Chapter 2. The legal control of unfair terms in consumer contracts : some comparative observations, *by Ewoud HONDIUS (Molengraaff Instituut voor privaatrecht, Utrecht university).*

This paper will be divided in three parts. In Section 1, I intend to introduce the subject to those readers, who are not familiar with the wave of unfair contract terms legislation which has swept over Western Europe in the 1970's. I shall also try to define the problems which are to be dealt with in Sections 2 and 3.

Section 2 will be devoted to some basic questions regarding the (abstract) control of unfair contract terms. In Section 3, I will then deal with some other major questions raised by the new control systems. In this part, I also hope to discuss some problems relating to the use of standard contract terms in individual contracts and to the coexistence of overlapping control systems.

As will be explained in Section 1, only the control systems with a general scope of application will be discussed. This means that special control systems for e.g. specific contracts (hire-purchase, insurance, transport) or specific contract terms (arbitration clauses, juridiction clauses) will not be dealt with. The same holds true for the control of unfair contract terms under the (judge-made) common law.

Due to limitations of time and space, the international implications of control legislation (conflict of laws, harmonisation) must also be left out of consideration.

Section 1 - Introductory remarks

§ 1. The unfair contract terms legislation of the 1970's.

On July 1, 1971, the Swedish Act on Prohibiting Improper Contract Terms (1) entered into force. This Act marked the beginning of a decade which saw the enactment of legislation on unfair contract terms in most major Western European countries. Sweden was followed by Denmark (1974) (2), the German Federal Republic (1976) (3), the United Kingdom (1977) (4), France (1978) (5), Finland (1978) (6), Austria (1979) (7) and the Irish Republic (1980) (8). In other countries laws on unfair contract terms are still in the course of

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(1) *Lag om förbud mot oskäliga avtalsvillkor (Law on prohibiting Unfair Contract Terms) of 30 April 1971, Svensk författningssamling 1971 n° 112, as amended : supplemented by a general clause in the law on contracts, introduced by Act of 22 April 1976, Svensk författningssamling 1976 nr. 185.*

(2) *Lov om markedsføring (Marketing Practices Act) of 14 June 1974, Lovtidende A 1974 n° 297, supplemented by a general clause in the law on contracts, introduced by Act of 12 June 1975, Lovtidende 1 1975 nr. 250.*

(3) *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) of 9 December 1976, Bundesgesetzblatt 1976, I, p. 3317.*

(4) *Unfair Contract Terms Act 1977, Elizabeth II, 1977, Chapter 50, supplemented for the control system by the Fair Trading Act 1973.*

(5) *Loi sur la protection et l'information des consommateurs de produits et de services of 10 January 1978 nr. 23, Journal Officiel 11 January 1978.*

(6) *Konsumentskyddslag of 20 January 1978, 1978 nr. 38.*

(7) *Konsumentenschutzgesetz of 8 march 1979, Bundesgesetzblatt 1979, 140 supplemented by an amendment of the Allgemeines Bürgenliches Gesetzbuch.*

(8) *Section 22 of the Sale of Goods and Supply of Services Act 1980 provides that the exclusion of a contract's proprietary transfer functions is unenforceable, unless such exclusion is in fact reasonable under the statutory criteria laid down under the Schedule reads almost the same as its British counterpart in the Unfair Contract Terms Act 1977. As to the regulation of other specific contracts see Jeremy PHILLIPS, Le contrôle par le droit privé des clauses du contrat dans l'intérêt du consommateur en Irlande, Revue internationale de droit comparé 1982, p. 790-808.*

being enacted. This is the case with Norway (1), Luxemburg (2) and the Netherlands (3). Finally, some countries still discuss how to deal with unfair contract terms. This is done in Belgium (4) and Italy (5). Only one major country, Switzerland (6), has plainly refused to adopt a general law on unfair contract terms. Instead, the Swiss intend to pass legislation on

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(1) *See the bill to amend the Lov om kontroll med markedsføring, Norges Offentlige Utredninger 1976 nr. 61.*

(2) *Projet de loi relatif à la protection juridique du consommateur, n° 2217 Chambre des Députés , Session ordinaire 1977-1978, submitted on 25 September 1978, printed 12 October 1978.*

(3) *Ontwerp-Invoeringswet Boeken 3-6 van het nieuwe Burgerlijk Wetboek (tweede gedeelte) algemene voorwaarden), Tweede Kamer, zitting 1981, nr. 16 983, submitted on 28 July 1981.*

(4) *Thierry BOURGOIGNIE and Françoise DOMONT-NAERT, Le contrôle par le droit privé des clauses du contrat dans l'intérêt du consommateur en Belgique, Revue internationale de droit comparé 1982, 519-589.The same : Clauses abusives et protection du consommateur/Eléments de réflexion, Annales de droit de Louvain 1981, 3-59 , especially 28-51.*

(5) *In Italy, the reform movement seems to be confined to academic circles. See, among others, C. Massimo BIANCA, Le condizioni generali di contratto, Milano, 2 volumes, 1979/1981, and Convegno di Fiuggi sulle condizioni generali di contratto del 5-6 giugno 1981 (at this conference, a draft bill on standard contract terms was submitted. Acceptance of this draft bill would bring Italy in line with the two-layer control system, discussed below).*

(6) *In answer to a question to the federal government by a Member of Parliament (Welter), the Swiss government stated that, although it basically approved of the Council of Europe resolution on unfair contract terms (see below), it considered premature the elaboration of a specific regulation on unfair contract terms or on the incorporation of such a regulation in the General Part of the Code of Obligations.Instead , the Conseil fédéral declared it to be "plus conforme à la conception suisse du droit de prévoir, pour certainsrapports contractuels où le besoin d'une protection particulière se fait sentir, des dispositions se rapportant concrètement aux intérêts en jeu" (Conseil national 77.738, question of 19 September 1977, answered on 23 November 1977).*

specific contracts (1).
As far as Greece (2), Iceland (3), Portugal (4) and Spain (5) are concerned, legislation in this area seems not to be thought of at present.

Western (6) Europe is not the only part of the world, where legislation on unfair contract terms has been enacted. A front-runner of the present wave of legislation was Israel, which already in 1964 adopted her Standard Contracts Law 1964 (7). In North America, many provinces and states have

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(1) *See P. FORSTMOSER, Gesetzgebung und Gerichtspraxis zu den Allgemeinen Geschäftsbedingungen in der Schweiz/Eine Standortbestimmung, in : E. HOLLIGER et al., Allgemeine Geschäftsbedingungen in Doktrin und Praxis, Zürich 1982, p. 23,28.*

(2) *There is scant legal writing writing on unfair contract terms used in consumer transactions in Greece. As to standard contract terms in general see N.A. DELOUKAS, Oi genekoi oroi sunallagon / to problema ton sumbaseon proschoreseos, Athens / Saloniki 1952, I. Karakostas, Allgemeine Geschäftsbedingungen in "internationalen" deutsch-griechischen Kauf- und Lieferverträgen , Regensburg 1973, and Jean Voulgaris, Le contrôle par le droit hellénique des clauses du contrat dans l'intérêt du consommateur , Revue internationale de droit comparé, 1982, 759-790. As to the notion of consumer in Greek law see B. DOUVLIS, Elements for the creation of an autonomous law for consuemr protection , Epitheorisis tou Emporikon Dikaion 1980, p. 187 ff. (cited by VOULGARIS).*

(3) *No data available to the author.*

(4) *As to the Portugese concept of adhesion contracts see C.A. da Mota Pinto, Contratos de adesao/Uma manifestaçao juridica da moderna vida economica, Revista de direito e de estudos sociais 1973, p. 119-148.*

(5) *As to the Spanish concept of general conditions see F. de Castro y Bravo, Condiciones generales de los contratos y la eficacia de las leyes, Anuario de derecho civil 1961, p. 295-341, and M. GARCIA-AMIGO, Condiciones generales de los contratos (civiles y mercantiles), Madrid 1969.*

(6) *The so-called General Conditions (Allgemeine Leistungsbedingungen,etc.), which are used for commercial transactions and to a more limited extent for consumer transactions throughout Eastern Europe, are a form of delegated legislation and not contract terms proper.*

(7) *Standard Contracts Law 1964, as amended (see the amended text in E.H. Hondius, Naar een wettelijke regeling van algemene voorwaarden, Zwolle 1979, p. 206-212).*

enacted laws on unfair contract terms (1). Latin America also provides us with several examples of unfair contract terms legislation, some of these inspired by Western Europe (2).

Several African countries, such as Egypt (3), Ethiopia (4) and Lybia (5), have also adopted legislation on unfair contract terms, inspired by Western Europe. However, this was not the present wave, but a previous legislative movement which concentrated on the incorporation of terms into the contract, instead of on content, and which saw the problem as an individual rather than a mass one. This legislative movement - for indeed to speak of a wave would be too presumptious - existed in Poland (6) and especially in Italy (7).

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(1) *In Canada see the Consumer Protection Acts of British Columbia (1967), Ontario (1966) , Manitoba (1970) and Quebec (1971) , The Sale of Goods Act of British Columbia (1971) and the Unconscionable Transactions Relief Acts of Alberta (1964), Manitoba (1970) New Brunswick (1964), Newfoundland (1962), Nova Scotia (1967), Ontario (1960), Prince Edward Island(1964) and Saskatchewan (1967), and the Civil Code of Quebec, all as amended (for further statutory references see E.H. HONDIUS, Standaardvoorwaarden, Deventer 1978, p. 195).*
As to the United States see Th. BOURGOIGNIE, Clauses abusives et le concept d'unconscionability en droit américain : une arme juridique efficace au service des consommateurs ?, Revue de droit international et de droit comparé , 1977, p. 19-52, S. DEUTSCH, Unfair contracts / The doctrine of unconscionability, Lexington Mass. 1977 and E. Allan Farnsworth, Contracts, Boston, 1982, p. 292-323.

(2) *The most notable example is Costa Rica, which has incorporated the Council of Europe's resolution on unfair contract terms (note p.) into her legislation. Another example of legislation on unfair contract terms in Latin America is provided by art. 63 of the Mexican Federal Consumer Protection Law.*

(3) *Art. 100, 149, 151 and 750 Civil Code (1948).*

(4) *Art. 1686 Civil Code.*

(5) *Art 100, 149 and 153 (= art. 100, 149 and 151 Egyptian civil code), and 150 and 151 (= art. 1341 and 1342 Italian Civil Code) Al Quanune al-Madani (1954).*

(6) *Art. 71 Law of Obligations (1933).*

(7) *Art 1341, 1342 and 1370 Codice civile (1942)*

Israel possibly functioned as a link between the two movements (1).

§. 2 . Why the 1970's ?

Standard contract terms, even unfair standardised terms, are not a recent phenomenon. It may be argued that standard contract terms came upon us with the earliest writing of mankind, which is to say, according to present knowledge some five millenia ago (2). Even if one does not accept this contention, one shall have to concede that the technique of standardising contract terms has been in use much longer than as of the 1970's. Then why, when employment contracts were regulated by legislatures as early as the XIXth century, did it last so long before standard contract forms became the object of general legislation ? The reference to employment contracts may provide us with an answer. Just like labour law regulation was inspired by the labour movement, including the activities of trade unions, thus the consumer movement - and the activities of consumer's organizations - gave rise to the wave of the 1970's, as part of a more comprehensive consumer-oriented regulation (3).
Why the 1970's ? It is probably because this was the decade when the development of a consumer movement infrastructure, with large private organizations, state-subsidised research institutes, national consumer councils, government ministers for consumer affairs, special journals, etc. began to bear fruit (4). Once again the consumer is not a new phenomenon. As of the

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(1) On the one hand, Italian legislation has clearly inspired the Israeli legislature - see G. TEDESCHI and A.W. HECHT, Les contrats d'adhésion en tant que problème de législation , Revue internationale de droit comparé 1960, p. 574-592. On the other hand, Scandinavian legislation may have been inspired by legal writing on the Israel Standard Contract Act, such as O. LANDO , Standard contracts / A proposal and a perspective , Scandinavian Studies in Law 1966, p. 127-148.

(2) E.H. HONDIUS, Staandaardvoorwaarden, Deventer 1978 (with English , French and German summaries), p. 98.

(3) E.H. HONDIUS, Konsumentenrecht, Deventer 1976.

(4) E.H. HONDIUS, Konsumentenrecht : de eerste tien jaar, Nederlands Juristenblad 1980, p. 849-956.

earliest of times, problems have arisen over contaminated apples (1) and aggressive selling techniques (2). But only in this century was the consumer really discovered by legal muckrakers and law reformers. The term became a magical catchword - are not we all consumers ? (3) - which also became politically important (4).
It still is rather peculiar that within one decade so many countries enacted legislation with such similar purposes. How is this to be explained ? In the case of some countries, the 'coincidence' can be explained by the simple fact that they belong to a common family of legal systems. The Nordic countries, for instance, have such close legislative links that their laws are often, if not identical, at least rather similar.

A major role in bringing about the spreading of the legislative wave over Wester Europe - where, as we have seen, only the Swiss Alps reach higher than these ways - has also been played by international organisations. The first to do so was the Organisation for Economic Cooperation and Development, which

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(1) See Luc BIHL, Consommateur défends toi ! , Paris 1976, p. 10.

(2) Eirlys ROBERT, Consumers, London 1966, p. vii, reminds us of Plato's Protagoras where the sophist, praising "his ware , is compared with the merchants" and shopkeepers who have no idea, which of their wares are good and wich are bad for the body, but praise them all alike.

(3) "Consumers by definition, include us all" is the famous opening statement of President Kennedy's Special Message to the Congress on Protecting the Consumer Interest of 15 March 1962 (reprinted by Eike von Hippel, Verbraucherschutz, 2nd edition, Tübingen 1979, p. 225-234). On previous occasions, I have often tried to debunk this phrase. Consumers do of course not include professionals when acting in their professional quality.

(4) It is only under the banner of consumers , that citizens formed major pressure groups. Earlier in this century, efforts to form associations of travellers users of public transport, or other "adherents" met with considerably smaller success.

in 1972 published a Report on Consumer Policy in Member Countries (1).
In the early 1970's, two European organisations also began to deal with unfair contract terms. In the case of the Council of Europe, this led to a resolution which was adopted by the Council of Ministers in 1976. (2) The European Economic Community's efforts to do something did not meet with success, however (3).
These developments have had two results. First, there has been a direct political influence from the Council of Europe's resolution. It has helped to shift the burden of proof from consumers - why should there be legislation on unfair contract terms - to enterprises - why should there be no such legislation. Second, international contacts have helped very much in the process of cross-cultural influencing. Bills and acts were translated in other languages, civil servants met in Paris, Brussels or Strasbourg and became accustomed to new concepts, such as a reasonableness test and 'abstract' control.

§. 3 . Time for evaluation

Whenever a law has been in force for five or more years, it becomes interesting - and sometimes necessary - to find out if and how it works in practice.

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(1) The text has been reproduced by Eike von HIPPEL, Verbraucherschutz , 2nd edition, Tübingen, 1979, p. 303-340. See also Committee on Consumer Policy / Consumer Policy during the past ten years - Main developments and future prospects, Paris, 1982.

(2) Unfair terms in consumer contracts and an appropriate methode of control, Resolution (76) 47 adopted by the Committee of Ministers of the Council of Europe on 16 November 1976.

(3) In the EC's Preliminary programme for a consumer protection and information policy (1975), " to protect consumers from unfair commercial practices, for example in the following areas: - terms of contract", is stated to be a priority (para 24(iii)) . Still no (draft) regulation or directive seems to be at hand.

Indeed, the Swedish (1) and the German (2) legislation on unfair contract terms have already been the object of evaluation, as has heen the approach in European countries in general (3). In some cases, for instance in that of the Council of Europe's resolution on unfair terms in consumer contracts, an

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(1) The Swedish Avtalsvillkorslagen and its effects upon the use of standard terms have been the object of several research projects . The bi-monthly Konsumenträtt & -ekonomi (K & E) regularly publishes court decisions on the application of the law. The last digest of Market Court decisions was published in K 1 E 1980/2 p.25-28. As of the 1980/3 issue, K & E has also been publishing a series of articles on the results of negotiations between the Konsumentombudsman and trade or professional organizations. The series , written by hovrättsassessor Thomas Utterström was concluded in the 1982/6 issue of K & E . An earlier research project has dealt with the use of standard contract terms in a particular branch of trade , the sale of automobiles , in the Göteborg region - J. LUFT, Konsumentköp av personbilar, thesis Göteborg Stockholm 1977 (but see also the comment by the former Konsumentombudsman Sven Heurgren in Svensk Jurristtidning 1978, p. 52-56).

(2) The German court decisions , which under the AGB-Gesetz have to be registered with the Bundeskartellamt, have been digested by H.J. BUNTE, Entscheidungssammlung zum AGB-Gesetz , Heidelberg, I (1977-1980), 1982 and II (1981) , 1982. In November 1980, the Federal Ministry of Justice charged H.J. Bunte with a research project concerning the changes brought about by the Act in standard form contracts in 30 differents branches. See Bunte's intermediary report, Erfahrungen mit dem AGB-Gesetz/ Eine Zwischenbilanz nach 4 Jahren, Archiv für die civilistische Praxis 1981, p. 31-67 and in H.J. Bunte, Handbuch der Allgemeinen Geschäftsbedingungen München 1982, p. 53-57. A summary review of the first five years experience with the AGB-Gesetz is given by P. ULMER, Erfahrungen mit dem AGB-Gesetz , Betriebs-Berater 1982, p. 584-589.

(3) The control of unfair contract terms in the consumer's interest in the EC countries has already been the object of a research projet by Alfred Rieg and Denis Tallon (France). Both the general report and the national reports, written by Thierry Bourgoignie and Françoise Domont-Naert (Belgium) , C. Hoffmann (Luxemburg), Isabelle de Lamberterie (France) , Jeremy Phillips (Irish Republic), Alfred Rieg (German Federal Republic) Odile Salvat (England) Gert Steenhoff (Netherlands and Jean Voulgaris (Greece), have been published in the 1982/n° 3 issue of the Revue internationale de droit comparé, p. 505-1113, as well as under separate cover by the Librairies Techniques (LITEC).

evaluation is even required by the regulation itself (1).

It is suggested, that one of the major aims of the forthcoming Louvain-la-neuve meeting will be to compare the evaluations, both with regard to procedures as with regard to results. The benefit of this exercise is obvious : on the national scale it may provide a better insight in why a statute does or does not work. It may also provide international organisations with some idea whether or not a new international measure, in view of the necessary harmonisation or for other purposes, would be useful.

§. 4 . Why legislation ?

So far, I have assumed that there is such a thing as a wave of legislation on unfair contract terms. This suggests that the legislations of the various European countries do have something in common. Apart from the obvious fact that the subject matter of the various statutes is similar (not always exactly the same) (2), there are also important similarities both as to the object (goal) and the means.

Let us first try to find out why legislation was considered necessary. The common law of most countries now provides the judiciary with several tools to deal with unfair contract terms. First, a court may conclude that a term has not been incorporated into the contract, usually because the parties cannot be deemed to have agreed upon such incorporation. Second, by construing or

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(1) *Part II of Resolution (76) 47 'Invites governments of member States to inform the Secretary General, after the expiration of a period of five years , of the steps which they have taken in consequence of this resolution and of the experience they have acquired in implementing it, so that the Committee of Ministers may decide wether the questions dealt with in this resolution should be re-examined in the light of the needs apparent at that time in the field of consumer protection'.*

(2) *Some laws are only applicable to standard contract terms, some to unfair contract terms in general . Then again, some laws deal especially with consumer contracts, while others cover contracts in general. See below.*

interpreting a contract term contra proferentem and in favour of the consumer, a court may arrive at an equitable result. Finally, in some jurisdictions a court may even test the reasonableness of the contract terms themselves. However sophisticated such tools may have become - the first tool was elaborated especially in France, the second in England, and the third in the German Federal Republic - they had one weak point in common : all depended upon the court. By this, I do not want to suggest that courts might act arbitrarily. If this were to have been the case, codification of the judge-made law would have been sufficient (codification was indeed one of the aims of the German legislation). Rather it is my suggestion that a traditional court procedure is not a very efficient answer to the problems posed by standard contract terms. Traditional court procedure presupposes that there is a real conflict between the parties. It then requires one of the parties to take the initiative of going to court - which at least for the consumer, in the oft-quoted terminology of Galanter, the one-shot player (as opposed to the repeat player), is risky and cumbersome. It finally leads to a judgement, which is only valid between parties and at best has some precedent value (if it is reported).

The new legislation of the 1970's has removed most of the obstacles described above. It has done away with the need for a conflict between two flesh-and-blood parties, by focusing on abstract conflicts. It has provided for public agencies or private organisations, as opposed to individuals, to institute legal action. It finally has given the resulting court decisions a higher status, among others by extending their scope of application to other parties not involved in the litigation.

§. 5 . Object of the legislation of the 1970's.

Incorporation of terms into the contract, construction and interpretation, applying a reasonableness test - these were the three major tools for the courts under the common law. The first wave of legislation (especially Italy 1942) may be said to have concentrated on the first two of these : incorporation and construction. The new wave, on the other hand, has concentrated on the subject-matter (without leaving the incorporation completely out of sight, as we shall later see). This reflects a change of outlook.

Instead of trying to restore party autonomy, the law is now seeking to find an equitable result - equitable in the eyes of the legislature. This change may also be described in other terms : suppose standard contract terms no longer exist, then the two major alternatives are individual, or bartered terms, and rules developed by others : the court, the legislature, etc. The Italian solution was to force parties to return to bartered terms, in order that the consumer, who knows his own interests best, arrives at a result which is good for him. The modern solution is that someone else, the court or the legislature, arrives at that solution. And to put it into still others words : some of the problems with regard to standard contract terms arise when they are incorporated into the contract. Other problems are due to the fact that one of the parties uses or abuses this, often but not necessarily in combination with a monopoly, to change the law. The Italian law focused on the first, modern legislation focuses on the second problem.

§. 6 . Means of the new legislation.

Through which means have the various legislatures sought to achieve their aims ? The major and apparently also most successful control system is the two-layer control, which was established first in Israel and later in the Scandinavian countries, the United Kingdom, the German Federal Republic and Austria, soon to be followed by the Netherlands. This system can be described as follows : in a first instance either a public agency (Attorney-General in Israel, Könsumentenombudsman in the Scandinavian countries, Office of Fair Trading in the United Kingdom) or a private organisation (consumer organisations in Austria, the German Federal Republic, the Netherlands) try to negotiate the contents of standard contract terms with trade and professional organisations or large companies. These negotiations may result in the removal of unfair terms from the contract terms or in the drafting of a whole new set of terms. In case the negotiations are successful the first-instance control agency or organisation may apply to a second-instance control board in what is , or is similar to, a judicial proceeding in order to have the use of certain clauses or certain standard terms forbidden. The second-instance control board may either be a special court (Israel, Sweden, United Kingdom) or an ordinary court (Denmark, German Federal Republic, the Netherlands

The word negotiations is used here in a broad sense. It includes on the one hand the German practice, where the activity of consumers' organisation is often limited to pointing out the contract terms which are directly at variance with mandatory law, on the other hand the Swedish system, where the Consumer Ombudsman and the enterprise concerned may arrive at wholly new contract terms.

In France, a different two-layer control system has been set up. First, the Commission des clauses abusives may draft a regulation dealing with specific abuses. Then, the Administration may - or may not - take over the draft-regulation. Or may not - that seems to be the problem of the French solution. Up till the present, only one draft regulation has been taken over by the Administration. Many more drafts will be found in the Administration's files. The French are already pondering over a way out. One solution which now is much discussed, is of having bilaterally drafted standard contract terms being formulated by, with the consent, or under the auspices of a public agency. It is this different approach to the problem, which the Dutch and the Luxemburg bills offer as an alternative way - next to the two-layer control as described above - of dealing with unfair contract terms (1).

§. 7 . Effectiveness of the new legislation.

Having outlined the scope, the object and the means of the new legislation on unfair contract terms, it should now become possible to establish the criteria according to which the effectiveness of this legislation might be measured. First of all, it should be made clear that the test should not (only) be whether the courts are now better equiped to deal with unfair contract terms. Codification of the judge-made law may have been one of the objects of unfair contract terms legislation, but it certainly was not the only, and even not the primary one. The primary object of the new legislation was to make it possible to alter the contents of standard contract terms, in order that they would become fair and equitable to both parties to a (consumer) transaction.

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(1) I have set out the various means in more detail in my contribution Unfair contract terms : new control systems , 26 American Journal of Comparative Law 525-549 (1978).

Whether or not this goal is being met, should be measured by comparing the contents of standard contract terms as used before the new legislation entered into force and their present contents. This should of course be done within the respective socio-economic frameworks : standard contract terms, which in the early 1970's may have been unfair, might conceivably be considered fair nowadays (for instance, because of the availability of insurance (1), or vice-versa. Lawyers may find this conclusion most annoying. They are used to comment on judicial cases, not on changes in actual contract terms. Judicial cases are reported in Law Reports, which they may consult in their office or at home. Contract terms are for the most part not published, they have to be dug up from society, by preference through social science techniques which are unfamiliar to most lawyers (2).

Lawyers may even be in for a still worse surprise. Is the research on the changes in standard contract terms the final word, when it comes to measuring the effects of unfair contract terms legislation ? Not really. A standard contract form may be as fair and equitable as is possible, and still consumers may find themselves in a bad position. This may be the case, because the other party simply does not use the standard form or because it does not conform its practice to the prescriptions of the standard form. It also might be that the other party does not use its discretionary power not to invoke the standard contract terms as often as it did previously. This is the kind of research, which lawyers can only do when they master social science

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(1) A famous example in The Netherlands concerns the so-called Bovag-clause an exemption clause used by most automobile garages until 1963. Before 1963 it was alleged by garages that they could not insure themselves against the risks involved in car repair and that therefore an exemption clause was necessary (especially, since automobile owners did have the opportunity to get insurance cover) . And indeed, once the garages could avail themselves of insurance, they immediavely got rid of the much discussed exemption clause.

(2) See for a research project regarding the use of standard contract terms in commercial transactions F.A.J. GRAS, Staandaardkontrakten / een rechtssociologische analyse, Deventer 1979.

techniques (1).

Does this mean that lawyers, not trained in the social sciences, should abstain from doing research on unfair contract terms ? Once again : not really. Although lawyers will not be equipped to find out about the use of standard form contract in daily life, they should be able to compare the various editions of these forms and naturally they are able to comment on judicial cases. Lawyers are also qualified to discuss the various means by which legislatures in the various countries have sought to meet their goals. It is the means which I intend to explore to some extent in the remaining parts of this paper. I will first discuss some of the basic features of the new control systems. Then I will take a closer look at what in my eyes are major issues being essential for a control system.

Section 2 - Basic features of the new control systems.

§. 1 . Voluntary and compulsory control.

In legal writing, the view has sometimes been espoused that all standard contract terms, in order be valid, should first be submitted to state control (2). This view has at a time even been supported by a major political

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(1) *An early research project of this kind has been Stewart Macaulay's Non-contractual relations in business : a preliminary study, 28 American Sociological Review 55 (1963).*

(2) *See, among others, I. GUDIAN, Genehmigungspflicht von Allgemeinen Geschäftsbedingungen, Zeitschrit für Rechtspolitik 1972, p. 147-148. Eike van Hippel, Präventive Verwaltungskontrolle allgemeiner Geschäftsbedingungen.?, Zeitschrift für Rechtspolitik 1972, p. 110-111; the same , Besserer Schutz des Verbrauchers vor unlauteren Geschäfsbedingungen, Betriebs-Berater 1973, p. 993-995 (reprinted in the first edition of Hippel, Verbraucherschutz, Tübingen 1974, p. 70-83); Philippe NORDMANN, Le contrat d'adhésion : abus et remèdes , Lausanne 1974, p. 129; Norbert REICH , Verbraucher und Recht, Göttingen 1976, chapter 5.*
Before the Second World War , an administrative control of standard contract terms had already been proposed by writers such as HILDEBRANDT, Archiv für die civilitische Praxis 1937, p. 326-329. The fact that administrative control had been considered in Nazi Germany has not always proved...

platform in one of the European countries (1), but it never led to a comprehensive administrative control (2). Why such a control was not set up, will be easy to understand. Apart from more principled objections (3), there are the practical problemes involved in having tens of thousands strandard contract terms being studied by a bureaucracy, thereby stifling rapid changes (4).

...tc be an assett for those promoting this control system - see W. LOWE, Der Schutz des Verbrauchers vor Allgemeinen Geschäftsbedingungen - eine Aufgabe für den Gesetzgeber/Eine rechtspolitische Betrachtung in : Festschrift für Karl Larenz, München, 1973, p. 373, 396; K.E. MROCH, Zum Kampf gegen die unlauteren Geschäftsbedingungen, Karlsruhe 1960, p. 32, note 132; P. ULMER, Welche gesetzgeberischen Massnahmen empfehlen sich zum Schuze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen (dargestellt an Beispielen aus dem Kauf - und Werkvertrags - sowie dem Maklerrecht ?), Verhandlungen des fünfzigsten Deutschen Juristentages, Hamburg 1974, II, H 8, H 33.

(1) The German Social-Democrats (SPD). See the bills drafted by the Arbeitsgemeinschaften sozial demokratische Juristen (ASJ's) Hessen-Süd and Süd-bayern, published in Zeitschrift für Rechtspolitik 1970, p. 190-191, and 1972, p. 148-149. See also the SPD Congress reports by RAMM, BRANDNER and DAUBLER in Gerechtigkeit in der Industriegesellschaft, Karlsruhe 1972.

(2) There are of course a number of specific branches where administrative control of standard form contract of the branch is customary : insurance (see OECD, Control of private insurance in Europe, Paris 1963), transport and public utilities.

(3) Especially the objection of "big brother" state influence spreading gradually to private life. This objection may be overcome by entrusting the control to an independent public agency. Another objection is the encroachment upon freedom of contract. To this argument it must be said that it holds true. It should be added that it is even more true that freedom of contract has been (ab)used to use so many unfair contract terms. And " entre le fort et le faible, c'est la liberté qui opprime , la loi qui libère" (Labaudère).

(4) See E.H. HONDIUS, Standaardvoorwaarden, Deventer, 1978, p. 712-720, Th. BOURGOIGNIE and F. DOMONT-NAERT, Annales de droit de Louvain, 1981, 3, at 50 add that disadvantages of preliminary control by an administrative agency include its non-availability for control of individually negotiated contract terms and its overlapping with judicial control. The first argument bears little weight, once the (standard) contract terms to be submitted for approval would be defined in a broad sense (see below). The second argument might also be raised against the control systems which are now in force in several European countries (see below).

How to overcome these obstacles ? Solutions have been sought in various directions. The first has been set up a voluntary control, a second one to leave it to the Administration - or to (selected) private organisations - to choose from the existing standard form contracts, which to monitor first. The second method will be set out in some more detail in the following paragraphs. I will now discuss some voluntary control models. The best known example of a voluntray control system is the Israel Standard Contracts Law 1964, prior to the introduction of the 1969 amendments (1). Under section 2 of the law, anyone may submit his standard contract terms to the Board of Restrictive Trade Practices for approval. The Board shall then decide, whether or not, having regard to the terms of the contract, any of the restrictive terms - which are set out in a limitative way in section 15 - is prejudicial to the customers or gives an unfair advantage to the supplier likely to prejudice the customers (section 6). If the Board approves the restrictive terms, and if the supplier mentions the approval in his contracts, an ordinary court may not declare these terms null and void (sections 10 and 13). The approval is valid for a five-year period or for a shorter period to be determined by the Board (section 9). If the Board refuses its approval, the term is null and void. The refusal of approval has retroactive effect, even with respect to terms in contracts already concluded (section 11).

The original Israeli control system has failed. Disappointment with its effectiveness has led to the addition, in 1969, of section 2A, which empowers the Attorney-General to apply to the Board for the cancellation of restrictive terms in standard form contracts entered into by suppliers. Ever since, a practice has developed for suppliers to contact the Attorney-General before asking the Board for approval. In every such case, the restrictive term

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(1) The Israeli system is set out in more detail in my contribution in 26 American Journal of Comparative Law 525 ff (1978), with further references to legal writing in note 28. To these should be added S. DEUTCH, Conservatism in interpretation of the Standard Contracts Law 1964, 32 Ha-Praklit p. 27 (1978) (in Hebrew) and Loris d'AMBROSIO, Tecniche e strumenti di controllo sulle condizioni generali di contratto: il modello israeliano, in C. Massimo BIANCA, Le condizioni generali di contratto, II, Milano 1981, who gives a survey of the case-law.

in question was later approved by the Board. In effect, this means that the control system is no longer a completely voluntary one : it has become close to the West-European two-layer control, discussed below.

Why the original Israeli control system has not worked, seems easy to understand. The benefits for suppliers who submitted their restrictive terms to the Board of Restrictive Trade Practices have simply been more than outweighed by the disadvantages of a possible refusal to approve : the application of the Board's decision not only to future contracts but also to existing contracts, the five-year ban of the unapproved restrictive terms and the negative publicity.

More important at present is the voluntary control system, which is in use in the United Kingdom (1). Under section 124 of the Fair Trading Act 1973 the Director General of Fair Trading should promote the adoption of codes of practice in the various trades (2). Such codes may contain rules with regard to contract terms. The Code of practice of The Association of British Launderers and Cleaners, for instance, sets out in its Preamble 'As a member of the Association of British Launderers and Cleaners Limited we undertake not to restrict our liability under the general law...'. This method has apparently been successful, witness the survey by Jeremy Mitchell (3). The survey, however, also discloses some of the weak points of the control by codes of practice (4). The code only applies to members of the trade association promoting the code, and then only to those who choose to accept the standards set

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(1) The UK control system is set out in more detail in my contribution in 26 American Journal of Comparative Law 525, 532 ff (1978).

(2) So far twenty codes of practice have been promoted by the Director General of Fair Trading - see Gordon BORRIE, Legal and administrative legislation in the United Kingdom of competition and consumer policies, University of New South Wales Law Journal, 80, 90-91.

(3) Jeremy MITCHELL, Government-Approved Codes of Practice, 2 Journal of Consumer Policy 144, 152-154.

(4) See Susan MARSCH, Voluntary Codes of Practices, 127 New Law Journal 419-421 (1977).

out by the code and to remain members (1). Another weakness is the sanction. The codes often do not make clear what disciplinary action may be taken by a trade organisation against recalcitrant members; it still remains to be seen whether the organisation will in fact be willing to take such action if necessary.
Whatever may be the weakness of control by codes of practices as the only control system, there seems little doubt that as an auxiliary tool the codes may be very useful. It should also be observed that codes of practice are to some extent a better way of regulating business practices than legislation, insofar as they do not stop at the moment the standard contract terms are incorporated into a contract but also deal with the follow-up, such as after-sales service.

Once the codes of practice are backed up by compulsory control systems, they lose their status of merely a voluntary control. A German Konditionenempfehlung may have a similar aim as a UK code of practice, it still is different to the extent that it merely is a help in complying with mandatory legislation.

A third voluntary control system, which has sprung up, on a limited scale, in several countries, is mediation by a public agency.
An example is the Dutch Commissie voor Consumenten Aangelegenheden (CCA) of the Sociaal-Economische Raad. In the last decade, this Commission has tried to start negotiations between consumers' organisations on the one hand and trade organisations at the other, with the Commission acting as a mediator. Only in two instances has this method met with succes (2). In other cases,

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(1) In some countries, such as the Netherlands, membership of a (public) trade corporation can be prescribed law.

(2) Under the auspices of the Commission , the general conditions for delivery of electricity, water and gas, issued by the three associations of public utility companies, were redrafted in co-operation with the consumers' organisations. The willingness of public utilities to submit to this control may have been furthered by an understanding of consumers, which is not always prevailing within the administration of public enterprises.

the purely voluntary nature of this type of control probably thwarted the negotiations.

§. 2 . Administrative and judicial control.

Most of the new control systems may be described as centered around a judicial model. This may be so, even when the second-layer control is exercised by an administrative agency. There is one major exception. In France, the administration is not required to act upon the recommendations of the Commission des Clauses Abusives. It may refuse, or simply omit to do so. A second objection to the French system is the lack of procedural guarantees. The Commission, before drafting a recommendation, may decide to hear representatives of the trade organisations concerned. It may also refrain from doing so.

In 1979 I have already criticised the only decree, which so far has been promulgated under the 1978 Act, on the ground that trade organisations had apparently not been heard with regard to the reference prohibition contained by art. 1 of the decree (1) (this provision was to be struck down by the Conseil d'Etat on other grounds - see footnote below). It now has become apparent that the first objection to administrative control is also valid. The fact that only one decree has been promulgated by the French government is not due to laziness of the Commission des Clauses Abusives, which in mid-1982 had already drafted 12 recommendations. Rather it has been the lack of response by the administration which is the cause of the ineffectiveness of the French control system. In a judicial model, the control agency simply is required to pronounce itself. The absence of such requirement in an administrative model makes it ill-equipped as a satisfactory system for the control of standard form contracts.

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(1) E.H. HONDIUS, Naar een wettelijke regeling van algemene voorwaarden, Handelingen Nederlandse Juristen-Vereniging 1979, I, p. 140.

§. 3 . Positive and negative control.

Most control systems which so far have become operative have in common that they employ negative sanctions. Once the user of standard contract terms does not comply with the law, or once negotiations between a first line-control agency and an enterprise (or trade organisation or court may then issue an injunction, prohibiting the further use, propagation or multiplication of standard contract terms or of a particular unfair term.

This 'negative' control leaves users of standard contract terms in uncertainty as to what will and what will not be allowed. In legal writing, a number of proposals has been put forward to provide enterprises with ready-made standard contract terms instead. The most far-reaching form of such 'positive' control is the introduction of mandatory provisions in the law. In this way, positive control seems far removed from standard contract terms. The link becomes more obvious, when the law also prescribes to take over certain mandatory provisions in their contracts (e.g. cooling-off periods in door - to door contracts).

An approach which deserves our attention consists of a form of delegating legislation to bodies, which are composed of -among others- representatives of organisations which otherwise would be negotiating the contents of standard form contracts. The new Dutch civil code, which is to enter into force in 1985, contains the following provision (1). :

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(1) The following text is taken from the semi-official translation edited by the Dutch Ministry of Justice (Leyden 1977) , with two adjustments. First the concept of "standard regulation" has been preferred to that of "standard terms" used by the semi-official translation. Second, a (minor) alteration proposed by a bill which has not yet been approved by Parliament (bill 17541) has already been incorporated into the text.

Art. 6.5.1.2. 1. In addition to the statutory provisions a contract made by one of the parties in the conduct of his business or profession is subject also to a standard regulation if for the class to which the business belongs or for the profession a standard regulation is in force in respect of such a contract. The particular kinds of contracts for which standard regulations may be made and the class of business or the profession for which each such regulation is intended are designated by legislative decree.

2. Standard regulations are made, varied and revoked by a commission to be appointed to that end by Our Minister of Justice. Further rules are laid down by statute for the composition and procedure of the commissions.

3. The establishment, variation or revocation of standard regulations does not come into force until it has been approved by Us and promulgated together with Our decree of approval in the Nederlandse Staatscourant.

4. In standard regulations deviation from statutory provisions is permissible, except those from which even in a contract deviation is in no way permissible. The provisions of the foregoing sentence do not apply if a different inference is to be drawn from a statutory provision.

5. The parties may deviate from a standard regulation in their contract. Such regulation may however prescribe a certain form for deviation.

The Luxemburg bill contains a similar provision (1). Since neither of these provisions have entered into force, there is as yet no experience to report.

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(1) Art. 7, Projet de loi relatif à la protection juridique du consommateur.

To the above it should be added that in France the possibility is now being explored of using the experience with collective labour agreements (1), and especially with their being turned into binding conditions for third parties, in consumer transactions (2). The analogies between labour law and consumer law have of course been explored earlier (3).

There is now some, although limited experience with a middle way between positive and negative control : the drafting of bilateral standard contract terms under the auspices of a public official. As was already mentioned earlier, the Dutch Commissie voor Consumentenaangelegenheden (CCA) of the Sociaal-Economische Raad has mediated between consumer's organisations and professional organisations, which so far has resulted in agreements as to the standard contract terms for the supply of electricity, gas and water and for the supply of wooden floors (the negotiations regarding the standard contract terms for the sale of automobiles have not yet been brought to a good end).

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(1) See G. DELHOVE, Het recht en de pratijk van de collectieve arbeidsovereenkomst in de zes landen van de EEG, Brussels 1963.

(2) Earlier expectations regarding the feasibility of bilaterally negotiated standard contract terms (used cars , life insurance, after-sales service) on a voluntary basis have not come true. On January 7, 1980 the principal French consumers' organisations wrote the Minister of Economic Affairs that they would not participate in negotiations as long as such negotiations would have been institutionalized by law. A draft bill on collective consumer contracts has been published in Consommateurs-Actualités , p. 8-10. Ever since , as a state commission is trying to find a way out. As to the situation in France, see Th. BOURGOIGNIE and F. DOMONT-NAERT, Annales de droit de Louvain, 1981, p.3 , 47-50 (the authors also advocate this approach for Belgium; see in this regard the references in Marc BOSMANS, Les conditions générales en matière contractuelle (Chronique de jurisprudence, 1975 à 1979), Journal des Tribunaux 1981, p. 17 ff , at 57-58).

(3) In my Standaardvoorwaarden , Deventer 1978, p. 324-326 , I give some references.

§. 4 . First line-control : public agency or private organisations

As I have stated previously (1), a major dividing line between the two-layer control systems is the Danish-German border. North of the border, first line-control is exercised by public officials, the Forbrugerombudsman (Denmark) or Konsumentenombudman (Sweden), and their staff. South of that border, private consumers' organisations have been assigned this role (sometimes in conjunction with existing public agencies). The difference in choice by the various legislatures can be explained by historical developments. Those countries which simply did not possess powerful consumers' organisations, but on the other hand had a tradition of independent public officials, chose for the latter. Countries which did have a strong consumers' organisation and lacked a tradition of independent public officials opted for the first.

What were the arguments advanced for one or the other system, apart from the practical reasons mentioned above ? First, it has been argued that a public official has more authority than private organisations. Then, it is said, a public official is more representative for consumers. Thirdly, entrusting first line-control to one public official may prevent quarrels between different private organisations over the question who is to be the negotiation partner of trade and professional organisations. On the other hand, it has been contented that the establishment of still another government office adds to the already too large government burocracy and that government has no experience in handling consumer interests. Perhaps it should be added that the distinction between a government office and a private organisation is in some countries smaller than one should expect. In the German Federal Republic for instance, the Verbraucherschutzverein is subsidised for nearly 100 % by the federal government.

In this introductory paper I can only outline some of the elements which may have influenced the success (or the failure) of the solution which was chosen.

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(1) 26 *American Journal of Comparative Law* 525, 537 (1978).

When we first take a look at the public official approach, it seems to me that the following factors have played a role :

(a) the budged of the office : when there is no money, little can be done;

(b) the number of tasks of the office : once it has too many tasks, the negotiations of standard contract terms may be considered less rewarding than other issues, which are bound to attract more publicity;

(c) the personality of the office holder : by appointing young and energetic persons, such as in Finland, Sweden and the United Kingdom (1) the chances for equitable contract terms do of course rise.

Now moving over to private organisations, some elements which may prove to be of importance are :

(a) once again : ubi denarii deficiunt...; the organisation should receive sufficient public funds to serve as a negotiating partner of enterprises and their organisations;

(b) the number of tasks is another element, which also in the case of private organisations may determine whether or not there are sufficient, well-experienced staff members to negotiate standard contract terms (2);

(c) the authority of the consumer's organisation (if the terms negotiated with the organisation may be challenged in court by another organisation, the willingness of a trade organisation to negotiate may dwindle).

In most new laws, the public official or the private consumer's organisations, although considered to be the main negotiating partners of private enterprise,

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(1) In 26 American Journal of Comparative Law 525, 535 ff. 1978. I may unwittingly have suggested , that my argument that the Danish Consumer Ombudsman's lack of success (compared to his Swedish counterpart) might among others be attributed to the personality of the office holder was taken from a publication by B. Dahl. I like to state that my sources in this case were interviews with several Danish experts.

(2) The financial risk of losing a court case may lead a consumers' organisation to split its unfair contract terms division, as was done in the German Federal Republic.

do not hold a monopoly in this regard. Under section 2A of the Standard Contracts Law 1964, as amended, not only the Attorney-General may apply to the Board of Restrictive Trade Practices for the cancellation of a restrictive term, but also, with the consent of the Attorney-General, the Israel Consumer Council and any organisation of customers which the Attorney-General has approved in that behalf. Likewise, para. 3 of the Swedish Unfair Contract Terms Act 1971 provides, that when the Konsumentombudman fails to ask the Market Court for an injunction, an association of entrepreneurs, consumers or employee's may file such a request. Similarly, the Austrian and German Acts, as well as the Dutch and Luxemburg bills empower Chambers of Commerce and other organisations to act as a first line-control agency. So far, it appears that these powers have only been used on a very limited scale (1). Most of the laws do not allow private consumers to file an action with the secondary control agency and rightly so (2), since the abstract control procedure should really only be used once negotiations fail - and an individual consumer can hardly be deemed to represent consumers in general (3).

§. 5 . Second line-control : from special board to ordinary court.

Within the two-layer control systems, not only the first, but also the second-line control may be entrusted to various agencies. These agencies may be a specific board, a special court outside the regular court system, a specific court within such system, or an ordinary court within the regular court system.

Countries which have entrusted the second-line control (in part) to special

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(1) *See as to Germany, H.J. BUNTE, Handbuch der Allgemeinen Geschäftsbedingungen , München 1982, p. 56.*

(2) *In The Netherlands , the Commissie voor Consumentenaangelegenheden in its Advies inzake het vraagstuk van de toepassing van standaardvoorwaarden bij transacties met de consument (The Hague, 1978) 8-29-30, was of a different opinion.*

(3) *The one exception being Mr. Ralph Nader.*

boards or courts are Israel (Board of Restrictive Trade Practices) and the United Kingdom (Restrictive Practices Court). An advantage of boards and courts such as these is that the composition may easily be adapted to the special needs of this type of control. On the other hand, it may also be observed that the ordinary courts do so often deal with contract terms, that they have all the expertise needed. A disadvantage of a board is that it will usually have less authority than a court and that the ordinary courts may be less willing to accept its findings as precedents. An easy (too easy ?) way out has been the Swedish solution to this type of problem : it has simply rechristened the market board into market court.

A better solution in my view is to entrust control to a single court of appeal per jurisdiction : the Maritime Court of Copenhagen in Denmark. The Hague Court of Appeal in The Netherlands. Similarly, para. 14 AGB-Gesetz authorizes the governments of the Länder to concentrate abstract control in one out of several Landgerichte. The only drawback of entrusting second-line control to courts within the ordinary court system may be that the type of control is of course not the same as in individual cases. The court should for instance be less dependent from the arguments, which each side brings to its attention. A more inquisitory role may sometimes be needed. On the other hand it must be admitted that courts have a long tradition of handling non-contentious problems and that any doubts may be ill-founded.

§. 6 . General clause and black lists.

By what standards should businesspersons draft their standard contract terms, should first-line watchdogs make their comments as to these terms, and should second-line courts or boards judge the same terms ? Two techniques are available to legislatures. First, they may lay down a general clause. Secondly, they may set up a list of clauses which are (deemed to be) unfair and therefore null and void.

Surprisingly, it has been the second technique, which was first used by legislatures. Both the Italian Civil Code and the Israeli Standard Contracts Law 1964 only apply to restrictive terms, set out in a limitative way. This

has proven not to be a good idea (1). In order to survive, businesspersons have to be imaginative. Their imagination makes it not too difficult to get around legal prohibition. An exemption clause will be redrafted as an exclusion clause.

It has therefore become apparent to most legislatures of the 1970's (2), that a list of restrictive terms should be supplemented by a general clause.

More important, at present, is the question whether, vice-versa, a general clause should be supplemented by a list of restrictive terms. The

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(1) *See the survey by Tommaso Adameo Auletta, Le clausole vessatorie nella giurisprudenza, in : c. Massimo BIANCA (ed) , Le condizioni generali di contratto, Milano, I, 1979, p.3-61.*

(2) *An exception must be made for the Belgium draft bill to amend the Wet van 14 July 1971 betreffende de handelspraktijken (Trade Practices Act 1971), which the Department of Economic Affairs brought into circulation in 1977.The draft bill consist of a number of provisions aiming at an increase of consumer protection. The provisions include an article 53 octavo declaring void vis-à-vis consumers any contractual term which upsets a fair balance of rights and duties in a contract for the sale or supply of goods or services. According to the draft article 53 novem, only a limited number of (eight) contract terms are deemed to be unfair in the sense of article 53 octavo. However, this black list may be supplemented by the King under article 53 undecim. The latter provision also empowers the King to prescribe the use of model contracts in specific branches. On September 28, 1979, the Raad voor het verbruik (National Consumer Council) submitted a Report on the draft bill to the Minister of Economic Affairs. The Council did not come to an agreement. The representatives of consumers' organisations , although of the opinion that a general clause on unfair contract terms should be added to the bill and that the provision laying down the King's power to prescribe model contracts should be better formulated, applauded the articles mentioned above (p. 173-175). The representatives of industry, distribution, retail trade and agriculture on the other hand rejected these provisions as an unwarranted encroachment upon freedom of contract (p. 179-182).*

Scandinavian countries have demonstrated that this question must not necessarily be answered positively. To continental European lawyers it is surprising to see how few legislative guidelines the consumer ombudsmen and the controlling courts have to go by.

What are the arguments in favour of black - or "grey" - lists and what arguments may be advanced against their incorporation in legislation ? In favour of such lists is the argument that the draftspersons, the users of standard contract terms, their contracting partners, first line and second line control agencies have a better picture of what the legislature had in mind when laying down the provisions on unfair contract terms. Seen from the other side : laying down a list of forbidden clauses ensures the legislature that her ideas will be better observed. Against this argument, it will often be argued that case-law may just as well eventually provide the certainty looked for by all parties concerned. Moreover, case-law, which deals with real-life contract terms, will give the parties a better insight. On the other hand : how long will it take small countries to build up a case-law, which is of some importance ?

Three arguments may be advanced against black lists. Firstly, they cannot take into consideration the special problems of specific enterprise (the island car dealer, who has to contract for extra-long delivery periods). Secondly, the lists are hard to change and therefore not easily adaptable to changing conditions or views. Thirdly, they may offer a -false-conviction that they offer the maximum protection, whereas they have been intended to lay down a minimum protection.

The first argument may be met in a number of ways, as may be illustrated by the Dutch bill on standard contract terms. This bill gives two lists of clauses (as do the German and Austrian acts) which are applicable to standard terms in consumer contracts. One is a black list of clauses which are always forbidden. The other is a list of clauses which, unless the contrary has become apparent, are held to be unfair (I have coined the expression 'grey list' for such a list and this has in no time become a household expression among Dutch lawyers).

Another possibility, provided by the same bill, is that once a consumers' organisation agrees, the mandatory lists may be set aside. This opens the way to negotiations, where a merchant may plead his cause. An example of this kind of mandatory legislation is to be found in labour law, where mandatory provisions may sometimes be derogated from by collective labour agreements.

The second argument is hard to refute. It is indeed the experience with all black (or grey) lists which have so far been adopted by legislatures, that no changes have been brought about, not even when case-law seems to indicate that such changes are desirable. Several solutions have been advanced. In the German Federal Republic it has been proposed - without success - that the Federal Government should have the power to convert decisions on unfair contract terms by the courts of appeal (Oberlandesgerichte) into statutory law by a mere formal declaration. The Dutch bill authorizes the government to extend and modify the 'grey' list. Other legislative techniques are possible. However, it remains to be seen whether or not they will work in practice.

A third argument not often raised in legal writing but inspired by studying a large number of German OLG decisions under the AGB-Gesetz is that the mere existence of a list of clauses may change the role of first line control agencies from negotiating partners of the users of standard contracts terms to that of policemen enforcing the minimum standards provided by law. If this picture is correct, it means that the aims of such an act may not have fully been met. It is of course possible that first line-control agencies have decided to give priority to those terms which are clearly at variance with the law. However, I am not completely convinced that this is really the case.

Section 3 - Secondary problems of the new control.

§. 1 . The concept of standard terms.

Several of the laws which have been discussed in Sections 1 and 2 have a scope of application which is limited to standard contract terms. This is the case in Austria and the German Federal Republic and - as far as

non-consumer contracts are concerned - the United Kingdom; it also applies to the Dutch and the Luxemburg bills (1). The limitation of the scope of the law to standard contract terms raises the problem how such terms should be defined.

In legal writing before the legislation of the '70's, the main question which was raised was whether in distinguishing standard contract terms from individually negotiated terms a substantive or a formal criterion - e.g. a contract term being printed - should be used. The main advantage of the formal criterion was its simplicity (2). Modern typewriting techniques however have outdated this approach. It is now very easy to integrate standard contract terms in an otherwise individual letter of confirmation or other contractual document. This has left us with the substantive criterion : standard contract terms are those terms drafted in advance for a number of contracts, which one of the contracting parties proposes to the other upon the conclusion of a contract (Germany par. 1) (3). It will be evident that such a criterion also raises a number of questions.

The most important question with regard to the substantive criterion has been to what extent individually negotiated terms fall within the scope of application of standard contract terms legislation. In the German Federal Republic,

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(1) In the Scandinavian countries and France it was not necessary to limit the scope of application of the legislation to standard contract terms. Since control of contract terms is entrusted to public officials or commissions , it is quite evident,from the mere point of priorities, that not single , individual terms will be sought out for control , but rather standard terms.

(2) See for instance J. SCHMIDT-SALZER, Allgemeine Geschäftsbedingungen, München 1971, p. 9, who still advocated a formal criterion (in the second edition of this publication in 1977 Schmidt-Salzer no longer defended this approach; see for a criticism W. GRUNSKY, Betriebs-Berater, 1971, p.1113-1118).

(3) The German Act rules out any formal criterion unequivocally : "It does not matter , whether the terms constitute a separate part of the contract or have been incorporated in the contractual document itself, how numerous they are , in which kind of writing they have been expressed and which form the contract has (para 1).

this question was already answered by the Bundesgerichtshof before the AGB-Gesetz entered into force. According to the German Supreme Court any contract term, which the party who proposes it is ready to change, is an individual term (1). This has as a consequence, that under para 1 section 2 of the subsequent Act such terms are not considered to be standard contract terms. Although it is up to the party who proposes the terms to prove that he was ready to change them, it still was feared in German legal writing that this broad concept of an individual term would lead to wide-scale circumvention of the AGB-Gesetz (2). According to recent legal writing, this fear has proven to be unfounded however (3).

The Dutch bill on standard contract terms has taken a different approach. The bill also applies to those individually negotiated contract terms, which were drafted in advance by one of the parties in order to be incorporated in a number of contracts. However, the Dutch bill makes a different distinction which reduces the scope of limitation of the law in another respect. The bill excludes from its definition of standard contract terms those terms, which denote the 'kern van de prestaties' (core of the obligations) (4). By this exclusion the draftspersons of the bill intend to prevent the courts from adjusting the primary obligations of the parties, such as the price (5). In commentaries on the bill it has been argued that the legislative fear for a revival of the doctrine of iustum pretium is ill-founded and that the exclusion may become a major source of litigation (6). The Dutch effort to distinguish between primary obligations and other contract terms is not wholly

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(1) *BGH 15 December 1976, NJW 1977, 624.*

(2) *Rohr, Handbuch des Verbraucherrechts, 1978, Chapter 40, AGB-Gesetz, Anmerkung 13.*

(3) *H.J. BUNTE, Erfahrungen mit dem AGB-Gesetz/Eine Zwischenbilanz nach 4 Jahren , Archiv für die civilistiche Praxis 1981, p. 31, 37.*

(4) *Art. 6.5.2A.1.*

(5) *Memorie van toelichting, p.21.*

(6) *E.H. HONDIUS, Ars Aequi Katern 1982, p. 46.*

new. In France, the very strict regime of the vices cachés has sometimes led sellers to reformulate their exemption clauses as exclusion clauses. Similarly it has been argued that the (UK) Unfair Contract Terms Act 1977 does only apply to exemption clauses (1) (the original name of the bill leading to the act was the Avoidance of Liability Act). Finally, Italian courts have sometimes held that when the essentialia of a contract are concerned one cannot speak of a clausola (clause) in the sense of art. 1341 Codice civile (2). Likewise, the German lists of clauses apply only to clauses which derogate from the law including the general clause of para. 9) (3).

The main argument to introduce legislation dealing with standard contract terms usually has been that terms, which are drafted unilaterally by one of the parties or by an organisation representing such party are prejudicial to the interests of the other party. It has therefore been argued that the scope of application of the legislation should be limited to such terms and that bilaterally negotiated contract terms as well as those contract terms which are drafted by a neutral person or organisation (notary public, government) should be excluded.
Since it has not been possible to find a suitable criterion to distinguish the different categories of standard contract terms, no legislature has accepted this proposition. Instead, some laws try to give bilaterally negotiated

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(1) *See Norman PALMER & David YATES, The future of the Unfair Contract Terms Act 1977, 40 Cambridge Law Journal 108-134 (1981). The authors give the following definition of an Exemption clause : a device by which one party takes away rights he has already conferred by his bargain (p. 108). An exclusion clause is defined by them as an instrument of clarification or candour, warning the other party what to expect by way of performance and advising him of any precautions he should take. An exclusion clause might be used as a means of differentiating between two varying levels of available service (de luxe/standard) or of stipulating the necessary preconditions for the reliant party's duty to perform (p. 108-109).*

(2) *See AULETTA, op. cit., at p. 4.*

(3) *Para 8 AGB-Gesetz.*

contract terms a preferential status (1).

§. 2 . The concept of consumer.

More difficulties have been caused by the introduction of the concept of consumer. Some of the control systems which were introduced in the 1970's are specifically confined to unfair contract terms in consumer contracts. This is especially the case in the Scandinavian (2) and the French legislation. However, all other laws use the concept of consumer, either to extend the scope of application to all contract terms (Unfair Contract Terms Act 1977) or to limit the scope of black and 'grey' lists of (presumably) unfair contract terms (Austria, German Federal Republic, Dutch bill).

The concept of consumer or consumer transaction is not so easy to define. Three main approaches can be discerned. The first is to use a purely quantitative criterion : credit legislation often only applies to loans under a specific maximum. The second is to use the quality of one or either party to the contract : the final user of the good or service, or the professional who enters into the contract in the course of a business. A third approach is more objective : it focuses on the good or service, which should be of a type ordinarily supplied for private use or consumption.

The second approach is the one adopted by the Austrian (para. 1 Konsumentenschutzgesetz), Dutch (art. 6.5.2A.3 and 4) and German (para. 24 AGB-Gesetz) legislatures. The United Kingdom (section 12 Unfair Contract Terms Act 1977) and Luxemburg (art. 2 of the 1978 bill) have opted for a combination of the second and the third approach.

Either of the definitions of a consumer transaction raises some major problems.

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(1) *Most notably the Dutch bill.*

(2) *In Sweden , it has recently been proposed to extend control legislation to standard contract terms used in business transactions.*

One of the most important of these is whether a professional who concludes a contract outside the area in which he is an expert acts as a consumer or not. So far, some courts seem to have adopted a very broad view of the consumer concept. Thus, in Peter Simmons and Co. v. John H. Cook (Queen's Bench Division 31 March 1981) it was held that a firm of surveyors did buy a car from a motor dealer not in the course of their business, but rather as a consumer, since the buying of motor car did not form an integral part of the firm's business, nor was it necessarily incidental to the business. The parties were not on an equal footing with equal bargaining power and the court indicated that it is only in commercial contracts negotiated between businessmen, each capable of looking after their own interests and of deciding how risks inherent in the performance of the various kinds of contract can be most economically borne (generally by insurance) that there will be a non-consumer relationship.

Under the Dutch bill, an exception is made for those contracting parties who themselves use the same or similar standard contract terms : they may not avail themselves of the open norm control by an ordinary court (art. 6.5.2A. 2 section 4).
The French experiences demonstrates that a uniform concept of consumer should be used in unfair contract terms legislation. France's use of both consumers and non-professionals in its legislation (art. 35) has led to confusion (1).

§. 3 . Incorporation of standard terms into the contract and interpretation.

Most of the new laws on unfair contract terms are based on a policy that consumer protection basically should not be achieved by posing high demands on the incorporation of standard terms into the contract, but rather by making possible a control of the contents of such terms (2).

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(1) See J. GHESTIN, in Les contrats d'adhésion et la protection du consommateur, Créteil 1978, p. 195, 201-203.

(2) See for instance the explanatory report to the Dutch bill on standard contract terms at p. 22.

In some legislations this trend constitutes a break with the past when control of the contents was sometimes only possible through control of the incorporation of the terms into the contract. Now that the new legislation does provide the courts with the power to control content, incorporation of contract terms has tended to get out of focus.

Still, the new laws do require the users of standard contract terms to do something in order to have their terms incorporated. Standard terms do not form a part of the law, nor will they usually be deemed - by way of custom - to form an element of a consumer contract. Legal certainty requires that consumers should have some notion that standard terms are applicable. With the exception of France, where however this provision in the decree of 24 March 1978 (1) was struck down by the Conseil d'Etat (2), legislatures have not outlawed altogether references to standard terms, which are to be consulted elsewhere.

Two additional remarks should be made in this regard. First, a number of jurisdictions have special rules for standard contract terms which are deemed to be not customary (at least vis-à-vis the other contracting party). An example is the "Unklarheitenregel" of para 3 AGB-Gesetz. Second, possibly more importantly, there is a number of contract terms which consumers should readily have at their disposal.

In general, consumers will have little use of standard contract terms. In a number of cases, however, they will be most helpful. This especially is the case when the contract term lays down a rule of conduct to be followed by the consumer. In order to receive his insurance indemnity, the consumer should inform the insurance company within 72 hours of the accident. In order to be entitled to damages for delivery of faulty goods, he should file a claim within 8 or 14 days, etc. On the other hand, there are those terms

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(1) Journal Officiel , April 1978.

(2) Conseil d'Etat 3 December 1980, JCP 1981, II , 19502.

which usually will only play a role once a conflict has arisen and which therefore may be drafted in such a way that they 'can be understood only by lawyers' (1).

Legislatures have often laid down rules for specific terms in legislation of special contracts. Insurance, the employment contract, door-to-door sales, consumer credit is the type of legislation, where provisions relating to the incorporation of standard contract terms may be expected. These provisions may require the user of the terms to hand out a copy to the consumer (2), they may also lay down certain typographical requirements : the contract should be in a least eight or ten point type (3), or certain clauses should be set out in a conspicuous way (4). A modern approach, coming from the United States is to require a clause to be in simple and readily understood language (5).

Are such requirements effective ? There is some research which throws doubt on the effectiveness of this type of legislation. Yet another reason to pose requirements such as these is to make consumers aware of the terms concerned, in order that they may prefer another company. It has been estimated that in this regard making consumers aware of credit terms has not been very effective (6). Then why should attempts at making consumers

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(1) Explanatory notes to paras 34 and 35 of a model passenger ticket, given by R. COLINVAX, D. STEEL, V.E. RICKS, Forms and precedents, London 1973, p. 35.

(2) For instance art.3 of the Swiss Federal Insurance Act of 908.

(3) For example section 7(2) of the English and Scots Hire-Purchase Acts 1965.

(4) See para 2-316(2) Uniform Commercial Code.

(5) Section 102 Magnuson-Moss Waranty-Federal Trade Commission Improvement Act 1975.

(6) T.A. DURKIN, Consumer awareness of credit terms : review and new evidence, 48 Journal of Business 253-263 (1975); W.C. WHITFORD, The functions of disclosure regulation in consumer transactions, 1973 Wisconsin Law Review 400-470.

aware of far less important contract terms (from the point of view at the time of conclusion of the contract) be more successful ? By raising these doubts, I do not want to convey the impression that legal requirements as set out above should be abolished. But if the aims are not fully met, other ways should be sought to achieve these.

The construction and interpretation of standard terms, once they have been incorporated into the contract, gives rise to a plethora of interesting legal issues. Many of these are mainly of a technical nature. Some have to do with the effectiveness of control procedures. By way of example I refer to a conflict which in German legal writing has arisen as to the question whether standard contract terms may be held to be only partially null and void. Against earlier writing (1), the Bundesgerichtshof has held that such terms should be wholly avoided (2). A different decision would clearly have meant a blow to the precedent value of court decisions under the AGB-Gesetz.

§. 4 . Registration and publication of court cases.

Any control system which is to have preventive effects must include a certain publicity. Among the new acts on unfair contract terms it is especially the German act which devotes much attention to publicity. Under para 20 of the AGB-Gesetz all complaints and all decisions in abstract control procedures should be brought to the attention of the Bundeskartellamt. This in turn keeps a register and gives information upon request. Although the Bundeskartellamt has been criticised in German legal writing for its handling of these matters, my own (limited) experience with this office has been good.

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(1) H. KÖTZ , Münchener Kommentar (1978), §11 AGB-Gesetz , Randnummer 39.

(2) BGH 17 May 1982 (VIIth Senate), NJW 1982, p. 2309, BGH 7 June 1982 (VIIIth Senate , NJW 1982, p. 2311 - see the note by H.J. BUNTE, NJW 1982, p. 2298 - and OLG Frankfurt 15 June 1982, NJW 1982, p. 2564.

A problem which is not dealt with in the AGB-Gesetz is how decisions in individual cases can be collected. This of course is not a problem which is specific for decisions concerning standard contract terms. In the past, the large majority of cases involving such terms have not been reported - or registered - for the simple reason that they were not considered to be important. Under the new control systems, abstract control undoubtedly is the primary model envisaged by the legislatures, but control in individual cases may at least play an important auxiliary rule. Much is left in the hands of private reporters.

§. 5. Conflicts with other control systems.

The main objective of the new wave of unfair contract terms legislation, as described above, has been to induce organisations to engage in negotiations concerning standard contract terms. This has heen sought basically through providing sanctions against those enterprises or trade organisations, which are unwilling to negotiate. The sanctions come on top of sanctions already in existence before the new legislation was passed. In this paragraph I shall explore some of the questions which the co-existence of two systems of sanctions may pose.

A major problem has been and still is the co-existence of abstract control and individual control. In all countries with unfair contract terms legislation in the modern sense these two systems now do co-exist, although in the past this has not always been the case (Sweden first adopted an abstract control system and only later introduced a general clause in her contract law) nor is the individual control as extensive as abstract control (in France, judicial control is limited to the clauses regulated by decree).

Let me set out some of the problems in more detail. Suppose a second-line control board issues an injunction against a trade organisation concerning certain clauses in the contract terms which the organisation advises her members to use. There will be little doubt that this injunction may be extended to all members of the organisation concerned, but is it also valid - or has it set a precedent - vis-à-vis organisations in other branches of

trade ? On the one hand, it seems to make little sense to distinguish whether a jurisdiction clause is used in the distribution of cars or of bicycles. On the other hand, there may well be a difference, or more important, the trade organisation which was not involved in the abstract control procedure may have better arguments in favour of its clauses.

Another problem which arises is as of when a decision in an abstract control procedure shall affect individual contracts. Most legislations make clear that contract terms, which notwithstanding the injuction are incorporated into contracts concluded afterwards, are null and void. But what about contracts which were concluded before the injunction was issued ? Does it make a difference whether these contracts have been wholly executed or not ?

In those countries which have adopted a black list of clauses, without any 'Wertungsspielraum' for the court, the answer seems clear. At least with regard to the contracts which have not yet been wholly executed, there is little doubt that the decision in the abstract control procedure may have retroactive effect. With regard to contracts which have been wholly executed, the answer is less clear. Giving the abstract control decision retro-active, effect may in such cases be barred by estoppel.

The most difficult question, however, is whether a decision in the abstract control procedure concerning the general clause or the "grey" list of clauses (presumed to be unfairly prejudicial unless the contrary is established) is to have retro-active effect. On the one hand, it may be argued that no distinction should be made between those clauses which the legislature has been able to prohibit in a detailed way and those which evidently were more difficult to point out. On the other hand, one may also contend that the leeway which such clauses give to the courts is actually meant to be filled in by the parties themselves. From this point of view, the court decision comes in the place of negotiated bilateral standard contract terms and should therefore be of a constitutive and not of a declaratory nature.

The problem may be illustrated by the German car distributors' conditions of sale. Until recently these conditions, recommended by the three main

car-trading associations, contained the following clause : "Price increases are only permitted when the delay between the conclusion of the contract and the agreed delivery date exceeds four months : in this event the price will be the ruling price of the vendor on the delivery date". This clause was not void under para 11 AGB-Gesetz, which only applies to those clauses which empower the trader to raise the price within four months of the date on which the contract was concluded. However, the Bundesgerichtshof invalidated the price of the day clause under the open norm of para 9 AGB-Gesetz (1).

The economic consequences of this decision are considerable. What makes matter worse for German car manufacturers, is that is has heen held that the Bundesrerichtshof decision has retro-active effect up to the day of entry into force of the law (2). This may mean that hundreds, if not thousands of consumers have to be reimbursed.

Let us take a look at another example. In several jurisdictions, the usual exemption clauses of professional photographers (3) have been held to be void. In Woodman v. Photo Trade Processing Limited it was held that defendant failed to satisfy the reasonableness test in Schedule 2 of the Unfair Contract Terms Act 1977 (which was applied, although strictly speaking it would only

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(1) BGH 7 October 1981 (VIIIth Senate), NJW 1982, p. 331; BEUC Legal News 1982 Nr. 2, p.10.

(2) By LG Nürnberg-Fürth 17 January 1982, BB 1982, p. 456 (E. JUNG) , ZIP 1982, p. 323, and LG Frankfurt 8 February 1982. Contra LG Darmstadt 12 March 1982, all reported in Beuc Legal News, 1982, Nr. 2, p. 10-11.

(3) In Woodman v Photo Trade Processing Limited, the clause read as follow : "All photographic materials are accepted on the basis that their value does not exceed the cost of material itself. Responsability is limited to the replacement of films .No liability will be accepted , consequently or otherwise , however caused".

apply to contracts for the sale, supply or disposition of goods) (1). Likewise, the Tribunal de grande instance of Angers held that a similar clause was null and void under article 2 of the decree of 24 March 1978, which renders void those clauses in contracts of sale between traders and consumers which have the purpose or the effect of reducing the consumer's right to compensation in the event of the trader's failure to comply with one of this obligations (2).

It seems to me that giving retro-active effect to decisions such as these is only unfair to the business world, but it may unduly influence negotiations taking place between interested organisations, making the organisation less willing to concede a point, when it runs the risk that this also will be deemed to have retro-active effect.

That such effect may in some cases be unfair to business is demonstrated by the fact that in the case of the price of the day clause, either an objective way of establishing the price or a way out for the consumer may make the clause acceptable. The same applies to the exemption clause of the photographers, which may be made acceptable, as was suggested in the English case, by offering a choice between two possibilities - one with full exclusion of liability, the other a more expensive service with a greater degree of

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(1) This case , decided by the Exeter County Court on 7 May, 1981 involved a reel of film of a wedding which had been supplied to the defendants for processing. Defendants relied upon the terms printed on a small card exhibited on the front of the shop counter. The case is reported in BEUC Legal News 1982 Nr.1, p. 11 , but more fully by Fiona SWAIN, 8 Droit et pratique du commerce international 1982, p. 29-40.

(2) This case , decided on 15 June 1981 and reported in BEUC Legal News 1982 Nr.1, at p. 10 involved a consumer who had brought back from a trip to India and Nepal a dozen rolls of films for slides. After the films had been developed with no problems, plaintiff submitted 28 slides to have prints made from them. These slides were lost . As compensation , the laboratory offered to provide a free film , in compliance with the conditions printed on the ticket handed to plaintiff on submitting the slides. The court awarded damages for the costs of a trip to India and Nepal and for moral injury.

liability (1).

Quite another conflict between different control systems arises when the new general control of standard contract terms is superimposed upon an already existing control system for specific contracts, with separate control agencies such as an Insurance Inspection (2).

§. 6 . Place within codification.

A problem which has arisen only in a limited number of jurisdictions here under review, is in what context legislation on unfair contract terms should be placed. On the one hand, it may be argued that legislation which consists of both substantive and procedural private law provisions, and sometimes of public law as well, should be encompassed in a special statute. On the other hand it has been contended that placing such important legislative provisions outside a civil code frustrates the whole concept of codification. It will now be apparent why this problem has only arisen in continental European countries : the United Kingdom does not possess an all-embracing codification of civil Law, and France does not have purely private law provisions.

The legislatures concerned seem to have adopted three different courses of action. The first is of having a completely separate Act on unfair contract terms, the second is integrating such legislation completely into an existing civil code, and the third is having a separate Act for the abstract control procedure and integrating the provisions dealing with unfair terms in existing contracts in a civil code. The German AGB-Gesetz is an example of the first course of action. When one looks into the arguments advanced in favour of this solution, a purely pragmatic approach seems to have been prevalent. Both the German government and parliament wanted legislation in this area to

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(1) *This has been worked out in the Code of Practice for the Photographic Industry , agreed with the office of Fair Trading.*

(2) *See for example Jan HELLNER, Information om Livförsäking til konsumenter, Kristianstad 1981.*

be adopted before the next general election and integrating the bill into the civil code would have meant extra time. It seems the Germans have later regretted this approach. The next piece of consumer legislation, the provisions dealing with the travel contract, was incorporated into the civil code. At present, there is a strong movement to incorporate more of this 'social' legislation into the BGB.
An example of the second type of legislation is the Dutch civil code, which according to the bill submitted to Parliament in 1981 is to encompass all provisions regarding unfair contract terms, including the abstract control procedure.

Finally, the Austrian and also the Luxemburg approach is of having a special act dealing with the abstract control procedure and at the same time incorporating the provisions dealing with concrete contracts in the civil code. The Danish and the Swedish solutions to this legislative problem have been the same.

It appears to me that incorporation of unfair contract terms legislation either in an existing civil code or in a Trade practices act is preferable to separate acts.