms. Several arguments may be advanced in favour of such provisions. First, the incorporation of standard contract terms into individual contracts has always led to conflicts. General contract law does not provide a ready-made answer to such conflicts. It is therefore better to lay down a number of basic rules in the law. Second, even if the Italian solution should be rejected as the general answer to the problems raised by the use of unfair contract terms, there is no doubt that in a number of cases better information of consumers is very helpful. Incorporation provisions therefore, although not necessary as a

general clause, are quite helpful in legislation on standard contract terms.

64. Construction and interpretation

Several Acts on unfair contract terms now in force contain rules as to the construction or interpretation of such terms. These rules are the contra proferentem rule and the prevalence of individually negotiated terms over standard contract terms. The contra proferentem rule has been laid down, among others, in German (par. 5 *AGB-Gesetz*), Italian (art. 1370 Civil Code) and Portuguese legislation (art. 11). In the jurisdictions where no such rule has been laid down in legislation, it has usually been adopted by the courts. The same applies to the prevalence of individually negotiated terms. This rule has been laid down, among others, in par. 4 of the German *AGB-Gesetz*.

This raises the question, whether the two construction rules should be codified. Are not they so self-evident, that the legislator can refrain from enacting them? A preliminary question, however, is whether the two rules are useful at all.

The contra proferentem rule has in the past often been used by the courts to arrive at equitable solutions. As a last resort, when no other ways seemed left, standard terms were maliciously construed so as to become ambiguous in order that the court could find against the supplier and in favour of the consumer. A classic example of such construction is the English (non-consumer) case Szymanowski v Beck, (1923) 1 KB 457, in which the clause 'goods delivered shall be deemed to be in conformity with the contract' was held not to prevent a claim that the rolls of cotton had a length of 188 yards instead of the 200 yards convened upon. This claim was held not to regard 'goods delivered' but rather the cotton that had nót been delivered. This 'solution' should be rejected. Lord Denning has described the ensuing situation in his last case, George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd, (1983) QB 284 (CA) at 297, (1983) 1 All ER 108 at 113-114, in the following words:

'(courts) still had before them the idol "freedom of contract".

They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract" '.

In 1938, Karl Llewellyn, draftsman of the Uniform Commercial Code, already argued that the difficulty with construction as a means to police standard form contracts:

'is threefold. First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to (return) to the attack. Give him time, and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction: that of marking out for any given type of transaction what the *minimum decencies* are which a court will insist upon as essential to an enforceable bargain of a given type, or as being inherent in a bargain of that type. Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts of true construction, later efforts to get at the truth of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability ... Covert tools are never reliable tools'[4].

Similar observations have been made by scores of other writers. European legislators of the second and third wave have never seriously considered construction of standard contract terms a means to police the content.

This does not imply that the contra proferentem rule is not useful at all. In many situations, standard terms *are* ambiguous, for instance because they are not suited to the individual contract into which they have been incorporated or because the draftsman has made a mistake. In both cases, it is equitable that any ambiguity should be construed against the person who incorporated the clause into the contract, viz. who drafted the term. Not only is this fair in the individual case, it may also have a preventive effect.

The usefulness of the contra preferentem rule does not automatically imply that it should be codified. In the Netherlands, the legislature has explicitly refused to incorporate any construction rules in the New Civil Code's Book 6 on Obligations in general. The government argued that there is no need for such rules in the Civil Code, since it is difficult to draft any hard and fast rules and since those rules which may be drafted will be self-evident to the courts. The latter argument would be convincing if a Civil Code were to address courts only. Since the idea of codification, at least in my view, is rather directed towards the citizen, the question whether or not a rule is self-evident to the citizen, rather than to the court, should be the criterion. As a rapid poll of the men and women in the street will demonstrate, the self-evidence of the contra proferentem rule for the ordinary citizen is a myth. It therefore seems advisable to codify this rule of construction.

65. Construction of standard terms: prevalence of individually negotiated terms.

The German *AGB-Gesetz* also contains the construction rule that individually negotiated terms prevail over standard contract terms (par. 4). Like the contra proferentem rule, this rule of construction is well known in other jurisdictions, where it has been developed by case law. Again, two questions may be raised: is the rule useful, and should it be codified.

If standard contract terms are to remain, in general, a useful tool for the parties to the contract and not to become master over the parties, then their dependent role should be stressed. They are what the parties have agreed expressly. It seems useful to have a rule of construction in this regard.

This may be demonstrated by the gaining of influence of American-style merger clauses or entire agreement clauses[5].

Although most European courts are well aware of these maxims, one should not forget that legislation shall also seek to reach the

citizen. It still seems very useful to codify the above-mentioned maxim, as long as it has not become self-evident.

B. Technical questions

66. Keeping up with new developments

Succesfull businessmen are imaginative people. When a specific clause has been forbidden by law, they will often find a way out. An exemption clause may be reformulated as an exclusion clause. A price index clause may be remodeled a price reduction clause. In both examples, commercial interests will probably prevent the businessman from opting for the alternatives mentioned. He may offer a TV-set as a defective TV-set, thereby removing the need for an exemption clause. And he may offer the Mercedes car to be delivered within three months at 110% of the price he had in mind, and then offer the buyer a 10% deduction, when the factory does not raise its prices meanwhile. Both actions would be commercially self-destructive and will therefore not often be undertaken.

What will happen in practice, is that newcomers to the market, consulting new lawyers, may find novel ways to circumcede a black list. Inspiration may sometimes be drawn from foreign examples. The supplier himself may be a subsidiary, asked to employ the general contract terms of the mother company. New clauses may also be the result of changes in legislation, in technology or in social and cultural patterns.

Anyway, a black list of clauses which are considered unfair, may soon become incomplete. The Italian and the Israeli examples demonstrate that this is not only theory. It may therefore be advisable to add to the law a mechanism which makes it possible to change the law by decree. Governments usually are not very eager to make use of such mechanisms, however. Still, entrusting other bodies with the power to change black lists - the Supreme Court for instance - does not seem a good solution either, being incompatible with the division of powers. The best options therefore seem to be the introduction of a broadly worded general clause and reporting the ensuing case-law on a broad front, as

well as a regular updating of the law by the legislature.

67. Scope of application

Two basic questions have so far been raised by every country which has considered introducing legislation on unfair contract terms. First, should legislation be limited to standard contract terms or be extended to all contract terms. Second, should (small) businessmen be included among those who are protected by the law.

The first question has so far been answered in quite different ways. Once again, it is useful to introduce the division between contract law and trading practices law. Under fair trade acts, private organizations or public entities may initiate an abstract control of contract terms. It is not necessary for the law to say expressly that only standard contract terms may be controlled. An organization would be very stupid to act against a contract term which is used only once and which does not appear to be used in the near future. The scarce resources of the first-level control agent will direct his activities towards contract terms which are of some importance. In considering the (un)fairness of this trading practice, a second-level control board may or may not attach importance to the fact that the terms in question are or are not standard contract terms.
As far as (individual) contract law is concerned, the situation is different. Here, the various laws differ very much. Some are highly sophisticated, making a large number of distinctions. Others, such as the various variations of the Scandinavian general clause, do not make any distinction at all.

It has often been observed that modern text-writers make it easy to make standard contract terms appear as individual terms. This may be one of the explanations of the decreasing importance of the issue discussed here. Several legislators have expressed concern over the possible use of unfair contract terms legislation as a modern *iustum pretium* doctrine, enabling the courts to determine what is a reasonable price. These legislators have sought to codify this concern by excluding from the Act's scope of application the essentials of the contract (see for example

article 6.5.2A.1 of the Dutch Act). Others, instead, have expressly extended the reasonableness test to prices.

When one analyses the various laws in this regard, there appears to be a connection with the existence of black lists. Once a legislation provides a black list of clauses considered to be unfair, without any discretion for the court, the only way out is an individual contract. Such legislatures have usually adopted for a limitation of their Act's scope of application to standard contract terms. Earlier, I have argued for the introduction of black lists. It seems consistent with this view, to argue for a limitation of the legislation's civil law provisions to standard contract terms. A similar limitation is not necessary for the marketing practices control, but neither can it do much harm.

The second question - who should benefit from the protection - is more difficult to answer. An easy way out is the answer that this issue falls outside the scope of the Report. In order not to take up too much space, I would rather refer to the German law, which seems to have struck a wise compromise, by extending the scope of application of some provisions to all contracts, and confining that of other provisions to consumer contracts.

Why should (small) businessmen be protected by law?

Small businessmen

Small businessmen often suffer as much from unfair contract terms as do consumers. Some legislators have therefore sought to include small businessmen in new consumer protection legislation. In some jurisdictions, most notably in several Canadian provinces, legislation protecting a specific category of small businessmen (farmers) against unfair contract terms has even preceded consumer protection in this regard.

A number of obvious arguments may be advanced in favour of protecting small businessmen. There also is a number of counterarguments. Even a small businessman is not a one-shotter; he rather will have some experience in looking after his own interests. An important argument against an extension of

legislation to small businessmen rests in the problem of defining the category. How to look for smallness? By taking the number of employees as a yardstick? Or assets or sales? Or should a more formal criterion be used, such as compulsory registration with a Chamber of Commerce? Finally, one should also look at the other side of the medal. A consequence of extending consumer protection to small businessmen may be that a small businessman who has concluded a contract with another small businessman should not be surprised when the other party invokes a measure of consumer protection.

Leaving it up to the courts to decide whether or not to apply consumer protection legislation to small businessmen by way of analogy also has its drawbacks, however. This may be illustrated by a Danish case involving a farmer[6]. In 1973, the farmer had taken out a hailstorm insurance on the then usual condition that the contract was not to be terminated before 1983[7]. The insurance company thereafter switched to a policy of one-year contracts without any increase in premium. When the farmer learned about the policy switch, he cancelled his insurance as of 1979. The company did not accept the cancellation and sued the farmer for the following year's premium. In court, the farmer maintained that he was not a businessman to be compared with the insurance company where the insurance conditions were involved. He asked for analogous application of section 14 of the Consumer Contracts Act, which provides for a maximum binding period for other contracts than insurance, or for application of section 36 of the Contracts Act.

The Court of Appeal found for the farmer: pursuant to section 36 of the Contracts Act, the Court set aside the contractual provision of irrevocability for ten years. Instead, a binding period of one year was fixed in accordance with the principles of section 14 (1) of the Consumer Contracts Act. One justice dissented and voted in favour of the insurance company[8]. In the Supreme Court, the vote also was split. Three justices voted for upholding the Court of Appeal's decision. The majority of four, however, set aside the lower court's decision. According to the majority, the farmer as a policy-holder could not be considered to be nor could he be deemed comparable with a consumer. As a

consequence, the Court did not find sufficient reasons to set aside the ten-year irrevocability clause in the insurance terms[9].

This case illustrates the need which may be felt for extending the legislation's scope of application, at least partially, to small businessmen. When I use the word partially, I have in mind the German solution as mentioned above. I do not have in mind the Dutch Act's article 10, which seeks to protect the 'squeezed' small businessman; squeezed that is between protection of the other party by consumer protection measures at one end and by harsh sales conditions at the other. This seems to be a situation which may also be dealt with by a general clause and which does not justify a separate provision, which in itself is not easy to understand.

68. Public and private law

When young men - and in the future possibly young women - are drafted for military service, a contract is not the term which one would use to qualify the relation between State and drafter. But what about a psychiatric patient involuntarily enrolled in a public hospital? Or a student in a state university? The number of examples may be extended endlessly. In this Report, I can only point to the issue. 'Unfair contract terms' have to do with contract, and what is contract and what not may vary from country to country.

Especially in the area of what the French call administrative contract, the views are at variance. Somewhat similar is the problem discussed in the next paragraph, whether or not public entities and their contract terms - or their functionally similar bye-laws or regulations - should be subjected to control under unfair contract terms legislation.

69. Public entities and private suppliers

Whenever suppliers and consumers haggle over unfair contract terms legislation, there is one issue which will unite them. The general contract terms used by public entities, such as public utilities,

transit authorities, the Post Office, cable television companies, etc. are generally perceived to be worse than those of private suppliers. It is therefore to be welcomed that public entities are no longer considered to be sacrosanct, as far as their contract terms are concerned. In the first half of this century, the State was usually thought of as a single entity. It was considered improper that one entity would control the acts of another entity. This control should be exercised by Parliament, or by the Town Council or Provincial Council in the case of local public entities.

This, of course, is mainly theory. Public utilities will often be considered as means of earning money for the public entity. Exemption clauses and all the other well-known devices may raise profits. It is only in recent times that public entities have grown aware of the consumer movement and show themselves willing to listen to consumer grievances.

Does this changing attitude justify legislative exemptions? In my view, this is not the case. Either their general contract terms are fair and balanced. In such case, they have nothing to fear from the new control methods. Or the terms are unfair, in which case an exemption no longer is justified.

In accordance with this view, public entities generally will have to comply with modern legislation on unfair contract terms. Only in some cases have legislatures been forced to make exceptions for some branches. This usually reflects the power of the various ministries involved.

One reason to be very careful with these exceptions, is that what may be a public entity today may well be a private enterprise tomorrow, or vice-versa. After the post-war nationalization movement, present-day 'privatisation' turns many a government enterprise into a private company.

70. Other exceptions

Public entities - and the ministries which supervise them - are

not the only advocates for exceptions to the application of unfair contract terms legislation to all consumer contracts. Other branches of trade which have sought recognition as not being in need of control include banking and insurance, the construction industry and transport. The arguments advanced in favour of exceptions usually are either that legislative or administrative control have already been introduced in this particular branch or that the aims of legislation - bilateral standard contracts - have been met. Thus, insurance conditions are usually subject to prior administrative approval, transport legislation is often mandatory and standard contracts in the construction industry are indeed often bilateral because the administration - this time in its quality of principal - is in the position to serve as a true countervailing power (or more than that) to large construction companies.

In my 1977 Report, I have minutely described administrative control of insurance conditions and its history. Since 1977, the number of countries which exercise such control has grown larger because of a European directive. Still, I would maintain that exceptions based on the argument of past legislation and administrative control should not be allowed. As with the public entities one may argue that either the administrative control applies the same standards as does the unfair contract terms legislation - in which case banks, construction companies, insurance companies and transport corporations should have no fear - or it does not, in which case an exception is not justified.

One may suspect that often the control exercised by for instance the insurance control boards is not adequate. Such control usually has the function, very important from a consumer point of view, of maintaining the liquidity and solvability of the insurance companies. Contract terms contain many clauses which are not typical for the insurance contract and which may therefore better be subjected to a general control by the courts.

Allowing no exceptions to the various specific branches does not mean that existing control systems in these branches should all be abolished. Since these systems usually have other functions beside

the protection of individual consumers, a conclusion to do away with them should be carefully considered.
In many countries, a Restrictive Practices Board, Monopolies Commission, or however it may be called, exercises control over general contract terms by way of anti-trust measure. Does the existence of such a control warrant the granting of exceptions? Although control of monopolistic activities and of contract terms have occasionally been entrusted to the same Office - in the United Kingdom they still are -, still the two should not be equated completely. The introduction of standard contract terms in a particular branch may well be in the consumer interest, since he will be in a better position to compare essentials: price, quality, after-sales service. At the same time, such concerted action may constitute a danger from another perspective. The co-operation of suppliers may be extended to price and quality, in which case the restrictive trade policies legislation must of course be applied. It therefore seems clear that the two types of control should be exercised separately and that they should not interfere with one another.

There is one type of exceptions which does seem justified. Many legislators have made an exception for labour contracts, some for rent contracts for housing. In both cases, control has often a long-standing tradition. Extensive mandatory legislation has been enacted, organizations of the weaker parties (trade unions) act as countervailing power, Parliament takes an active interest in the contracts in these areas. Also, the types of conflicts often differ considerably from the ordinary types of consumer conflicts. One may even doubt whether one may speak of consumers in this case. Unfair contract terms legislation which exempts, wholly or partially, employment contracts and/or rent contracts is therefore quite justified.

71. National and international scope

Most laws on unfair contract terms now contain provisions, which seek to prevent suppliers from circumventing consumer protection by inserting choice of law clauses. The usual technique is that of a *règle d'application immédiate*, which requires a national court

to apply national consumer protection legislation, no matter which national law is applicable. Of course, foreign courts may not feel bound by such rules and forum shopping may be the result.

Rules such as these may once have seemed necessary to protect national consumers from the unilateral contract terms of foreign barbarians. Now that all West-European countries have enacted or are on the verge of enacting legislation on unfair contract terms, the idea of being an island of consumer protection in a sea of barbarians no longer holds true.

Also, one should notice that a legislature's attitude towards international commercial transactions has often been just as radical, but then in a reverse direction. Thus, under article 13 of the Dutch Act, international commercial contracts are not governed at all by the Act. This radical division of the law in comsumer transactions and commercial transactions calls for demarcation problems. It therefore may be submitted that radical consumer protection measures through devices such as the *règles d'application immédiate* have had their time. Now that the law as to unfair contract terms is providing for a higher level of consumer protection in all member countries of the EC, tight border controls become obsolete. The ordinary conflicts rules can take over. Perhaps not completely. It cannot be denied that legal cultures are still different in the European countries. In order to protect consumers from unexpected culture shocks, it may be necessary to retain the prohibition of choice of law clauses in general contract terms, which is in force in several countries.

72. Place of legislation

For countries with a codified system of law, the question arises where to store the provisions on unfair contract terms. Earlier in this Report, I have submitted that legislation may be divided in two groups of rules: those dealing with unfair contract terms on the individual (contract) level and those dealing with the use of unfair contract terms as a trade practice. In accordance with this division, the common law countries and the Scandinavian countries have divided their unfair contract terms legislation over two

distinct types of laws: Civil Code type laws and Trading Practices Laws. Theoretically, this seems to be the most appropriate way of dealing with unfair contract terms from a legislative point of view.

The disadvantage of divisions is that the various parts may grow apart, especially so when they must be interpreted by dissimilar courts. Some countries have therefore preferred enacting a single Act on unfair contract terms in particular or on consumer protection in general. The disadvantages of such a policy is that the Civil Code and other traditional legislation may now become obsolete. The Germans have generally deplored the fact that their *AGB-Gesetz*, for practical reasons, could not be integrated in their civil code. This has even led to a movement to reintegrate all civil law in the civil code. Little after the *AGB-Gesetz* came into force, the German Ministry of Justice asked a number of mainly academics to submit proposals as to a revision of the Law of Obligations. One of the reports which resulted deals with consumer relations in general[10].
At present, only a small part of all the ideas has been taken up by the Ministry, which has charged a commission to convert these into a draft bill.

In The Netherlands, the substantive provisions on unfair contract terms have been incorporated into the (New) Civil Code. The same applies to the procedural provisions, but here we should take into consideration that The Netherlands are among the few countries which do not have an all embracing Fair Trading Act.

C. Europe's role

73. Introduction

Ever since the preliminary Programme for Consumer Protection (1976), unfair contract terms have been high on the list of priorities to be dealt with by the European Community[11]. In the same year a Memorandum and a set of Articles for a directive (Documents ENV/381/76 and ENV/384/76) were presented which were discussed with government experts.In 1979 the Commission postponed

further work on a directive (*Official Journal* C 291 of November 10, 1980, p. 35).In 1984 the Commission then published a document on unfair contract terms (Bulletin EC 1984 Supp. 1/84), which provides for two ways of action. First, a directive should harmonize the laws of the member states and further the protection of consumers. Secondly, the EC should stimulate negotiations between organizations, under the auspices of a public control body. In 1987, a new set of draft articles was brought into circulation.

The draft articles will not be dealt with in this Report, nor will their basis in the EC Treaty be discussed. The articles themselves need not be set out in a Report, which is addressed to the Commission. The constitutionality of Community measures of consumer protection has sufficiently been discussed at the occasion of the preparation of the directive on products liability.
Rather, I will briefly make some observations regarding the need for the EC measures which are now being discussed.

74. Towards a directive

First, it will appear from the previous paragraphs in this Chapter and from Chapter I, that I now welcome an EC directive on unfair contract terms. As we have seen in Chapter II, legislation in this regard varies very much within the European Community and the same applies to practice (Chapter III). This endangers free competition of goods and services between member states.

An EC directive would also force those member states who are still considering the introduction of legislation or of adequate legislation to make that last step which is necessary for such legislation to come into force.

75. Towards negotiations

As for the other part of the EC's draft proposals, I am more skeptical. I am also sympathetic towards these proposals, since they are in line with what I have advocated in my 1977 Report. The

skepticism stems from the fact that experience with guided negotiations so far is mixed.

In several countries such negotiations have indeed taken place. The Dutch New Civil Code, the French Calais-Auloy Report, the original Luxemburg bill - they all seek to promote such negotiations and to provide for instruments to declare the resulting contract terms binding as of law.

But one may not close one's eyes to the fact that negotiations have often not led to a result, that they are very costly and time-consuming and that the necessary prerequisites, such as a sufficient level of organization on both sides, are not always there.

In the absence of clear-cut results, and with the possibility that new legislation will provide the useful stick behind the door, the Commission seems well advised to promote further experiments in this regard, possibly even at an EC level.

76. Varying national contract law; a time-bomb?

Perhaps unfairly I have kept one difficult question for the end. Contract terms either confirm, 'codify' existing law, or deviate from it. Usually the latter is the case. Unfair contract terms legislation seeks to limit the possibilities of deviation from existing law; 'codification' of existing law usually presents little danger.Harmonization of unfair contract terms legislation in the EC therefore means harmonization of the limitations to deviate from existing contract law. These limitations may well be completely uniform, but does this mean that the situation in the various countries will be the same?

No, this is not the case. When the possibilities to deviate from existing law are limited, what remains is ... existing law. And as we well know, existing contract law in the EC is far from uniform.

Although this argument may appear convincing at first sight, there are some flaws.First, not all provisions in unfair contract terms

legislation are purely negative. Some lay down exactly to what standards a contract term should conform in order to be considered fair. Such provisions, when harmonized in the member countries, may in fact bring about harmonization of contract law, or some measure. Second, the said legislation usually provides for rules on the incorporation of contract terms, their construction and interpretation, collective action, etc., which may well be harmonized.

Still, the message is clear. The harmonization of the law as to unfair contract terms is but one step in the direction of a harmonized contract law. Harmonization of substantive law may well be the next step.

Another very interesting point of discussion could be the central provision that defines if the unfairness of a term which is considered ~~based on~~:

1. See B. Grossfeld, Macht und Ohnmacht der Rechtsvergleichung, Tübingen 1984.

2. E.R. Blankenburg, J.R.A.Verword, Beroep op de rechter als laatste remedie? Enkele vergelijkingen tussen de rechtsculturen in Nederland en de Westduitse deelstaat Nordrhein-Westfalen, *Nederlands Juristenblad* 1986, p. 1045-1052.

3. See Nr 39 above.

4. 52 *Harvard Law Review* 700, 702-703.

5. See my contribution 'De "entire agreement" clausule: Amerikaanse contractbedingen in het Nederlandse recht', in: Recht als norm en als aspiratie / Opstellen over recht en samenleving ter gelegenheid van het 350-jarig bestaan van de Utrechtse juridische faculteit, Nijmegen 1986, p. 24-34.

6. Madsen, *Scandinavia Studies in Law* 1984, p. 83, 92.

7. The following case study is taken from Madsen, o.c., p. 93-94.

8. *Ugeskrift for Retsvaesen* 1980, 917.

9. *Ugeskrift for Retsvaesen* 1982, 176.

10. H.P. Westermann,Verbraucherschutz, vol. III, p. 1-122.

11. As to the following see L. Krämer,EEC Consumer Law, Bruxelles/Louvain-la-Neuve 1986, Nrs. 227-235.

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