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Unfair Contract Terms and the Consumer: ECJ Case Law, Foreign Literature, and Their Impact on Dutch Law

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Summary: In the late twentieth century, most European states have adopted legislation on unfair contract terms. The Directive 93/13/EEC on unfair terms in consumer contracts has effectively made the European Court of Justice (ECJ) the final arbiter in interpreting much of this legislation. The present paper explores the impact which the ECJ case law and foreign legal writing has had in an individual Member State, that is, the Netherlands. Seven issues are highlighted. (i) First, especially in the United States, information requirements as to contract terms have been investigated and found wanting. Although it must be conceded that not every consumer will read the small print even when enticed by the legislature to do so, this paper submits that such requirements do have *some* value. (ii) *Contra proferentem* interpretation is one of three age-old weapons against unfair contract terms; but, unlike the common law, Dutch law has not made much use of it. (iii) Dutch law has used the overt control over the introduction into the contract and the content of standard contract terms, but the result is of little use to guide parties, attorneys, and judges. Dutch case law, unlike that in Germany, is so much attuned to the circumstances of the case that it hardly establishes useful precedents. (iv) One of the first cases on unfair contract terms decided by the ECJ, the *Océano* case, caused a major discussion in the Netherlands. Should the Dutch legislature step in and change the sanction of avoidance or nullification into that of considering an unfair term not binding, or should the consequences of ex officio avoidance or nullification be left to the existing statutory provisions? The *Hoge Raad* eventually came to terms with *Océano* and the following ECJ case law in *Heesakkers* v. *Voet*. (v) An issue with regard to which Dutch courts have not yet had the opportunity to tie in with the case law of the ECJ is the problem of *geltungserhaltende Reduktion,* rejected in the *Banesto* case, which is in line with German case law. Until *Banesto*, Dutch case law had in fact accepted the device of *geltungserhaltende Reduktion*. This paper strongly supports the approach applied by the ECJ and German case law. (vi) Dutch law does not extend the control of unfair contract terms to the main subject matter. This is in line with the EC Directive and the case law of the ECJ (*Kásler*), and it is an expression of the rejection of the *iustum pretium* doctrine. The Nordic experience with handling unfair contract terms, without the exception for the main subject matter, demonstrates that the exception is not necessary. (vii) Finally, with regard to enforcement, the Dutch experience shows some surprising discrepancies with that in Germany. The two models may be described as the Dutch *poldermodel* and the German 'battle' model. The final paragraph sets out the conclusion of the foregoing analysis. In dealing with unfair contract terms, a collective approach should be favoured. Indeed, the Unfair Contract Terms Directive itself directs Member States to do so. Unfortunately, this is hidden for practitioners, because their understanding of the Directive will usually be limited to the part which

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has been transposed into national legislation, and the national legislation usually does not include the relevant provisions of the Directive. Also, it may be argued that a collective breach needs a collective remedy. This has been illustrated by two issues concerning unfair contract terms. The first one is the validity or invalidity of exemption clauses in standard terms. A second example is the question of the (in)validity of an arbitration clause in standard building terms.

Résumé: À la fin du XXe siècle, la plupart des États européens se sont dotés d'une législation en matière de clauses abusives. La directive 93/13/EEC concernant les clauses abusives dans les contrats conclus avec les consommateurs a donné à la Cour de justice de l'Union européenne (CJUE) le dernier mot s'agissant de l'interprétation de la majeure partie de ces corps de règles. Le présent article examine l'impact de la jurisprudence de la CJUE et de la doctrine étrangère sur le droit d'un État membre particulier, les Pays-Bas. Sept questions sont successivement abordées. (i) D'abord, les exigences relatives à l'information sur les clauses contractuelles ont été étudiées, surtout aux Etats-Unis, ce qui a conduit à mettre en doute leur efficacité. Même s'il faut admettre que certains consommateurs ne liront pas les clauses en petits caractères même s'ils y sont incités par le législateur, il est permis de penser que des exigences de ce type ne sont pas dépourvues d'utilité. (ii) Bien que l'interprétation *contra proferentem* soit l'une des trois armes classiques contre les clauses abusives, le droit néerlandais, à la différence de la common law, y recourt très peu. (iii) Le droit néerlandais prévoit un contrôle des clauses introduites dans le contrat et des clauses contractuelles types, mais les résultats de cette approche n'ont que peu d'utilité pour les parties, les avocats et les juges. À la différence de la situation qui prévaut en Allemagne, la jurisprudence néerlandaise est si attentive aux circonstances individuelles qu'il est presque impossible de dégager des précédents utilisables. (iv) L'une des premières affaires sur lesquelles se soit prononcée la CJUE en matière de clauses abusives, l'affaire *Océano*, a suscité des débats passionnés aux Pays-Bas. Le parlement néerlandais devait-il intervenir pour écarter les anciennes sanctions de nullité ou de résolution et prévoir que les clauses abusives ne lieraient pas les consommateurs, ou les conséquences d'une nullité ou résolution décidées ex officio devaient-elles être maintenues sous l'empire du dispositif législatif existant? La *Hoge Raad* a fini par s'aligner, dans l'arrêt *Heesakkers v . Voet*, sur les solutions développées par la CJUE dans le prolongement de l'arrêt *Océano*. (v) Les tribunaux néerlandais n'ont pas encore eu l'occasion de se rallier à la jurisprudence de la CJUE s'agissant de la *geltungserhaltende Reduktion*, qui a été rejetée dans l'arrêt *Banesto* comme auparavant par la jurisprudence allemande. Jusqu'à *Banesto*, la jurisprudence néerlandaise avait au contraire accueilli la technique de la *geltungserhaltende Reduktion*. L'auteur se prononce nettement en faveur de l'approche adoptée par la CJUE et la jurisprudence allemande. (vi) Le droit néerlandais exclut le contrôle du caractère abusif des clauses relatives à l'objet principal du contrat, conformément à ce que prévoient la directive et la jurisprudence de la CJUE (*Kásler*). Cette solution exprime un refus de la doctrine du *iustum pretium*. L'expérience nordique en matière de clauses abusives montre pourtant que cette exception ne se justifie pas. (vii) Enfin, la confrontation des approches néerlandaise et allemande visant à faire cesser l'utilisation des clauses abusives, approches qui peuvent être respectivement qualifiées de *poldermodel* et de 'modèle d'affrontement', fait apparaître des différences surprenantes. La conclusion de cette analyse est qu'en matière de lutte contre les clauses abusives, une approche collective devrait être privilégiée. La directive incite d'ailleurs les États membres à agir en ce sens, mais ce point échappe souvent aux

praticiens qui ne connaissent souvent de la directive que ce qui a été transposé dans leur droit national, ce qui est rarement le cas pour ces dispositions. Il est aussi possible de faire valoir qu'un manquement collectif appelle une solution collective, idée qui peut être illustrée en matière de clauses abusives par les questions de la validité des clauses types exclusives de responsabilité et des clauses types d'arbitrage.

Zusammenfassung: In der zweiten Hälfte des 20. Jahrhunderts haben die meisten europäischen Staaten das Recht der Allgemeinen Geschäftsbedingungen gesetzlich geregelt. Die Richtlinie 93/13/EEC über missbräuchliche Klauseln in Verbraucherverträgen hat effektiv den Europäischen Gerichtshof zum letztinstanzlichen Interpreten vieler dieser Gesetze gemacht. Der vorliegende Beitrag untersucht die Wirkungen der Rechtsprechung des Europäischen Gerichthofs und ausländischer Literatur auf einen Mitgliedstaat, die Niederlande. Er fokussiert sich dabei auf sieben Punkte. (i) Zunächst werden Informationspflichten behandelt, die insbesondere in den USA untersucht und kritisiert worden sind. Zwar ist zuzugeben, dass nicht jeder Verbraucher das Kleingedruckte lesen wird; gleichwohl wird vorliegend argumentiert, dass die Statuierung von Informationspflichten ihren Sinn hat. (ii) Zum Zweiten geht es um die Auslegung *contra proferentem*, eine von drei altbewährten Waffen gegen missbräuchliche Klauseln. Anders als das *common law* hat das niederländische Recht sich ihrer nur selten bedient. (iii) Niederländische Gerichte haben sich der offenen Kontrolle hinsichtlich der Einführung von Allgemeinen Geschäftsbedingungen in einen Vertrag und hinsichtlich ihres Inhalts bedient, ohne dass damit freilich Richtlinien für die Vertragsparteien, Anwälte und Richter deutlich geworden wären. Anders als in Deutschland ist das niederländische Fallrecht allzu stark an den Umständen des Einzelfalles orientiert. (iv) Eine der ersten Entscheidungen des Europäischen Gerichtshofs zu missbräuchlichen Klauseln, die *Océano*-Entscheidung, hat in den Niederlanden zu erheblichen Kontroversen geführt. Bedarf es hinsichtlich der Sanktionierung der Verwendung missbräuchlicher Klauseln eines Eingreifens des Gesetzgebers oder reichen die bestehenden nationalen Vorschriften aus? Der *Hoge Raad* hat die Entscheidung in *Océano* und das darauf folgende Fallrecht des Europäischen Gerichtshofs in *Heesakkers v. Voet* akzeptiert. (v) Noch nicht mit dem einschlägigen Fallrecht des Europäischen Gerichtshofs haben sich die Niederlande in Sachen geltungserhaltende Reduktion arrangiert. Sie haben eine derartige Reduktion traditionell akzeptiert, während der Europäische Gerichtshof (*Banesto*) sie, im Einklang mit dem Ansatz in Deutschland, ablehnt. Diese ablehnende Haltung verdient Unterstützung. (vi) Das niederländische Recht erstreckt die Kontrolle von missbräuchlichen Vertragsklauseln nicht auf den Hauptgegenstand des Vertrages. Das entspricht der Richtlinie und dem Fallrecht des Europäischen Gerichtshofs (*Kásler*) und der Ablehnung einer *iustum pretium*-Doktrin. Die Erfahrung der Nordischen Staaten mit der Klauselkontrolle zeigt, dass eine derartige Ausnahme nicht erforderlich ist. (vii) Schließlich zeigen sich zum Thema der Durchsetzung der Gesetzgebung zur Klauselkontrolle überraschende Diskrepanzen zwischen dem niederländischen und dem deutschen Ansatz. Die beiden Modelle können als das niederländische 'poldermodell' und das deutsche agonale Modell bezeichnet werden. Insgesamt sollte im Hinblick auf missbräuchliche Klauseln ein kollektiver Ansatz verfolgt werden. Die Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen selbst weist in diese Richtung. Bedauerlicherweise entgeht dies den meisten Rechtspraktikern, da sich deren Verständnis der Richtlinie normalerweise auf die Teile beschränkt, die in das nationale Recht übernommen worden sind; und das nationale Recht erfasst in der Regel nicht die hier einschlägigen Vorschriften.

Zudem ist darauf hinzuweisen, dass ein kollektives Problem eine kollektive Antwort erfordert. Das ist an zwei Fragen im Hinblick auf missbräuchliche Klauseln gezeigt worden. Eine davon betrifft die Wirksamkeit oder Unwirksamkeit von Haftungsausschlüssen in Allgemeinen Geschäftsbedingungen. Das andere ist die Frage der Wirksamkeit oder Unwirksamkeit von Schiedsklauseln in vorformulierten Bauverträgen.

I. Introduction

In the 1970s, I had the pleasure and honour of being consulted by Arthur Hartkamp and his then-colleague Wouter Snijders as to the upcoming Dutch legislation on unfair contract terms. At the time, Arthur was working for the Ministry of Justice, which was preparing the enactment of a new Civil Code. In 1992, the most important part of that Code entered into force.[1] The draft had initially contained no specific provisions on unfair contract terms, but upon the request of consumers' organizations, the *Nederlandse Juristen-Vereniging*,[2] and political parties, in the end this was to be changed. In the present paper, I do not wish to look back upon the legislation which was the result of Arthur's work, but rather hope to give a glimpse of the impact which the EU Unfair Contract Terms Directive[3] and especially the European Court of Justice's (ECJ) case law has had upon Dutch law. This is in line with the approach of Arthur Hartkamp, the importance of which for Dutch law may be seen, apart from his work on the law of obligations in the major Dutch treatise of private law,[4] in his analysis of the impact of European law on Dutch private law.[5] For a real overview, developments in other European jurisdictions should have been covered, but the present paper limits such comparisons mainly to Germany.

Unfair contract terms have generated a vast amount of private law scholarship,[6] but this paper will deal with only seven selected issues: information

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1 A.S. Hartkamp, 'Einführung in das neue Niederländische Schuldrecht, Teil I: Rechtsgeschäfte und Verträge', *Archiv für die civilistische Praxis* 1991, pp 396–410.

2 See J.H. Dalhuisen & E.H. Hondius, *Preadviezen Nederlandse-Juristenvereniging* (Zwolle: Tjeenk Wllink 1979), pp 7–84, 91–290, where I have argued for legislation, whereas Dalhuisen thought this unnecessary.

3 Council Directive 93/13/EEC of 5 Apr. 1993 on unfair terms in consumer contracts.

4 The Asser series was started by Carel Asser (Leiden) as *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht* in the nineteenth century. From 1984 Hartkamp was the author, and from 2008 co-author, of the 7th to the 14th editions of the four volumes on 'Verbintenissenrecht'.

5 A.S. Hartkamp, *European Law and National Private Law: Effect of EU Law and Human Rights Law on Legal Relationships between Individuals* (Deventer: Kluwer 2012); A.S. Hartkamp et al. (eds), *The Influence of EU Law on National Private Law* (Deventer: Kluwer 2014).

6 The major specific textbook on unfair contract terms, apart from the general survey by A. Hartkamp & C. Sieburgh, in *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht* 6-III: Verbintenissenrecht – Algemeen overeenkomstenrecht (Deventer: Kluwer

requirements, the interpretation *contra proferentem,* abstract or concrete control, the ex officio application of such control (*Océano*), the *geltungserhaltende Reduktion* (*Banesto*), the main subject matter (*Kásler*), and enforcement. Dutch law initially focused on the incorporation of standardized contract terms in individual contracts and on information requirements[7] but then increasingly experienced the impact of EU unfair contract terms case law.[8]

II. Information

Should consumers be protected through information requirements? Dutch legislation has extended the obligation to provide information about standardized contract terms to business-to-business contracts, and case law has strictly adhered to this requirement, laid down in Article 6:233 Dutch Civil Code (BW).[9] On the other hand: who really reads the fine print? Article 1341 of the Italian *Codice civile*, which requires the consumer's written consent, has utterly failed as a control system. More generally, recent studies in behavioural consumer economics[10] and empirical research[11] have questioned the effectiveness of consumer information.

2014), runs into 782 pp: B. Wessels, R.H.C. Jongeneel & M.L. Hendrikse (eds), *Algemene voorwaarden* (Deventer: Kluwer 2010, 5th edn).

7 M.A.B. Chao-Duivis, 'Een nieuwe fase in het leerstuk van algemene voorwaarden (deel 1)', *Tijdschrift voor Bouwrecht* 2015, p 124.

8 See, for an overview, H-W. Micklitz & N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive', *Common Market Law Review* 2014, pp 771–808 and C.M.D.S. Pavillon, 'Wat maakt een beding oneerlijk? Het Hof wijst ons (eindelijk) de weg', *Tijdschrift voor Consumentenrecht* 2014, pp 163–172.

9 See E.H. Hondius et al. (eds), *Verbintenissenrecht* (Deventer: Wolters Kluwer, looseleaf).

10 H. Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (PhD: Rotterdam 2009) (Antwerpen: Intersentia 2010), p 322.

11 See F. Marotta-Wurgler, 'Unfair Dispute Resolution Clauses: Much Ado About Nothing?', in O. Ben-Shahar (ed.), *Boilerplate: Foundations of Market Contracts* (Cambridge: Cambridge University Press 2007), pp 45–65; F. Marotta-Wurgler, 'What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements', *JELS* (*Journal of Empirical Legal Studies*) 2007, pp 677–713; F. Marotta-Wurgler, 'Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements', *JELS* 2008, pp 447–475; F. Marotta-Wurgler, 'Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements', *Journal of Legal Studies* 2009, pp 309–343; F. Marotta-Wurgler, 'Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"', *University of Chicago Law Review* 2011, pp 165–186; F. Marotta-Wurgler, 'Some Realities of Online Contracting', *Supreme Court Economic Review* 2011, pp 11–23; F. Marotta-Wurgler, 'Does Contract Disclosure Matter?', *Journal of Institutional and Theoretical Economics* 2012, pp 94–119; F. Marotta-Wurgler & Robert Taylor, 'Set in Stone? Change and Innovation in Consumer Standard Form Contracts', *New York University Law Review* 2013, pp 240–285. See also E. Zamir & Y. Farkash, 'Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal

It must indeed be conceded that information is not a panacea for the evils related to unfair contract terms. However, to repeal or restrict information-related obligations would, in my view, not be appropriate. Occasionally, atypical consumers, such as Lord Denning[12] or Professor Laurens Winkel,[13] both of whom started reading general transport conditions out of sheer boredom, came up with devastating criticisms which led to changes in these conditions. More importantly, run-of-the-mill consumers may also benefit from knowing when to report incidents to their insurance company or damaged goods to their suppliers. And one should not forget that it is useful for the advisers of consumers to have a full set of contract terms available. Information requirements should, therefore, remain in force.

III. *Contra proferentem*

Domestic legislation on unfair contract terms only came into fashion in Europe in the 1970s.[14] Before such legislation, not yet having been equipped with specific instruments to control the content of standardized contract terms, courts all over the world looked for general principles that could be utilized for such control. Basically, three principles have been found (or developed). They may be referred to with the key words 'ticket cases', 'contra proferentem', and 'overt control'. The ticket cases were decided in the late nineteenth and early twentieth centuries between railway companies and injured passengers. In order to be able to rely on the exemption clauses in their ticket conditions, railways were required by the courts to show that, under the law of offer and acceptance, the passenger had accepted the contract terms. By imposing strict requirements concerning both offer and acceptance, courts were, in fact, able to control the contractual content.[15] The second principle was and is that of *contra proferentem.* Under this age-old principle, the party who has drafted a contract must bear the

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Scholarship', *Hebrew University of Jerusalem Legal Studies Research Paper Series* No. 15-16, *Jerusalem Review of Legal Studies* 2015, forthcoming.

12 Lord Denning once, on a boat to Ireland, found out that the small print of the travel contract allowed the shipping company to do almost anything without incurring liability. This may have been the background for his harsh view on exemption clauses in his later judicial career.

13 Laurens Winkel was Professor of Legal History at the Erasmus University in Rotterdam. On his daily trips via high-speed train from his home in Amsterdam to Rotterdam, he started to read the travel conditions of the Dutch Railways and discovered that the surcharge he and other passengers had to pay was infringing the railway's own standard terms; see W. VERART & T. WALLINGA, 'Chaos op het spoor', *Ars Aequi: Special Issue for Laurens Winkel* 2014, p 4.

14 See, for the development in the nineteentch century, PHILLIP HELLWEGE, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (Tübingen: Mohr Siebeck 2010).

15 *Parker* v. *SE Rly Co.*, (1877) 2 *CPD* 416.

consequences of mistakes and unclear wording.[16] The third option, not popular in common law countries but successful in Germany, is that of overt control. On the basis of §§138 and 242 BGB, German courts were able to hold that invoking a specific contractual provision in the circumstances at hand would be unfair: it would constitute an abuse of economic circumstances or an infringement of *Treu und Glauben*.[17]

In the Netherlands, prior to the current legislation on unfair contract terms, all three instruments were used in practice, but none of them was very successful. Incorporation of standard contract terms was (too) easily accepted by the courts, overt control was only introduced in 1966 – more than forty years after it had been introduced in Germany – while *contra proferentem* was accepted, but always with some suspicion.[18] Then, the EC Directive on Unfair Contract Terms seemed to force the Netherlands to introduce *contra proferentem* into Dutch legislation. The Dutch government at first refused to do so but, after having been convicted by the ECJ,[19] it finally had to concede, and the relevant rule has now been codified in Article 6:238(2) BW. Unlike common law courts, Dutch courts have always been reluctant to detect a gap or a discrepancy in a contract which could then have been filled to bring about an equitable result.[20] The way in which *contra preferentem* is applied varies considerably among the European jurisdictions. The ECJ would therefore have a hard job to bring EU Member States' case law in line on this point.[21]

IV. Abstract or Concrete Control

When problems arise with regard to unfair terms incorporated in standard form contracts, a standardized answer would appear to be required. This is precisely what German case law provides. Dutch case law, unfortunately, does not. In the leading case of *Saladin* v. *Hollandse Bank-Unie,* the *Hoge Raad* decided that whether a clause in a contract may be invoked in good faith depends on a number of elements, such as the gravity of the fault, taking into account the nature and substance of the interests affected by the conduct in question, the nature and

16 Celsus D. 34, 5, 26.

17 See my *Standaardvoorwaarden* (PhD: Leiden) (Deventer: Kluwer 1978), pp 456–470.

18 Hoge Raad 28 Apr. 1989, *Nederlandse Jurisprudentie* 1990, 583.

19 ECJ 10 May 2001, C-144/99 *Commission of the European Communities* v. *Kingdom of the Netherlands*.

20 An amusing example is *Szymanowski* v. *Beck,* [1923] 1 *KB* 457 (HL), where the contract clause 'the goods delivered shall be deemed to be in conformity with the contract, unless the buyer shall claim the contrary within 7 days' was held not to apply because the expression 'the goods delivered' could not apply to goods which were not delivered.

21 In ECJ 1 Apr. 2004, C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Hofstetter*, the ECJ even refused to accept the control of national case law on the unfairness of contract terms.

other content of the agreement containing the term in question, the social position of the parties and their relationship to each other, the way in which the term came into existence, and the extent to which the other party was aware of the effect of the term.[22] It is generally thought that this is an excellent solution for individual litigation. But as a standardized answer to a standard problem, Dutch case law is inadequate. If a client asks an attorney how to draft an exemption clause in line with Dutch law, the answer will have to be that the validity of the clause will ultimately depend on the circumstances of the case. This is a highly unsatisfactory outcome. In Dutch legal writing, it has therefore been argued – so far in vain – that Dutch law should adopt the German solution.[23]

V. Ex officio Application

In European law, the instrument of the directive is widely held to be a great invention. It steers Member States' legislation in a certain direction, while leaving it to the Member States to supply the details. Thus, they are also able to adapt a directive's terminology to that of home-grown legislation. This is precisely what happened in the case of the sanction for incorporating unfair terms in consumer contracts. 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer': these are the words of Article 6(1) of the Unfair Contract Terms Directive.[24] Not having at its disposal the concept of a term being 'not binding', the Dutch legislature translated this into voidability or nullification: 'A term in general terms and conditions may be nullified

(a) if it is unreasonably onerous to the other party, taking into consideration the nature and the further content of the contract, the manner in which the terms and conditions were established, the mutually apparent interests of the parties and the other circumstances of the case; or
(b) if the user has not given the other party a reasonable opportunity to take note of the general terms and conditions'.[25]

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22 Hoge Raad 19 May 1967, *Nederlandse Jurisprudentie* 1967, 261. The translation has been taken from Hugh Beale et al. (eds), *Cases, Materials and Text on Contract Law* (Oxford: Hart, 2nd ed 2010), pp 777-778.

23 J.H. Duyvensz, *De redelijkheid van de exoneratieclausule* (PhD: Tilburg) (The Hague: Boom 2003).

24 Similar wording is used in the other translations of the Directive.

25 The English translations of Dutch legislation in this paper have been taken from H. Warendorf, R. Thomas & I. Curry-Sumner (eds), *The Civil Code of the Netherlands* (Alphen aan den Rijn: Wolters Kluwer 2013), p 1301.

This is, of course, not the same as 'not binding'. One of the first rulings by the ECJ on unfair contract terms was handed down in the *Océano* case, and there the Court decided that:

> [t]he protection provided for consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.[26]

The Dutch were highly upset by that decision and its consequences for Dutch law. Did Dutch legislation have to be amended? How were the lower courts to handle cases where the consumer did not show up? In the end, both the Hoge Raad and the lower courts found practical solutions, even without an amendment of Dutch legislation.

In *Heesakkers* v. *Voet*,[27] the *Hoge Raad* came to terms with the ECJ's case law. The case[28] concerned a service agreement between a consumer and a construction firm. The applicable general terms included a clause which stated that, in case of late payment, interest at the rate of 2% per month was payable. A dispute arose between the parties in the course of which the construction firm claimed payment of an amount of interest still due. Unlike the District Court, the Court of Appeal held this claim to be justified. The question of whether the general term was unfair or not was not raised by the consumer. And the Court of Appeal did not of its own motion consider whether the general term was unfair or not. This was the question on which the appeal to the Supreme Court turned, for it was argued that the Court of Appeal should have decided, on its own motion (ex officio), whether the consumer was bound to pay 2% per month. The provision relating to the 2% interest rate being a general term and one of the parties being a consumer, the Unfair Contract Terms Directive and the ECJ case law on that topic, are to be applied. Supporting that the term is unfair, the Court of Appeal should have ruled that it is not binding on the consumer.

The *Hoge Raad* started by referring to the rationale of the European case law on the ex officio application of EU law. The system of protection introduced by the Unfair Contract Terms Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining

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26 ECJ 27 Jun. 2000, C-240/98 *Océano Grupo Editorial SA* v. *Quintero*.

27 *Hoge Raad* 3 Sep. 1993, *Nederlandse Jurisprudentie* 2014, 274 (annotation by H.B. Krans), WPNR 2013/6996 (annotation by A. Hartkamp). See similarly *Hoge Raad* 10 Jul. 2015, *Rechtspraak van de Week* 2015, 921, *X* v. *Dexia Nederland*.

28 The following is largely taken from B. Krans, 'European Relief for Consumers: Procedural Challenges to the Fairness Test', *International Association for Procedural Law* 2015.

power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. Therefore, Article 6 of the Directive provides that general terms, insofar as they are unfair, are not binding on the consumer. As is apparent from the case law, this is a mandatory provision which aims to re-balance the rights and obligations between the parties in order to make them more equal. The consumer is not only in a weaker position vis-a-vis the professional party with regard to the Unfair Contract Terms Directive. As a result, the ex officio application is not restricted to unfair terms but includes consumer credit transactions, contracts negotiated away from business premises, and consumer sales. The *Hoge Raad* makes a concerted effort in this decision to clarify a number of aspects relating to the topic. From a Dutch point of view, it contains a relatively extensive obiter dictum.[29]

The lower courts convened a meeting of their representatives which resulted in the adoption, in 2010, of a policy rule determining how to deal with such cases.[30] And in 2014, after an evaluation of this policy rule and the more recent ECJ case law, a second edition of that document was published.[31]

VI. *Banesto*: '*geltungserhaltende Reduktion*'

On 14 June 2012, the ECJ gave judgment in the case of *Banco Español de Crédito SA* v. *Joaquin Caldéron Camino*.[32] The *Banesto* case – as it is commonly referred to – concerns the ex officio assessment of an unfair term in a consumer contract.[33] It immediately attracted considerable attention,[34] among others from

29 The decision has been welcomed by A. Hartkamp, *European Law and National Private Law*, *supra* n. 5, para 188, who points out that, on this hotly debated issue, pre-1992 parliamentary history already made it clear that this interpretation is possible, irrespective of later developments in EU law.

30 *Landelijk overleg vakinhoud civiel en kanton (LOVCK),* chaired by Judge Han Jongeneel, who himself had earned a PhD for a thesis on unfair contract terms in the Netherlands and Germany: R.H.C. Jongeneel, *De wet algemene voorwaarden en het AGB-Gesetz* (PhD: Vrije Universiteit Amsterdam 1991).

31 See C.M.D.S. Pavillon, 'Het LOVCK-rapport Ambtshalve toetsing II kritisch getoetst', *Tijdschrift voor Consumentenrecht* 2015, pp 127-135.

32 ECJ 14 Jun. 2012, C-618/10 *Banco Español de Crédito SA* v. *Joaquin Caldéron Camino*.

33 A Dutch-language survey of the case law may be found in A. Hartkamp, 'De verplichtig tot ambtshalve toepassing van Europees recht door de Nederlandse rechte', TREMA 2010/4, pp 136-143; F. Ancery, *Ambtshalve toepassing van EU-recht* (PhD: Groningen) (Deventer: Wolters Kluwer 2012), p 246.

34 See also my case note in E. Terryn, G. Straetmans & V. Colaert (eds), *Landmark Cases of EU Consumer Law in Honour of Jules Stuyck* (Cambridge: Intersentia 2013), pp 625-631.

Austrian,[35] Czech,[36] Dutch,[37] French,[38] German,[39] Luxembourg,[40] and, of course, Spanish[41] authors. One question dealt with by the ECJ, which has not received the attention it deserves (except in the conclusion of Advocate General Trstenjak) is the prohibition in *Banesto* of what German lawyers refer to as *geltungserhaltende Reduktion.* Elsewhere, I have argued in favour of this prohibition.[42] The bottom line of my argument is that mass problems require a mass response; an individualized court decision is not likely to provide an incentive to traders to discontinue the use of unfair contract terms.

The ECJ answers the question by holding that Article 6(1) of the Unfair Contract Terms Directive must be interpreted as precluding legislation which allows a national court to modify an unfair contract term by revising its content. Such revision is not altogether unusual; it often happens in landlord and tenant cases where the rent has been fixed above the lawful level.

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35 A. Geroldinger, *Klauselkontrolle im Lichte der jüngsten EuGH-Rechtsprechung: Ende der geltungserhaltenden Reduktion bei Verbraucherverträgen?* (Powerpoint Presentation) available at www.bankrechtsinstitut.at/.../Folien_Neumayer-Ge; M. Schauer, 'Der EuGH und die ergänzende Vertragsauslegung: Konsequenzen der Entscheidung C-618/10, Banesto', *Österreichisches Recht der Wirtschaft* 2012, p 673; M. Slonina, 'Amtsprüfung eines Verstoßes gegen die Klauselrichtlinie im nationalen Mahnverhahren', *Ecolex* 2012, pp 697 ff.

36 V. Knoblochová, 'Zneužívající smluvní ujedbnání – další krok k ochraně spotřebitelů', *Jurisprudence: specialista na komentováni judikatury* 2012, pp 89–94.

37 M.B.M. Loos, *Tijdschrift voor Consumentenrecht* 2012, p 285; M.B.M. Loos, 'Rechtsgevolgen van onredelijk bezwarende bedingen in algemene voorwaarden', *Weekblad voor Privaatrecht en Notariaat* 2012, p 561; R. Meijer, 'Banesto/Caldéron Camino – Unierechtelijke geboden en verboden bij toetsing aan Europees consumentenrecht', *Maandblad voor Vermogensrecht* 2012, pp 295–299; M.R. Mok, *Nederlandse Jurisprudentie* 2012, p 512. See also the blog of Alex Geert Castermans, available at leidenlawblog.nl/articles/ consumer+presume.

38 G.L. Schiavo, 'La jurisprudence de la Cour de justice et du Tribunal de l'Union européenne: Chronique des arrêts. Arrêt "Banco Español de Crédito SA c. Joaquín Calderón Camino"', *Revue du droit de l'Union européenne* 2012, pp 564–568; G. Paisant, 'L'élargissement, par la CJUE, du pouvoir d 'office du juge et le refus de la révision d'une clause déclarée abusive', *La Semaine Juridique* 2012, pp 1637–1640.

39 W. Hau, 'Banco Español de Crédito/Joaquín Calderón Camino (Prüfung missbräuchlicher Klauseln im Mahnverfahren)', *JZ* 2012, pp 964–966; N. Reich, 'Der Effektivitätsgrundsatz im EU-Verbraucherrecht – die Bedeutung des Art. 47 Charta der Grundrechte der EU', *Verbraucher und Recht* 2012, pp 327–334; P. Rott, 'Case note on *Banco Español de Credito* v. *Joaquín Calderón Camino*', *European Review of Contract Law* 2012, pp 470–480; P. Schlosser, 'Todesstoß für ergänzende Vertragsauslegung von AGB in Verbraucherverträgen', *IPRax* 2012, pp 507–515; A. Wendenburg, 'Prüfung missbräuchlicher Klauseln im Mahnverfahren und geltungserhaltende Reduktion', *Europäische Zeitschrift für Wirtschaftsrecht* 2012, pp 758–760.

40 A. Beka, 'Commentary note on Case C-618/10 *Banco Español de Crédito SA* v. *Joaquín Calderón Camino*, judgment of 14 June 2012', *GPR* 2012, pp 326–328.

41 C. B. Gómez, available at www.notariosyregistradores.com/

42 E.H. Hondius, 'Terug naar Banesto: de afwijzing van geltungserhaltende Reduktion', *Weekblad voor privaatrecht, notariaat en registratie* 2013, No. 6967, pp 203–204.

The ECJ has followed the lead of German unfair contract law which does not allow *geltungserhaltende Reduktion* with regard to unfair standard contract terms. What does this mean? If, for example, general sales conditions contain an unfair and hence unlawful clause, the question arises whether courts should hold such provisions to be invalid or whether they may convert it into a provision that would have been lawful? At first blush, the latter option seems to be preferable, because it leaves the parties' original intentions intact as much as possible. But, on further reflection, that solution deserves to be criticized. In the first place, it does not provide the drafter of the contract with an incentive to draft a contract that is valid from the outset. Second, contract terms which may later be invalidated do not present a correct picture of the rights and duties of the parties (who may be unaware of the voidability of the provision). Third, granting the courts a power of reduction allows them, effectively, to step in to help only one of the parties. Finally, basing an argument on the intentions of the parties will, in the case of standardized contract terms, not always reflect reality.

These arguments have induced German authors and case law[43] vehemently to reject *geltungserhaltende Reduktion.* But there are exceptions. In her PhD submitted to the University of Bayreuth, Katharina Uffmann attempts to show that those exceptions are much more important than is usually admitted.[44] Until recently, there was one general exception, which concerned standard employment contracts. With regard to these contracts, the Federal Labour Court (*Bundesarbeitsgericht* = BAG) did not apply the prohibition of *geltungserhaltende Reduktion.* The BAG did not have to do so, because labour contracts were outside the scope of application of the statute relating to unfair contract terms (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* = AGBG). With the incorporation of the AGBG into the BGB in 2001, the exception for standardized terms in labour contracts was deleted and, immediately, the BAG joined the private law courts in rejecting *geltungserhaltende Reduktion.*[45] This was unjustifiable, according to Uffmann. An incentive to draft balanced conditions is, in her view, a matter of public order, which should be pursued by public law means. Transparancy will not be achieved by such prohibition.

Uffmann's proposition should be rejected.[46] A civil code may deal with public goals. Family law, company law (which, in some countries, is part of the civil code), property law, and even the law of obligations provide examples.

Outside Germany, the notion of *geltungserhaltende Reduktion* has also been rejected. Peter Rott, in his annotation to *Banesto*, refers to the English case

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43 BGH 17 May 1982, *BGHZ* 84, 109.

44 K. Uffmann, *Das Verbot der geltungserhaltenden Reduktion* (PhD: Bayreuth, 2009) (Tübingen: Mohr 2010), p 330.

45 *Bundesarbeitsgericht* 4 Mar. 2004, as quoted by K. Uffmann, *supra* n. 44, p 4.

46 See also H. Schmidt, Book Review, *Zeitschrift für das gesamte Handelsrecht* 2011, pp 584–587.

– one of the few on unfair contract terms – of *Stewart Gill Ltd* v. *Horatio Myer & Co*.[47] Here, Stuart-Smith LJ stated:

> Nor does it appear to me to be consistent with the policy and purpose of the Act to permit a contractor to impose a contractual term, which taken as a whole is completely unreasonable and sufficient to exclude or restrict his liability in a manner relied upon.[48]

This view is also held in the Netherlands: see the comments in the Asser series[49] and by Marco Loos.[50]

The prohibition, by the ECJ, of the *geltungserhaltende Reduktion* is to be approved. It reflects the choice for a remedy on a collective level, as opposed to a remedy which is geared towards the individual circumstances of the case. It may be argued that the end result of the *Banesto* case – where the consumer does not have to pay anything or very little – is unfair. But this may also be viewed as the reward for undertaking to act as a private watchdog.

VII. Main Subject Matter (*Kásler*)

Under Dutch law, the *iustum pretium* doctrine has generally been rejected.[51] That is the reason why, even before the Unfair Contract Terms Directive, Dutch unfair contract terms legislation excluded 'the main subject matter of the contract [and] the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange on the other'[52] from its fairness requirement. This provision has been interpreted narrowly by Dutch courts.[53] Likewise, in *Kásler*,[54] the ECJ took the approach that:

> Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that:

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47 [1992] 2 *All ER (CA)* 257.

48 *Ibid.*, p 261.

49 Hartkamp & Sieburgh, *supra* n. 6, para. 647.

50 M.B.M. Loos, *Tijdschrift voor Consumentenrecht* 2012, *supra* n. 37.

51 I. van Loo, *Vernietiging van overeenkomsten op grond van laesio enormis, dwaling of misbruik van omstandigheden* (PhD: Open Universiteit 2013), p 285.

52 The wording is taken from Art. 4(2) of the Directive.

53 Hoge Raad 19 Sep. 1997, *Nederlandse Jurisprudentie* 1998, 6, *Assoud* v. *Stichting De Nationale Sporttotalisator*, and 21 Feb. 2003, *Nederlandse Jurisprudentie* 2004, 567, *Weevers Stous* v. *Stichting Parkwoningen Hoge Weide*.

54 ECJ 30 Apr. 2014, C-26/13 *Kásler* v. *OTP Jelzálogbank Zrt*.

- the expression 'the main subject-matter of a contract' covers a term, incorporated in a loan agreement (denominated in foreign currency) concluded between a seller or supplier and a consumer and not individually negotiated, such as that at issue in the main proceedings, pursuant to which the selling rate of exchange of that currency is applied for the purpose of calculating the repayment instalments for the loan, only in so far as it is found (which is for the national court to ascertain, having regard to the nature, general scheme and stipulations of the contract and its legal and factual context) that that term lays down an essential obligation of that agreement which, as such, characterizes it;
- such a term, in so far as it contains a pecuniary obligation for the consumer to pay, in repayment of instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, cannot be construed as 'remuneration' the adequacy of which as consideration for a service supplied by the lender cannot be the subject of an examination as regards unfairness under Article 4(2) of Directive 93/13?

But the ECJ goes even further:

> Article 4(2) of Directive 93/13 must be interpreted as meaning that, as regards a contractual term such as that at issue in the main proceedings, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.

The latter addition is relevant for Dutch law, which has, so far, not attributed much importance to this element. One may doubt, however, whether the first argument is correct. In Nordic case law, the absence of the main subject matter exception does not prevent the courts from arriving at equitable results. This appears from the case law regarding § 36 *Avtalslagen*.[55]

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55 See the various papers in Boel Flodgren (ed.), *Avtalslagen 90 år/aktuell nordisk rättspraxis* (Stockholm: Norstedts juridik 2005), p 498.

VIII. Enforcement

How should unfair contract terms legislation be enforced? If we confine ourselves to private law, there are two divergent options. One is to require plaintiffs to ask for an injunction against the further use of unfair terms. The other is to let organizations negotiate contract terms. Elsewhere, I have described these two options and analyzed their advantages and disadvantages.[56] Against the German antagonistic model, where trade and consumers' organizations battle over the validity of contract terms in court, one may consider the *poldermodel* of the Netherlands, where the organizations involved engage in bilateral negotiations under the auspices of the Social and Economic Council, usually successfully. For once, the Dutch, rather than the German, model seems to be better equipped to deal with a mass problem.

IX. Conclusion

In dealing with unfair contract terms, Member States should opt for a collective approach. First of all, the Unfair Contract Terms Directive itself directs Member States to do so. This is hidden from practitioners, because their understanding of the Directive will usually be limited to the part which has been transposed into national legislation, and national legislation usually does not include such provisions of the Directive as Article 7(1): 'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'.

In the second place, a collective breach needs a collective remedy. This may be illustrated by two of the issues concerning unfair contract terms raised above. The first one is the validity or invalidity of exemption clauses in standard terms. In some countries, such as the Netherlands, this question is so entangled with the circumstances of each case that a clear-cut answer as to the question of validity is often impossible. In Germany, this is different: there, the courts do provide precise answers and, thus, legal certainty.[57] A second example, taken from Dutch law, is the question of the (in)validity of an arbitration clause in standard building terms. Anticipating legal reform of Dutch arbitration law, the Leeuwarden Court of Appeal held that a standardized arbitration clause was unfair under the general provision of Dutch unfair contract terms legislation (Art. 6:233 BW). The *Hoge Raad* annulled the judgment because the law requires a specific motivation in relation to the nature and other content of the contract, the way in

56 E. Hondius, 'AGB-Kontrolle in den Niederlanden', in C. Stumpf, F. Kainer & C. Baldus (eds), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht: Privatinitiative und Gemeinwohlhorizonte in der europäischen Integration, Festschrift für Peter-Christian Müller-Graff* (München: Beck 2015).

57 See J.H. Duyvensz, *De redelijkheid van de exoneratieclausule* (PhD: Tilburg) (The Hague: Boom 2003).

which the conditions were arrived at, the interests of both parties, and the other circumstances of the case, while the consumer is charged with the burden of proof.[58] This point of view must be rejected: it overlooks the importance of opting for a general answer to a general problem.

58 Hoge Raad 21 Sep. 2012, *Nederlandse Jurisprudentie* 2012, 431 (H.J. Snijders).