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THE UNIVERSITY OF ALBERTA

UNFAIRNESS IN STANDARD FORM CONSUMER CONTRACTS

THE CAUSES AND CURES

A comparative look at the situation
in Canada and
the Federal Republic of Germany.

BY

CHRISTA FRIEDMAN

A THESIS

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"When I use a word,"
Humpty Dumpty said in a rather scornful tone,
"it means just what I choose it to mean -
neither more nor less."
"The question is," said Alice,
"whether you can make words mean so many different things."
"The question is," said Humpty Dumpty,
"which is to be the master -
that's all."

Lewis Carroll, Through the Looking Glass

"Die allgemeinsten Meinungen und,
was jedermann für ausgemacht hält,
verdient oft am meisten untersucht zu werden."

Georg Christoph Lichtenberg (1742-1799)

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The undersigned certify that
they have read, and recommend
to the Faculty of Graduate Studies and Research
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submitted by Christa Friedman
in partial fulfilment of the requirements of the degree of
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For Ray and Sarah

Abstract

This thesis examines the problem of standard form contracts which are prone to include terms unfair to the consumer. This thesis analyses and compares the techniques used in the Federal Republic of Germany and the Canadian Province of Alberta to fight unfair terms used in standard form consumer contracts. These countries were chosen, respectively, as representatives of the civil and the common law systems. In Germany standard form contracts are regulated by an all-inclusive statute; the area of contract law in the Canadian Province of Alberta is regulated exclusively by common law.

The apparently different systems may imply that the comparable problem of unfairness in standard form consumer contracts is dealt with in a significantly different way. This thesis shows that, although different techniques are used, the arguments provided in each system are surprisingly similar. There is, however, one major and important exception. In order to re-establish the principle of freedom of contract, the German statute provides a test of content of standard form terms to be conducted by the judiciary. The common law, on the other hand, states that in accordance with the principle of freedom of contract the judiciary can only interpret the parties' intentions; the fairness of standard terms cannot be tested. Despite this concept, common law judges often perform a covert test of content mainly by using the technique of interpretation as their tool.

This thesis concludes that the common law system should openly admit to a test of fairness of standard form clauses. The common law should either adopt a statute comparable to the German statute, or (more in accordance with

the common law system) the judiciary should develop a solution which openly admits the performance of a test of content. This would bring fairness to the individual standard form consumer contract and increase the predictability of the law in an area of some uncertainty. Unfortunately an in-depth examination of the problem of unfairness by either the judiciary or the legislature cannot be predicted for the near future.

Preface

Almost every consumer[1] will have some experience with standard form contracts, as they are almost an invariable feature of many consumer transactions[2]. Standard form contracts are, however, prone to include clauses highly disadvantageous to the average consumer and thus to create difficult problems to be addressed by the law of contracts. Countries, with legal systems as different as common law and civil law have to deal with the problems created by standard form contracts and in many countries these contracts have been a centre of discussion for a long time.

The focus of this thesis is the question of unfairness in standard form consumer contracts. Standard form contracts between businesses[3] are

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[1] According to Webster's Third New International Dictionary (1981), a consumer can be defined as "somebody who utilizes goods or services as opposed to producing them".

[2] W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1970-71) 84 Harv. L. Rev. 529 states in reference to the situation of 1970 that more than 99% of all contracts are made as standard form contracts. H. R. Hahlo, " Unfair Contract Terms in Civil Law Systems" (1979-80) 4 Can. Bus. L. J. 428 at 432 cites the percentage given by W. D. Slawson, idem, as more than 95%. Bulletin of the European Communities 1984 Supplement 1/84 "Unfair Terms in Contracts concluded with consumers" at 5: "The use of standard terms is now widespread throughout the Community and applies to a vast majority of contracts between suppliers and consumers." The Bulletin adds at 14: " ... the German Federal Justice Ministry has estimated that some 200,000 to 300,000 standard terms are in use in Germany." H. B. Sales, "Standard Form Contracts" (1953) 16 Mod. L. Rev. 318 notes: "... the probability is that they are the most important contracts that he [the consumer] ever makes.".

[3] These contracts may be called "commercial contracts". Forté, A. D. "Unfair Contract Terms" [1985] Lloyd's Maritime and Commercial L. Q. 482 at 488 summerizes Lord Diplock's statement in the case of Schroeder Publishing Co. v. Macaulay (H. L. (E.) [1974] 1 W. L. R. 1308 at 1316 : "Lord Diplock identified two categories into which standard form contracts might broadly be grouped. The first comprises commercial contracts between business organizations of roughly comparable bargaining strength who are often in the same general line of business. The second category typically involves a contract between an ordinary consumer or a small trader and a monopolositic or cartelized supplier. Both types exhibit certain features in common: most importantly, neither is drafted with a particular transaction in view. **The major point of distinction between them lies in the inequality of bargaining power of the parties to contracts of the second kind.** Negotiation is always possible in contracts of the first type, even though final agreement is often only reached by a process of attrition achieved by bombardment with standard terms." (Emphasis is added.).

analysed, but only in order to compare the position of a business with that of a consumer.

This thesis will analyse the solutions employed in Canada and in the Federal Republic of Germany[4] and try to evaluate which system provides the consumer with better protection from unfair standard form contracts.

Canada and Germany were selected as countries affected by the problem, because they can be seen as representing the common law system and the civil law system respectively.[5] Canada was selected because in some provinces and particularly in Alberta the area of standard form contracts is regulated by the common law and not by an all-inclusive statute. Germany was selected because it can look back at over ten years of experience with a statute regulating specifically the area of standard form contracts.

It is also of interest to analyse and contrast the solutions found to comparable problems in different legal systems.[6] Are the solutions as distinct as the apparently different systems seem to suggest? It might be possible to transfer a solution found in one system to the other and to refine and improve it. Looking for a solution beyond one's own legal system might also revitalize the

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[4] Hereinafter referred to as Germany.

[5] When declaring Canada as a member of the common law family it has to be kept in mind that the Canadian province of Quebec is covered by a civil law system. When categorizing Canada and Germany as members of a specific system, it should not be neglected that there are differences between the members of one legal system. Not every country categorized as a member of the common law family handles a problem just like another member. See generally J. H. Merryman, The Civil Law Tradition (1969) 13.

[6] S. Sandrock, "The Standard Terms Act 1976 of West Germany" (1978) 26 Am. J. Comp. Law 551 at 554, 555 notes that there is a large amount of writing with regard to standard contract terms in the area of comparative law. E. v. Hippel, Verbraucherschutz (3rd ed. 1986) 121 notes that standard form contracts have been the subject of comparative legal conferences, for example, in Berlin (1967), in Pescara (1970) and in Teheran (1974).

search for the **best possible** solution to the problem of standard form consumer contracts.

Chapter One of this thesis examines the characteristics and problems of standard form consumer contracts and looks at the significance of the principle of freedom of contract as well as the consumer's consent to such contracts.

Chapter Two shows the techniques used in the German law[7] to deal with standard form consumer contracts. Information on German law in general and on special features of the civil law will be provided as necessary for the understanding of a reader trained only in common law.

Chapter Three shows the techniques used in the common law in Canada to deal with the problems which standard form contracts cause for the consumer. This thesis will focus on the situation in the Canadian province of Alberta. It will not attempt to analyse legislative changes that have been implemented in the majority of the provinces during the past ten years.

Chapter Four contains a comparative analysis of the techniques used in Canadian and German law regarding the problem of standard form consumer contracts. It includes an examination of the effectiveness of a comparative study in general and asks whether an exchange of techniques used in the respective systems is possible. It also suggests a solution to the problem of standard form consumer contracts.

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[7] Thoughout the thesis, this means the law of the Federal Republic of Germany.

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CHAPTER ONE

CHARACTERISTICS AND PROBLEMS OF STANDARD FORM CONSUMER CONTRACTS

A variety of approaches are used to identify and solve the problems which standard form contracts create for the consumer.[1] Even though a consumer is frequently confronted with such contracts, it seems to be difficult to explain exactly the essential features of a standard form contract.

A consumer may, for example, contract for transportation[2] or parking[3]. Some contract terms are frequently printed on a ticket or voucher which is provided by one party and presented to the other. A notice alerts the consumer to these terms or to the location where terms not printed on the ticket are accessible.[4] Equally familiar is the situation in which a consumer may sign a contract which is presented to him in a standard form, without reading any or all the terms contained in it.[5]

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1 F. Kessler "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Col. L. Rev. 629 at 633 characterises the common law of standardized contracts as "highly contradictory and confusing".

2 For example: Union SS. Ltd. v. Barnes [1956] S. C. R. 842, 5 D. L. R. (2 d) 535 concerning a passage on a ferry.

3 For example: Thornton v. Shoe Lane Parking Ltd. [1971] 2Q.B. 163, [1971] 1 All. E. R. 686 (C.A.) concerning the rent of a stall in a parkade in which a ticket was provided by a machine.

4 See, for example, the facts of Parker v. South Eastern Ry. Co. ; Gabell v. South Eastern Ry. Co. (1877), 2 C. P. D. 416 (C. A.) at 416, 417 where the front of the ticket noted "See Back", referring to several clauses printed on the back of the ticket; additionally a notice to the same effect was printed and hung up in the cloak-room. See also the facts of Thornton v. Shoe Lane Parking Ltd. [1971] 2 Q. B. 163, [1971] 1 All. E. R. 686 (C. A.) at 686 where the ticket, issued by an automatic machine stated in small print: "This ticket is issued subject to the conditions of issue as displayed on the premises".

5 See, for example, the case of Tilden Rent-A-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601 at 602 , 4 B. L. R. 50, 83 D. L. R. (3d) 400 (C. A.) describing the following chain of events: "A contract was submitted to him for his signature, which he signed in the presence of the clerk, and he returned the contract to her. ... He did not read the terms of the contract before signing it, as was readily apparent to the clerk, and in fact he did not read the contract until this litigation was commenced, nor had he read his copy of a similar contract on any prior occasion."

A. STANDARD FORM CONSUMER CONTRACTS - A DEFINITION[6]

Standard form contracts have been called standardized mass contracts, "boiler-plate agreements" and contracts of adhesion. Features such as "fine print", standard terms and exclusion or exemption clauses[7] can be added to the terminology used to describe these special contracts, even though the latter two are only part of these contracts. This thesis uses the terminology STANDARD TERMS and STANDARD FORM CONTRACTS and refers to the contracting parties as the CONSUMER and the USER, the latter being the party who presents the standard form contract to the consumer.

At first sight the multitude of names used seems to make the task of defining this type of contract in the common law more difficult. The descriptive character of some of these names may, however, help to explain what constitutes a standard form contract.

The contract terms are provided on a mass-produced form in which one set of terms is intended to be used for a multitude of contracts.[8] The term "standard form contract" therefore describes not only a special type of contract, but it also emphasizes that the terms of the contract are pre-formulated[9] and

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6 This portion of the thesis does not reflect the definition of a standard form consumer contract given by the German law. With regard to the German situation, infra pp. 32-41.

7 The terms "exemption" and "exclusion clause" are used synonymously. D. Yates Exclusion Clauses in Contracts (2nd ed. 1982) at 1 gives the following wide definition of an exclusion clause: "a clause in a contract or a term in a notice which appears to exclude or restrict a liability or a legal duty that would otherwise arise.".

8 The elements of mass production and multiple use of the same form are emphasized if the term "standardized mass contract" instead of "standard form contract" is used. The term "standardized mass contract" is used by: L. M. Friedman, "The Impact of Large Scale Business Enterprise upon Contract" VII International Encyclopedia of Comparative Law 3-17; A. Lenhoff, "Contracts of Adhesion and the Freedom of Contract" (1962) 36 Tul. L. Rev. 481; F. Kessler, "Contracts of Adhesion " supra n. 1 especially at 631.

9 Bulletin of the European Communities 1984 Supplement 1/84 "Unfair Terms in Contracts concluded with consumers" at 5 notes "In real economic terms, there are essentially only two

footnote continued on next page

standardized for a large number of transactions. Often, only details identifying the goods or services in question along with the name and address of the purchaser need to be added in each individual case.[10] The individual consumer - for example his reliability as a contract partner - is not important to the user of a standard form. The form is drafted and presented to the public in general rather than to an individual.[11] The usage of standard terms further indicates that they are not the result of a bargaining process - a process of mutual give and take - but presented by one contract party to the other without any possibility of negotiation. Standard form contracts consist of terms, which are pre-formulated by the user, not individually bargained for by the consumer and which the user intends to employ for a multitude of contracts.

The physical appearance of some standard forms can be characterized by the term "fine print". This non-technical expression describes the terms and conditions of a contract often found on the reverse of the contract document. Sometimes this part of the contract can easily be distinguished by its small type size[12] and faint printing. The presence of "fine print" is not a necessary element of every standard form contract. For example, the standard terms in a so called

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types of transaction in which contract terms are not generally formulated in advance: - atypical transactions relating to situations so far removed from the norm that standard terms are inappropriate; - on-the-spot transactions which do not involve a substantial risk for the supplier, such as retail sales of foodstuffs, books or cosmetics.".

[10] Idem at 6.

[11] A. Lenhoff, "Contracts of Adhesion and the Freedom of Contract" supra n. 8 at 481. A. von Mehren, "A General View of Contract" VII International Encyclopedia of Comparative Law at 15 speaks of "depersonalized contracts".

[12] Black's Law Dictionary (abr 5th ed. 1983) defines "fine print" as: "Term or expression... typeset in small type and so located in the document so as to not be readily noticed".

"ticket case"[13] may be brought to the consumer's attention by a notice "printed in red ink with a red hand pointing to it"[14].

"Contracts of adhesion"[15] or "boiler plate agreements"[16] are frequently perceived as having a negative effect on the consumer's interests, although many writers[17] emphasize that "it should not be presumed that all adhesion contracts are evil"[18].

Two characteristics are frequently mentioned to describe a standard form contract if the terminology "contract of adhesion" or "boiler plate agreement" is used.

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[13] Examples are provided: supra n. 2, 3, 4.

[14] Lord Denning uses this vivid description in J. Spurling, Ltd. v. Bradshaw [1956] 2 All. E. R. 121 at 125, [1956] 1 W. L. R. 461 at 466.

[15] Black's Law Dictionary supra n. 12 defines "Adhesion contract" as : "Standardized contract form offered to consumers ... on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or service except by acquiescing in form contract. Distinctive feature ... is that weaker party has no realistic choice as to its terms. ...". A. Lenhoff, "Contracts of Adhesion and the Freedom of Contract" supra n. 8 at 489 names Raymond Saleilles, who, in 1901 analysed the nature of such contracts and named them 'contrats d' adhésion'. F. Kessler, "Contracts of Adhesion" supra n. 1 at 632 footn. 11 notes: "The word 'contract of adhesion' has been introduced into the legal vocabulary by Patterson, "The Delivery of a Life Insurance Policy" (1919) 33 Harv. L. Rev. 198 at 222.".

[16] Black's Law Dictionary supra n. 12 defines "Boilerplate" as: "Language which is used commonly in documents having a definite meaning in the same context without variation. Term used to describe standard language in a legal document that is identical in instruments of a like nature.". This terminology is used, for example, by K. L. Llewellyn, The Common Law Tradition (1960) 362 in the chapter on "The Form or Boiler-Plate 'Agreement' ".

[17] These are among others: H. C. Havighurst, The Nature of Private Contract (1961 Rosenthal Lectures) Lecture III at 111; J. S. Ziegel, The Common Law of Contract (1969) 150 "Complaints by and against the Consumer" publ. in Canadian Consumer, May/June 1968 says at 217: " We are in the age of adhesion or form contracts."

[18] R. S. Johnston, Unfair Contracts (1980) at 124. See as well D. Yates, Exclusion Clauses in Contracts supra n. 7 at 2 stating that they are not necessarily a weapon of consumer oppression. W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1970-71) 84 Harv. L. Rev. 529 at 549, 550 notes that the absence of a standard form does not guarantee that the contract is not adhesive.

One characteristic is that all terms of these contracts are developed by only one of the contracting parties.[19] The consumer normally does not attempt to change any of the pre-formulated terms, but just signs "on the dotted line". If a ticket with preprinted terms is presented, the consumer rarely even takes notice of these terms. This factor, even though it is commonly present in standard form contracts, does not define this type of contract. Even if the consumer reads all the standard terms presented, the contract obviously remains a standard form contract. If the consumer, however, takes notice or reads all the terms of the contract before signing, it is difficult if not impossible for him to change any of the terms.

The second characteristic is therefore that the consumer presented with a standard form frequently lacks bargaining power. This element, which will be defined later[20], suggests that the contracting party presented with the standard terms lacks any realistic ability to change them. However, the element is not part of the definition of a standard form contract, for contracts of this nature **can** be made by parties of equal or comparable bargaining power.[21]

The elements of lack of reading and lack of bargaining power can therefore not be used to define a standard form contract. But the question remains whether it is possible to give a definition which does more than describe a special format of the contract.

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[19] Bulletin of the European Communities supra n. 9 at 6: " ... the terms were designed, drawn up and applied unilaterally by the supplier".

[20] Infra pp. 20, 21.

[21] This can, for example, be the case in a commercial contract; see with regard to "commercial contracts" supra Preface p. viii, footnote 3.

Lord Denning says, that "we always know standard terms and conditions when we see them"[22], making a definition unnecessary. It is, however hard to accept Lord Denning's statement in its generality. Even if the courts know what a standard form contract is just by looking at it, this should not excuse them from explaining the elements which persuaded them to put a contract into this category.

Forté[23] doubts "whether a comprehensive definition should ever be attempted". But it has to be asked why a definition should not be tried, just because an exhaustive definition cannot be established. If one element can be found that shows a standard form contract to be distinctively different from other types of contracts, then this element **defines** a standard form contract. The failure to attempt a definition can also not be justified by the fact that there will always be exceptions to any definition and always borderline cases. It will always be necessary to interpret whether a particular contract falls into the category, for example, if someone wants to use a pre-formulated standard form just once.

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[22] Lord Denning H. L. Vol. 384 1976 - 77 col. 447; Lord Denning's statement was made during a debate in the House of Lords with regard to the Bill of Unfair Contract Terms. The issue at hand was whether a definition for written standard terms of business should be given in the Act. Lord Denning agreed with the Lord Chancellor H. L. Vol. 384 1976 - 77 col. 446, the latter citing the Law Commission's report at § 157 : "We think that the courts are well able to recognise standard terms used by persons in the course of their business, and that any attempt to lay down a precise definition of 'standard form contract' would leave open the possibility that terms that were clearly contained in a standard form might fall outside the definition.".

[23] A. D. Forté, "Standard Form Contracts" (1981) 26 Journal of the Law Society of Scotland 380 says at 382 : "It is doubtful if some statutory formula could provide all the anwers. It is far better that the task of definition be left to the courts.".

Forté[24] further says that the term standard form contract is not a term of art, which means that it does not have any specific legal significance. This does not mean, however, that there is not an element common to all standard form contracts which would make a definition possible.[25]

Despite the difficulties that a definition of a standard form contract presents, two common denominators of such contracts can be noted. They contain pre-formulated terms and they are presented by just one party, thus eliminating the bargaining process.

B. PHILOSOPHY AND THEORY BEHIND STANDARD FORM CONSUMER CONTRACTS

In the mid-1970's consumer standard form contracts were a focus of attention.[26] An abundance of literature was created, analysing this area of law from many different angles and courts had to decide many cases where problems concerning standard form contracts were an issue.

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[24] Idem at 382 agrees with H. B. Sales, "Standard Form Contracts" (1953) 16 Mod. L. Rev. 318: "Neither the expression 'standard form contract' nor any variant of it has aquired the status of a term of art or, indeed, any recognised and distinctive meaning.".

[25] All these considerations with regard to a definition do not state anything with regard to the legal treatment of these contracts. The legal treatment, however, seems to be the underlying reason for Forte's statements.

[26] A. D. Forté, "Unfair Contract Terms" [1985] Lloyd's Maritime and Commercial L. Q. at 482 says with regard to the situation in the European Economic Community : "... a policy of protecting the consumer from commercial and related forms of exploitation began to emerge.". R. Cranston, Consumers and the Law (2nd ed. 1984) in the Preface at XXXVII notes that " ... in 1976 and 1977, the economic and political conditions still seemed reasonably favourable to consumer protection measures.".

In the 1980's the mood towards consumer standard form contracts seems to have changed[27], at least insofar as they are no longer in the limelight of intense interest and discussion. Consumer standard form contracts may not be a timely issue, but it does not mean that the situation of the consumer with regard to such contracts has been changed or that a solution to the problems has been found. The importance of the problems connected with consumer standard form contracts should not be underestimated. It would be a serious legal and sociological problem if a multitude of consumers were to judge the legal system as not "working" with regard to the representation of their interests in standard form contracts.

In order to evaluate the existing solutions which are applied to the problems of standard form consumer contracts, and if necessary to develop new ones, it will be important to look at the philosophy and theory behind these contracts. It will also be necessary to clarify the relationship between general contract theory and the phenomenon of standard form contracts and to expose the underlying philosophical values of these contracts.

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[27] Differences in regard to the extent of this change have to be noted. R. Cranston, Consumers and the Law supra n. 26 discusses a 'New Right' economic theory and says in the Preface at XXXVII: "... by 1983 ... much consumer protection law is objectionable because it interferes with the efficiency of the market. (In practice not a great deal of consumer protection law has been rolled back so far, although various new initiatives have been thwarted.) Business interests have also been campaigning against consumer protection legislation, on the basis of what they say are its enormous costs." On the other hand, in 1984 The Commission of the European Communities presented a discussion paper dealing with "Unfair Terms in Contracts concluded with Consumers". See Bulletin of the European Communities supra n. 9.

1. DEVELOPMENT AND USE OF STANDARD FORM CONSUMER CONTRACTS

Standard form contracts are not a new kind of contract. They have been in use at least since the end of the last century[28], and possibly since the time when the modern law of contract was developed[29]. Von Mehren[30] notes that "standardized transactions are not strictly a contemporary phenomenon. Such contracts frequently appear in medieval notaries' handbooks"[31] and "they were used in the twelfth and thirteenth centuries in the transportation of pilgrims to the Holy Land"[32].

Standard form contracts certainly prospered during the Industrial Revolution and may be described as the adaptation of the legal field to the age of mass production. Instead of repetitious individual bargaining over the same product or service and instead of writing the same contract terms over and over, standard form contracts rationalized the process.[33]

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[28] L. M. Friedman, "The Impact of Large Scale Business Enterprise upon Contract" supra n. 8 at 14 : "The phenomenon [meaning a contract of adhesion] antedates the twentieth century." J. R. Peden, The Law of Unjust Contracts including the Contracts Review Act 1980 (NSW) (1982) 89 characterizes standard form contracts as having "burgeoned in the later part of the nineteenth century".

[29] L. M. Friedman, "The Impact of Large Scale Business Enterprise upon Contract" supra n. 8 at 5 notes: "The modern law of contract developed along with the Industrial Revolution. Its formative years may be dated, more or less conventionally, between 1775 and 1850. The common law of contracts then took on its classic form.".

[30] A. von Mehren, "A General View of Contract" supra n. 11 at 15.

[31] Idem at 15. See for examples of such contracts: *Martinus de Fano,* Formularium LXXXII: *Wahrmund* (ed.), Quellen zur Geschichte des Römisch-Kanonischen Processes im Mittelalter I no. 8 (Innsbruck 1907) 32-34.

[32] O. Prausnitz, The Standardization of Commercial Contracts in English and Continental Law (1937) at 17 notes: "The terms were very harsh. Regulatory ordinances designed to improve the pilgrim's lot provided that the space for one pilgrim shall be 6 1/2 to 7 handbreadths long and 2 1/2 handbreadths wide, providing that two pilgrims may be housed in this space 'if it is customary so to place them in the ships, that the one should put his feet next to the head of the other.' ".

[33] See with regard to the process of rationalization: Palandt-Heinrichs, Einf. v. AGBG, Rdn. 1; Erman - H. Hefermehl, Vor § 1 AGBG Rdn. 1-2.

Standard form contracts are not a special type of contract, comparable for example to unique contracts such as a lease or a loan. Standard form contracts have broad applications[34], in fact almost every type of contract can be made in a standard form. But, these broad applications combined with their frequent usage[35] do not tell us much about the characteristics of these contracts, nor do they enable us to assess their usefulness.

2. Characteristic features of standard form consumer contracts[36]

There are, however, certain features and effects which are characteristic of standard form consumer contracts. These features and effects will be described and grouped in terms of their advantages and disadvantages. It has to be kept in mind that the terms "advantages" and "disadvantages" are ambivalent. An advantage to one party can, but does not have to be, a disadvantage to the other party.

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[34] G. Gluck, "Standard Form Contracts" (1979) 28 I.C.L.Q. 72 notes at 74 that the "standard form contract has come to be used in virtually every aspect of commercial life".

[35] See supra Preface p. viii, especially footnote 2.

[36] There is also an abundance of literature available on this subject in Germany. See Palandt-Heinrichs Einf. v. § 1 Rdn. 1. Almost all commentaries and books on standard form contracts start with a description of their characteristic features accompanied by a list of further literature on the subject. For example: Soergel, Einl. AGB-Gesetz, Rdz. 1-3; Münchener Kommentar - Kötz, Einl. AGB-Gesetz, Rdn. 1-4; Staudinger - Schlosser, Einl. zum AGBG, Rdn. 1-5; Erman - H. Hefermehl, Vor § 1 AGBG, Rdn. 1-2; Ulmer/ Brandner/ Hensen, 4th ed., Rdn. 3-4.

(a) Features commonly seen as advantages

(i) Cost and price reduction

Standard form contracts can lower the costs of the product or service as tney eliminate negotiation costs[37] and reduce costs with regard to writing, performing and enforcing of a contract[38]. All consumers will benefit[39] as these costs are factors in the price calculation and if certain overhead costs are lowered, the producer is in a position to lower the overall price. The only possible influence of the consumer is through competition[40], but if the business is in a monopoly or near-monopoly position[41], this influence may not be significant.

(ii) Clarification of contract terms

Standard forms help to clarify the conditions of the contract[42] and therefore facilitate the operation of the contract. Even though every written contract has a clarification function, the special advantage of standard forms is that a widely

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[37] D. Yates, Exclusion Clauses in Contracts supra n. 7 at 1; S. Deutch, Unfair Contracts (1977) at 6; F. Kessler, "Contracts of Adhesion" supra n. 1 at 632; W. Freiherr von Marschall, "The New German Law on Standard Contract Terms" [1979] Lloyd's Maritime and Commercial L. Q. 278 at 279.

[38] W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 53; S. Macauley "Private Legislation and the Duty to Read" (1966) 19 Vand. L. Rev. 1051 at 1059 notes as an advantage for the business that standard form contracts "allow a corporation to control its agents, preventing them from compromising the corporation by generous deals with individual consumers".

[39] A. D. Forté, "Standard Form Contracts" supra n. 23 at 381 notes that: "... society as a whole may be said to benefit from the use of the standard form contract". S. Deutch, Unfair Contracts supra n. 37 at 6.

[40] W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 548 suggests to use competition as a tool in order to get better information from the users for the consumers.

[41] A. D. Forté, "Standard Form Contracts" supra n. 23 at 381 states with regard to the parties of a standard form contract: "... an individual (or a small business) on the one hand and a monopolistic or cartelised supplier on the other.".

[42] H. B. Sales, "Standard Form Contracts" (1953) 16 Mod. L. Rev. 318 at 321.

accepted interpretation of certain terms can develop. It is not uncommon for a whole industry or trade to use almost identical standard contract terms.[43]

Any clarification of terms is advantageous to both contracting parties, provided that the terms themselves are reasonably fair. The business presenting the standard form might prefer vague terms, hoping that in case of a dispute, this might prove to be advantageous.

(iii) Allocation and calculation of risks

Standard form contracts enable the user to allocate and calculate his risks[44] and this might even be essential to certain contracts.[45] The user of a standard form contract must be able to determine the risks he is willing to take and the ones he wants to exclude. His evaluation of risks will be the basis of the multitude of contracts which he will make with individual consumers. This practice is obviously an advantage to the user. Only a closer look at the individual terms of the standard form contract would decide whether this practice is an advantage or disadvantage to the consumer. It is, however, an advantage in some cases in which certain goods or services could and would not be offered by any business unless certain risks were excluded.

The user of a standard form contract may want to exclude some risks which are difficult to calculate like, for example, the "juridical risk", which

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[43] Bulletin of the European Communities supra n. 9 at 6 notes that standard forms might be drawn up "by a trade association for use by its members".

[44] W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 531 and 552; D. Yates, Exclusion Clauses in Contracts supra n. 7 at 2; S. Deutch, Unfair Contracts supra n. 37 at 6.

[45] The essence of insurance contracts, for example, is the allocation and calculation of risks. These contracts are also regulated by statute.

Kessler[46] describes as "... the danger that a court or jury may be swayed by 'irrational factors' to decide against a powerful defendant". It has also to be noted that every contract has the potential to create a dispute between the parties that may lead to a court action. As the outcome of a court action often cannot be predicted, the party bringing an action takes the risk of losing. Even if the action proves successful, the winning party may still incur some costs.

The user of a standard form contract may also want to protect himself against litigious customers. According to Havighurst[47] a business often worries that "... the other party will prove to be an evil person, that the other party will trump up a lawsuit against him. This is not an idle fear."

It is certainly advantageous for businesses to exclude these real or perceived risks by including appropriate terms in their standard forms. It is also clear that the legal position of the consumer is being severely prejudiced by this practice.[48]

(b) Features commonly seen as disadvantages

Turning to those features of standard form contracts which are commonly seen as disadvantages, it has to be kept in mind that the term "disadvantage" is ambivalent. As mentioned earlier, a disadvantage to one party can, but does not have to be a disadvantage to the other party.

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[46] F. Kessler, "Contracts of Adhesion - Some Thoughts about Freedom of Contract" supra n. 1 at 631 ; the author adds that "the insurance business probably deserves credit ... for having first realized the full importance of the so called 'juridical risk' ".

[47] H. C. Havighurst, The Nature of Private Contract supra n. 17 at 115.

[48] Idem at 115-118 on the issue of depriving the consumer of 'a day in court'; on the aspect of legal actions with regard to standard form contracts see infra pp. 16-18.

(i) Not reading the standard terms before signing a contract

The consumer has to invest his "trust" in the "integrity" of the user because there always is the risk that the standard form contract is purely one-sided and therefore unfair.[49] Not many consumers read and understand all the terms of a standard form contract and they are generally not expected to do differently.[50] This applies even if "the contract stipulates that signature by the consumer indicates that he understands and accepts all its terms"[51]. But this is not necessarily a disadvantage to the consumer. It is up to him if he reads the contract terms or not. The opposite is true with regard to the understanding of the contract terms. Because the terms are presented to the consumer in a pre-formulated form, it should be the user's responsibility to present them in a way that is understandable to the average consumer.[52] Failure on the part of the user to do so, whether intended or not, is a disadvantage to the consumer.

(ii) Impossibility of consumer initiated change of standard form terms

A main factor that contributes to the time and cost saving character of standard form contracts is that only one party sets the terms of the agreement. If the consumer takes the time to read all the terms of the presented contract and

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[49] S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" (1971) 49 Can. Bar Rev. 578 notes that if exclusion clauses are " ... drafted in favour of one party, and that party holds a greatly superior bargaining position over the other, there is a clear possibility of serious injustice. This possibility has materialized in a marked way in contracts for the supply of goods and services to consumers".

[50] A. D. Forté, "Unfair Contract Terms" supra n. 26 at 489; S. Deutch, Unfair Contracts supra n. 37 Introduction at XIII; W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 544 comments "... if sellers really *intended* to bring the adverse terms of their forms to consumers' attention, they could readily do so in the same manner in which they advertise their product's desirable features".

[51] Bulletin of the European Communities supra n. 9 at 6.

[52] See further with regard to this argument: infra pp. 47-49 (rule of non-clarity) and infra p. 96 (rule of *contra proferentem*).

if he understands them, can the consumer then "re"-negotiate or unilaterally change any of these terms?

A solution for the consumer may be to strike out the term - or part thereof - that he does not agree with or add a term that he considers important to the contract. Actions like these will seldom be accepted by the sales or service personnel working for the user of the standard form. The personnel act as an agent for the business party which will generally be in the position of an offeror. Any change by the consumer of any term of the offer constitutes a counter-offer and it is for the business party to decide whether or not to accept the changed term. The personnel acting as agents normally lack that authority.[53]

In a rare case, the contract may nevertheless have come into force with the changes made by the consumer, much to the surprise of the business party.[54] If the contract offer has to be seen as coming from the consumer, because all the prior actions of the business party were just invitations to treat, then the business party accepts the offer in the form it comes from the consumer. The issue of a counter-offer does not arise, but an agent's authority to accept the consumer's offer will have to be questioned.

It is certainly a disadvantage to the consumer who reads the presented terms and wants to negotiate some of them that he normally does not have the opportunity to do so. On the other side, it is advantageous for the user of a standard form contract. Not only is he presenting his pre-formulated terms, but

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[53] W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 553.

[54] D. Yates, Exclusion Clauses in Contracts supra n. 7 at 27 says: "Occasionally forms seemed to be accepted from clients ... with individual clauses ... struck out ... the firms concerned [finance companies and insurance companies] seemed to think that it made no difference to the terms of the agreement ... It is almost certain that the company's confidence ... was misplaced.".

his position of "dictating" the contract terms is strengthened by the fact that the consumer can usually not change any of these terms.

(iii) Reluctance of consumers to take court action

A consumer who regards a standard form contract or some of its terms as unfair will nevertheless seldom bring this contract to the attention of a court. Even though the term(s) might be economically disadvantageous to the consumer it does not justify the risks, time[55] and effort connected with a court action.[56]

The consumer does not want to bear the risk of having to pay for the court costs[57] if he loses his case. Pursuing a case which concerns a standard form contract may even involve a greater than ordinary risk of losing because

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[55] In Germany, there is no equivalent to the Canadian Small Claims Court. Therefore, the time element has to be especially stressed, because it can take years before a case is definitively decided. P. Reinel, Die Verbandsklage nach dem AGB-Gesetz (1979) at 6, 7 remarks the length of the court procedure.

[56] H. Kötz, "Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen? (dargestellt an Beispielen aus dem Kauf- und Werkvertrags- sowie dem Maklerrecht)" Gutachten für den 50. Deutschen Juristentag in: Verhandlungen des 50. Deutschen Juristentages Hamburg 1974 vol. I (Gutachten) Part A at A 53. E. P. Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention" Study #12 in J. Swan and B. J. Reiter, Contracts (2nd ed. 1982) at 6-369 notes that "... very few [consumers], if any, would consider it worthwhile to carry their dispute to litigation: the financial disincentives are too formidable. The result is that the private, individualized consumer suit is all but an anachronism.".

[57] H. Kötz "Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen? (dargestellt an Beispielen aus dem Kauf- und Werkvertrags- sowie dem Maklerrecht)" supra n. 56 at A 83-93; M. Dietlein, "Neues Kontrollverfahren für Allgemeine Geschäftsbedingungen?" (1974) 27 NJW 1065 speaking of "gambling at high stakes"; Münchener Kommentar, Gedach. Ver § 13 Rdn. 2 ; Wolf in Wolf/ Horn/ Lindacher Einl. Rdn. 7

judgements in the area of standard form contracts may be less predictable than in other areas of contract law.[58]

Another reason for consumers not to consider court action against unfair standard form contracts or terms can be described as the power of the printed word. Consumers are confronted by widely used and seemingly accepted standard terms. Often being ignorant of their legal rights[59] the consumers will form the impression that the terms cannot be so bad after all[60]. A court action under a contract or terms which appear like sections of a statute is perceived as useless and therefore not seriously considered.[61]

The consumer's reluctance to take issue with the fairness of a standard form contract is advantageous to the users of such contracts as their risk of being taken to court is minimized. An agreement with the consumer can always be worked out[62] if a court action is pending in order to avoid the publicity of a court case or because the chances of winning the case are not considered favourable.

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[58] P. Reinel, Die Verbandsklage nach dem AGB-Gesetz supra n. 55 at 8; P. J. Witte, Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung Allgemeiner Geschäftsbedingungen (1983) at 60.

[59] E. P. Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention" supra n. 56 at 6-369 notes that " ... consumers as a whole are ignorant of their legal rights.".

[60] W. F. Lindacher, "Richterliche Inhaltskontrolle Allgemeiner Geschäftsbedingungen und Schutzbedürftigkeit des Kunden insbesondere zur Frage, ob und wann der richterliche Schutz auch Kaufleuten zuteil wird" (1972) 27 Der Betriebs-Berater BB 296 at 297. It has to be noted that the author made his statement (that the consumer will get a wrong impression) with regard to the preformulated character of standard form terms.

[61] M. Rehbinder, Allgemeine Geschäftsbedingungen und die Kontrolle ihres Inhalts (1972) at 10; P. Reinel, Die Verbandsklage nach dem AGB-Gesetz supra n. 55 at 8.

[62] Idem at 10 marking this as a notion of fair dealing; H. Kötz, "Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen? (dargestellt an Beispielen aus dem Kauf- und Werkvertrags- sowie dem Maklerrecht)" supra n. 56 at A 54.

A user of a standard form contract who is taken to court by a consumer and loses the case is not prohibited from using the same terms in a contract with a different consumer who may not fight the contract in court.[63] It can even be the economically correct decision of the user of a standard form contract to risk legal action by using a clause which would certainly be judged invalid by a court[64], trusting that the consumer will not go to court[65].

Disregarding the terms of the contract, the user might allow the consumer more than he is legally bound to do[66] for reasons of competitiveness of the product or fear of adverse publicity.

Even though consumers are reluctant to bring court action against standard form contracts, this factor cannot be seen as an exclusive disadvantage of such contracts.

(iv) Legislative-like power of standard form contracts

The user of a standard form contract is in a powerful position. He sets all the terms of the contract and he does so for a multitude of individual consumers.

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[63] P. J. Witte, Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung Allgemeiner Geschäftsbedingungen supra n. 58 at 59, 60 and H. Kötz, "Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen? (dargestellt an Beispielen aus dem Kauf- und Werkvertrags- sowie dem Maklerrecht)" supra n. 56 at A 54 noting - for the German system - the principle that a judgement has only effect *inter partes*. See further with regard to an expansion of the principle of *inter partes* in § 21 of the AGB statute, infra p. 74.

[64] H. Kötz, "Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen? (dargestellt an Beispielen aus dem Kauf- und Werkvertrags- sowie dem Maklerrecht)" supra n. 56 at A 55.

[65] R. Cranston, Consumers and the Law supra n. 26 at 81 on the implementation of private law rights. L. M. Friedman, "The Impact of Large Scale Business Enterprise upon Contract" supra n. 8 at 16,17 says "... even when a clause ... is dubious or invalid" for the average man "... what the contract says is gospel, and he must accede. ... court tests will be rare.".

[66] L. M. Friedman, "The Impact of Large Scale Business Enterprise upon Contract" supra n. 8 at 17; H. C. Havighurst, The Nature of Private Contract supra n. 17 at 115.

The chance for the consumer to get more agreeable terms by dealing with another business is slim if the business is a near-monopoly, or if, as is often the case, other businesses are using a virtually identical standard form contract. The consumer's choice is reduced to making a contract according to the terms that are used industry-wide, or to not buying the product or service; in other words, he can only "take-it-or-leave it".

What is the justification for placing one party to the contract in such a powerful position? Why should one party have a legislative-like power over the other?[67] The scope of this thesis does not allow a detailed discussion of these interesting questions.[68] A comment of Slawson should, however, be noted: "A person who possesses the power to impose adhesive contracts on another possesses the power to make law for him without consent. Neither a legislature nor a court can constitutionally allow that power to exist in private hands except when appropriate safeguards are present, including a right to judicial review."[69] An elaboration on this comment (which the writer thinks to be generally justified) would require a thesis of its own[70], covering aspects of constitutional as well as contract law.

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67 W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 530 notes an example: "... automobile manufacturers make more warranty law in a day than most legislatures or courts make in a year."; A. Lenhoff, "Contracts of Adhesion and the Freedom of Contract" supra n. 8 at 482, 483 refers to the user being in a "paterialistic position" and rule "in a substantially authoritarian manner". H. C. Havighurst, The Nature of Private Contract supra n. 17 at 97 notes with regard to parties "legislating" for themselves that a form, for example an architect contract, could be passed as a statute, but Parliament might not be a competent and neutral body as the Institute of Architecture is.

68 See on the subject especially W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 529 and W. D. Slawson, "The New Meaning of Contract" (1984) 46 U. Pitts. L. Rev. 21.

69 W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 at 553.

70 See, for example, the thesis of H.-J. Pflug, Kontrakt und Status im Recht der Allgemeinen Geschäftsbedingungen (Schriften des Instituts für Arbeits- und Wirtschaftsrecht der Universität zu Köln, vol. 50, 1986).

It can be said that the legislative-like power of the business party is disadvantageous to the consumer, as it puts him into an inferior position. The same power is advantageous to the business party, even though the business might see it as a serious responsibility to create fair and well-balanced standard terms, despite its position of power.

(v) Lack of consumer bargaining power

The lack of consumer bargaining power[71] has already been mentioned[72] as a disadvantage for the consumer. The user of standard forms benefits from this lack of bargaining power. His position is strengthened because his terms are accepted without bargaining and even if a consumer wanted to negotiate some terms of the contract, he does not have any bargaining power to "force" the user into a change of terms. The act of bargaining itself does not mean anything, if one party does not have any bargaining power.[73]

The lack of consumer bargaining power may be one of the reasons why standard form contracts work and are so heavily used. Curing this disadvantage for the consumer cannot be as easy and drastic as giving the consumer more - or possibly equal - bargaining power. A re-establishment of individual bargaining would probably put an end to the use of standard form contracts, because they depend heavily on the absence of time consuming and

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[71] The German legal community puts special emphasis on the consumer's intellectual disadvantage as compared to the situation of the user of a standard form contract.

[72] See supra p.5.

[73] S. Deutch, Unfair Contracts supra n. 37 at 6 notes that bargaining is not the best way to protect consumers against unfair contracts. W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 states at 552, 553: " ... the validity of contracts [never has] been thought to depend upon their having been 'dickered' " giving example of a reward offer.

expensive bargaining.[74] Relief from the consumer's disadvantageous position might come from the doctrine of inequality of bargaining power, which is presented in Chapter Three of this thesis.[75]

It cannot be said that standard form contracts should be abolished altogether; they do provide certain advantages. Since not every standard form contract is evil *per se* [76], the "attack" should not be against standard form contracts generally, but rather against their potential for being one-sided and unfair.

(c) Principle of freedom of contract

The Bulletin of the European Communities notes that "[t]he widespread use of standard contract terms can ... be seen as calling into question the consensual basis of contract law".[77] In order to analyse unfairness occurring in standard form consumer contracts, it will be necessary to examine the basis of contract law and the underlying principle of freedom of contract.

The principle consists of two components: the freedom of every party to contract or not to contract with another party and the freedom of the parties to determine the content of their contract.[78]

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[74] The economic changes which would be necessary to re-establish individual bargaining are, of course, a different issue. This thesis does not deal with the wide range of economic questions posed by standard form consumer contracts.

[75] Infra pp. 120-125.

[76] S. M. Waddams "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" supra n. 49 at 578 with regard to exclusionary provisions in standard form; D. Yates, Exclusion Clauses in Contracts supra n. 7 at 2; A. D. Forté, "Unfair Contract Terms" supra n. 26 at 484.

[77] Bulletin of the European Communities supra n. 9 at 6.

[78] A. Lenhoff, "Contracts of Adhesion and the Freedom of Contract" supra n. 8 at 481 using the German terms of *Abschlußfreiheit* and *Inhaltsfreiheit* respectively ; H. C. Havighurst, The Nature of Private Contract supra n. 17 notes at 107 regarding the relationship of the components, that a juridical or legislative imposition of contract terms upon the parties does not

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Based especially on the latter component, a court will generally not interfere with the parties' contract and, in particular, it will not examine the fairness of the contract terms.[79]

(i) Development and essence of the principle

The principle of freedom of contract was developed in a time of *laissez-faire*[80] and is closely linked with the economic model of free enterprise[81]. It emphasizes the freedom of the individual and manifests the importance of his will. It replaced the feudal order, where the status of a person was the important factor in the determination of his legal position.[82] With the development of the law of contract, including the principle of freedom of contract, the focus shifted away from the status of the individual to the individual as a person. "Either party is supposed to look out for his own interests and his own protection."[83] Because of the social and economic changes it has been suggested that the "pendulum of history" has been reversed, creating a movement from contract to

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"... infringe upon the parties' freedom of choice as to whether they enter into the transaction...".

[79] L. E. Trakman, "Interpreting Contracts " (1981) 59 Can. Bar Rev. 241 at 243, 244.

[80] R. S. Johnston, Unfair Contracts " supra n. 18 at 4; F. Kessler, "Contracts of Adhesion" supra n. 1 at 630. See with regard to the historical development of the principle: N. S. Wilson, "Freedom of Contract and Adhesion Contracts" (1965) 14 I. C. L. Q. 172 at 173-175 and P. S. Atiyah, The Rise and Fall of Freedom of Contract (1979) forming three distinctive eras: 1. The beginning of freedom of contract: The Story to 1770; 2. The Age of freedom of contract 1770 - 1870; 3. The Decline and Fall of freedom of contract: 1870 - 1970.

[81] M. Rehbinder, "Status, Contract and the Welfare State" (1971) 23 Stan. L. Rev. 941 at 946; F. Kessler, "Contracts of Adhesion" supra n. 1 at 640.

[82] P. S. Atiyah, The Rise and Fall of Freedom of Contract supra n. 80 at 725.

[83] F. Kessler, "Contracts of Adhesion" supra n. 1 at 640 adds that "Oppressive bargains can be avoided by careful shopping around. ... Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.".

status.[84] In this thesis it will not be possible to describe and discuss in detail the changes from a "liberal" contract law of the nineteenth century to a more "socialized" contract law of the twentieth century.[85] The changes that have occurred since the Industrial Revolution have had limited effect on the principle of freedom of contract. Lawyers, at least in the area of contract law, have not adjusted well to these changes. Atiyah notes that "... the lawyer ... still applies his concepts deriving from the classical model unless he encounters some specific statutory provision intruding upon that model."[86]

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[84] L. M. Friedman, "The Impact of Large Scale Business Enterprise upon Contract" supra n. 8 at 12; Friedman adds at 13 : " perhaps it would be most accurate to say that law has been forced to respond to new social pressures; the doctrine of freedom of contract, in its extreme form, was a tool that served certain masters. The political strength of the middle-class has led to its partial dethronement.". F. Kessler, "Contracts of Adhesion" supra n. 1 at 641; M. Rehbinder, "Status, Contract and the Welfare State" supra n. 81 emphasizes the importance of "social roles"; he notes at 955: "Contract law burdened man by forcing him to create for himself a legal position; the law of roles now allows him to choose among positions and behavioral standards, created and safeguarded by the state. As social life constantly increases in complexity, there is a growth in the size and scope of the legal system. Freedom of the individual today consists less in a freedom of role creation than in a freedom of role choice. This combination in our social system of 'personal mobility with relational stability' is also a characteristic of modern law: It is a law of roles performed and safeguarded by the state, yet open and subject to constant change."

[85] See on the change of the social environment: M. Rehbinder, "Status, Contract and the Welfare State" supra n. 81 at 947; J. R. Peden, The Law of Unjust Contracts including the Contracts Review Act 1980 (NSW) supra n. 28 at 9; D. Yates, Exclusion Clauses in Contracts supra n. 7 notes at 5 that "... industry and commerce which, through its standard form contracts, could no longer be allowed to misuse its bargaining power, superior resources and commercial know-how to impose standardized, unfair and oppressive terms on consumers".

[86] P. S. Atiyah, The Rise and Fall of Freedom of Contract supra n. 80 at 716. The writer thinks that a more extensive quote seems to be called for. "... [the] fact that the market in which many contracts are made is no longer a free market, likewise is of little interest to the lawyer who still applies his concepts deriving from the classical model unless he encounters some specific statutory provision intruding upon that model." The scope of this thesis does not allow a discussion of Atiyah's statement that contracts are no longer made in a free market. However, the writer doubts that the statement in its generality should be made. With regard to changes in the law the question has to be added, who is responsible for a change in contract theory: the courts, the legislature, an administrative board or a combination of all three? B. J. Reiter, The Control of Contract Power Law and Economics Workshop Series Number WS IV - 1 1981 at 37 notes that " ... courts must supervise private law making, as they supervise the executive, legislative and administrative processes, in order to assure an underlying process and substantive values." Reiter also emphasizes at 36-38 that the control of contract power is a political issue.

(ii) Limitations to the principle

Parties can create a contract and enforce it with the help of a court. But the court will generally not interfere with the parties' intention as manifested in the contract terms thus bringing certainty, predictability and stability to every transaction.[87] The principle, however, has never been without limitation.[88] Some legal protection has always been given to "the weak, the poor, the feeble-minded and the inexperienced"[89] in order to prevent oppression and exploitation[90].

The values of fairness and justice in the individual case, even though opposing the values of certainty, predictability and stability presented by the principle of freedom of contract[91], are not seen as incompatible[92]. "... [L]aws

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87 C. Carr, "Inequality of Bargaining Power" (1975) 38 Mod. L. Rev. 463 at 466.

88 B. J. Reiter, The Control of Contract Power supra n. 86 notes at 2: "We never did have, we do not have, and we never could have a total and unthinking delegation of contract power in society." Reiter refers to the statement of Jessel, M. R. [Printing and Numerical Registering Co. v. Sampson (1875), L. R. 19 Eq. 462 at 465]: "... [If] there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily should be held sacred ...". H. C. Havighurst, The Nature of Private Contract supra n. 17 at 95 says that the principle was never fully realized. H. R. Hahlo, " Unfair Contract Terms in Civil Law Systems" (1979-80) 4 Can. Bus. L. J. 428 at 430, 431 points to measures of protection used by the classical, post-classical, medieval and post-medieval Roman law.

89 R. S. Johnston, Unfair Contracts supra n. 18 Introduction at 4.

90 An intervention of the law can be seen as the addition of a qualifing factor to the principle, that means it cannot be relied on for any abusive use. See H. C. Havighurst, The Nature of Private Contract supra n. 17 at 122,123. Or the intervention can be seen as a safeguard against a violation of the very principle. See S. Deutch, Unfair Contracts supra n. 37 at 75 with regard to unconscionability.

91 D. Tiplady, "The Judicial Control of Contractual Unfairness" (1983) 46 Mod. L. Rev. 601 at 602 - 604 on justice and certainty as opposing values in contract law; S. M. Waddams, "Legislation and Contract Law" (1979) 17 U of W. Ont. L. Rev. at 185; D. Vaver, "Developments in Contract Law" (1985) 7 Supreme Court L. Rev. 131 at 208-212 on the principle values applied by Chief Justice Laskin in his decisions in contract law.

92 R. S. Johnston, Unfair Contracts supra n. 18 at 4; J. R. Peden, The Law of Unjust Contracts including the Contracts Review Act 1980 (NSW) supra n. 28 at 9 "... concept of a contract being held to be ... unfair, even though it manifested the external indicia of free consent, was not so easy to reconcile with freedom ... of contract.".

designed to combat unfair dealing are not only desirable, but essential in present-day society ... ."[93]

The principle cannot be advanced in order to prevent the fairness of standard forms from being scrutinized.[94] A user of a standard form cannot be allowed to put a term into the contract - regardless of its unfair content - and then hide under the cloak of the principle of freedom of contract.

(d) Significance of the consumer's consent to the contract

Based on the principle of freedom of contract, the argument can be made that the consumer consents to the standard form - according to his free will[95] - when he accepts the contract by his actions or by his signature on the contract document[96]. A consumer who does not agree with certain contract terms is not forced to make this contract. But if he consents to it, he does so on the basis of the principle of freedom of contract.

This argument is of course confronted by the fact that the consumer normally does not read or take notice of everything that is included in the standard form and even if he does, he normally cannot change any of the contract terms, due to a lack of bargaining power.

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[93] R. S. Johnston, Unfair Contracts supra n. 18 at 4; H. C. Havighurst, The Nature of Private Contract supra n. 17 at 111 comments that "... justice and the interests of society are furthered when the law to some extent ranges itself upon the side of the party who for some reason or another is unable to safeguard his own interests.".

[94] R. S. Johnston, Unfair Contracts supra n. 18 at 141: "...the freedom of contract principle survives, but persons who extract hard bargains should be aware that the courts will exercise vigilance to ensure that such contracts have not been brought about in an unconscionable manner. ... if a contract has been imposed rather than negotiated in a setting in which the adherent to the contract effectively has no bargaining options it is suggested that relief might be granted...".

[95] F. Kessler, "Contracts of Adhesion" supra n. 1 at 640.

[96] N. S. Wilson, "Freedom of Contract and Adhesion Contracts" supra n. 80 at 177, 178 notes that the assent to a standard form contract is seldom questioned.

Slawson[97] presents the thesis that a standard form contract is not a contract insofar as the consent of the consumer to certain contract terms is not "manifested". Consent cannot be assumed if the user of standard terms "... could not reasonably expect that a recipient would read and understand them."[98]

Cranston[99] opposes the above theory; despite (and because of) an "appealing simplicity" it does not provide a solution for more complicated transactions. Nevertheless, the theory might present a valuable solution at least to many simple transactions. The theory might also be reinforced by changes in society which have reduced the importance of the values of free choice and consent.[100] The focus seems to be no longer on the question of what the consumer consented to - as for example, manifested by his signature to the contract - but on the question of what he could reasonably have been expected to consent to.

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[97] W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" supra n. 18 especially at p. 539; Slawson bases his interesting article on a comparison between the law of contract, with standards forms in particular and the administrative law, with the law of delegation in particular. He notes at 533: "This article will construct an 'administrative law' of contracts, whereby the unilaterally drawn portions of what we now call contracts could similarly be kept consistent with the parties' actual agreement and otherwise fair to both of them.".

[98] Idem at 544; a similar approach is taken by K. L. Llewellyn, The Common Law Tradition (1960) at 370 as he notes that there is blanket assent to any not unreasonable or indecent terms the seller may have on his form; S. Deutch, Unfair Contracts supra n. 37 at 76 says: "In standardized contracts ... the principle of freedom of contract should be no hindrance in measuring the fairness of the transaction, because no real consent has been given to the unreasonable terms of the contract.".

[99] R. Cranston, Consumers and the Law supra n. 26 at 69.

[100] M. Rehbinder, "Status, Contract and the Welfare State" supra n. 81 at 952 notes that "the importance of intention and will in the doctrine of legal transactions is steadily reduced in favor of protection of reliance". P. S. Atiyah, The Rise and Fall of Freedom of Contract supra n.80 at 726.

In summary, consumer standard form contracts create complex problems. These can be analysed from many different angles, but all problems are connected in some way with the following dilemma. The factor that is responsible for their existence and multiple use - the elimination of the bargaining process - is also the factor that can create unfairness to the consumer and eradicate the theoretical basis of contract law. This dilemma does not only cause a confrontation between consumer and business, but as well between contract theory and the practical needs of business.

With this background, which is generally valid more or less for both the German and the Canadian legal systems, Chapters Two and Three will look at how the dilemma is handled and the solutions which have been developed by each system.

CHAPTER TWO

THE GERMAN STATUTE GOVERNING STANDARD FORM CONTRACTS

A. INTRODUCTION

How does the German law address the problem of standard form contracts[1], especially with regard to their possibly disadvantageous effect on the consumer?

The following analysis of the German law will not attempt to provide a complete reflection of case material and academic publications in the area of standard form contracts, an impossible task due to the vast amount of material available[2]. The analysis will focus on a description of the basic rules of the German law. It will mark points of special interest and controversy but will not provide a comprehensive evaluation of these points.

In Germany the protection of the consumer is mainly achieved by the Statute Governing Standard Form Contracts[3], commonly abbreviated in

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[1] See Chapter One describing the characteristics of these contracts.

[2] It is not uncommon that a reading list preceeding an article may fill several pages. For example, A. Stein, Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen AGB-Gesetz Kommentar (1977) at 42-53. The most recent commentaries - an important tool to the German legal community - were chosen for the description of the AGB-statute. Not every citation can, however, be seen as exceptional due to the number of commentaries available.

[3] Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) vom 9. Dezember 1976 Bundesgesetzesblatt I S. 3317. The statute can be found in Schönfelder Collection of Statutes. J. Gres and D. J. Gerber, The German Law Governing Standard Business Conditions (1977) translate the German name of the statute "Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen" as "The German Law Governing Standard Business Conditions". This translation is not considered to be optimal, as it puts too much emphasis on "Business", allowing the conclusion that consumers might not be addressed. The translation "Statute Governing Standard Form Contracts" avoids this possible misconception while expressing the statute's broad application. With regard to the statute's broad application see infra pp. 38, 39.

Germany as AGBG[4]. This federal statute, which came into effect on April 1, 1977, and which has remained unchanged for eleven years with the exception of a minor amendment[5], provides the entire German legal community with a versatile tool.

The subject of standard form contracts was added to the agenda of legislative action at a time when consumer protection was a centre of legal discussion[6]. In its legislative proposal the cabinet[7] [which then was formed by a coalition of the Social Democratic Party (SPD) and the Free Democratic Party (FDP)] deemed the enactment of an AGB-statute necessary in order to re-establish the principles of freedom of contract and contractual justice which had become obscured by the usage of standard form contracts.[8] Contracts were no longer concluded with regard to the interests of all parties to the contract, but by only one party which had the power to dictate often unfair and abusive contract terms.[9]

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[4] An alternative abbreviation is AGB-Gesetz. Throughout this thesis the abbreviations "AGB-statute" and "AGBG" will be used (the latter when citing a section of the statute). A translation of the entire statute is given in an appendix to this thesis.

[5] Vierzehntes Gesetz zur Änderung des Versicherungsaufsichtsgesetzes vom 29. März 1983 Bundesgesetzesblatt I S. 377 at 386 - a statute governing the insurance industry - amended § 16 of the AGB-statute.

[6] Consumer protection was, for example, the subject of the 50th annual "Bar Convention" in Hamburg in 1974; Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 7 describes the political mood at the time as favouring an increase in consumer protection. He also notes that in 1972 a working committee was formed by the Federal Minister of Justice to analyse the problem of standard form contracts.

[7] Gesetzentwurf der Bundesregierung dated Aug. 6, 1975 in Bundestags-Drucksache 7/ 3919, 7/ 5412. There was also a proposal by the Christian Democratic Party and the Christian Social Union (CDU/CSU) dated Jan. 1, 1975 in Bundestags-Drucksache 7/ 3200 and 7/ 5412. See with regard to the discussion involving the state proposals: Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 8-9, 10-11; Palandt-Heinrichs at Vor § 1 Anm. 2 b; Löwe in Löwe/Graf von Westphalen/Trinkner Einl. at 25 on the development of the enacted statute.

[8] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/ 3919 at 9 and 13.

[9] Idem.

The enactment of the AGB-statute was preceded and accompanied by numerous publications[10] which documented the extent of interest in the new statute. Ten books were published on the subject only four months after the enactment of the statute, along with introductory articles in major legal journals.[11] Utilizing these publications, users of standard form contracts could adjust to the new statute. The statute itself, although completing the legislative process on December 9, 1976, did not come into force until April 1, 1977.[12] This "period of grace" was intended to give users of standard form contracts the opportunity to review and adjust their existing contracts.[13]

It should be mentioned that the enactment procedure in the *Bundestag* [14] was completed despite time pressures at the end of the session. This rush[15] might be responsible for some of the deficiencies in the composition and the wording of the statute[16].

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[10] V. Reinhard, Die AGB - Reform (1979) at 7, especially at footnote 2 notes a publication boom in the early 1970's; H.-J. Bunte, "Erfahrungen mit dem AGB-Gesetz-Eine Zwischenbilanz nach 4 Jahren" (1981) 181 Archiv für die civilistische Praxis AcP [illegible] 33.

[11] H.-J. Bunte, "Erfahrungen mit dem AGB-Gesetz - Eine Zwischenbilanz nach 4 Jahren" supra n. 10 at 33 providing a list of the major publications.

[12] According to Art. 82 of the Grundgesetz (The German equivalent to a Constitution) the legislative process ends with the publication of a statute in the Federal Publication of Statutes (*Bundesgesetzblatt*). It should be noted that the AGB-statute was passed by the *Bundestag* on November 10, 1976 and by the *Bundesrat* on November 12, 1976 thus being already "public" prior to its publication. *Bundestag* is the German Federal Parliament. *Bundesrat* is a second body involved in the legislative process, but one which cannot ultimately block a legislative proposal.

[13] H.-J. Bunte, "Erfahrungen mit dem AGB-Gesetz - Eine Zwischenbilanz nach 4 Jahren" supra n. 10 at 33.

[14] This is the German Federal Parliament.

[15] Schlosser in Schlosser/ Coester-Waltjen/ Graba at Vor § 1 Rdn. 6; Staudinger - Schlosser at Einl. zum AGBG Rdn. 11 e notes especially the rush due to the CDU/CSU proposal with regard to the rules of procedure.

[16] For example, the complicated regulation of § 24, 2 AGBG in its relationship to §§ 9, 10 and 11 AGBG (see with regard to § 24 AGBG: infra n. 42).

The AGB-statute has become the most important instrument for providing consumer protection from unfair contracts.[17] There are, however, other statutes aimed at consumer protection, for example ...

•*Fernunterrichtsschutzgesetz* [18], a statute in force as of January 1, 1977, concerning the sale of educational courses by correspondence.

•*Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften* [19], a statute, enacted January 16, 1986, concerning door-to-door sales and related businesses.

• An amendment to the *Gesetz gegen den unlauteren Wettbewerb* [20], the statute concerning unfair business competition, in force as of January 1, 1987, concerning the labeling practice during discount sales.[21]

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[17] N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland (1980) at 331, 332 noting that it does not provide answers to all the problems; E. von Hippel, Verbraucherschutz (3rd ed. 1986) at 121 stating that the AGB-statute contains the most detailed regulation of standard form contracts in the world; G. Ernst, Zur Bilanz der Diskussion um die Allgemeinen Geschäftsbedingungen nach dem AGB-Gesetz - Konkretisiert am Beispiel der Geschäftsbedingungen für den Verkauf von gebrauchten Kraftfahrzeugen (1979) at 141 notes - among other evaluations with regard to the statute - that it has been evaluated as one of the most important statutes in the area of contract law since the enactment of the Civil Code BGB in 1900.

[18] Gesetz zum Schutz der Teilnehmer am Fernunterricht, Gesetz vom 24.8.1976 in Bundesgesetzblatt I 2525.

[19] Gesetz vom 16.1.1986 in Bundesgesetzblatt I S. 112 and Bundesgesetzblatt III 402-30.

[20] Gesetz zur Änderung wirtschafts-, verbraucher-, arbeits- und sozialrechtlicher Vorschriften vom 25.7.1986 in Bundesgesetzesblatt I 1169.

[21] It is no longer permitted to use labels that compare the regular to the discount price. The statute intends to protect the consumer from inflated regular prices that give the wrong impression of the discount price being a bargain. W. Alt, "UWG - Novelle und künftige Werbepraxis" (1987) 40 NJW 21-28 giving details with regard to the amendments.

B. DESCRIPTION OF THE AGB-STATUTE

The AGB-statute can be divided into three main parts:

§§ 1-7 AGBG contain regulations with regard to the requirements of incorporating standard terms into the contract. They provide a definition of "standard form contract" and regulate the consequences if a clause is not incorporated into the contract or is invalid because of its content.

§§ 8-11 AGBG contain regulations to test the fairness of a clause.

§§ 13-24 AGBG contain rules of procedure including rules with regard to the application of the statute.

1. DEFINITION OF 'STANDARD FORM CONTRACT'

According to the AGB-statute (§ 1 I 1 AGBG[22]) a standard form contract is defined as a contract containing terms pre-formulated by one party to the contract, designed to be used for a multitude of contracts and presented by this party to the other party at the time of conclusion of the contract. Every contract fitting this definition will be judged according to the regulations of the statute.

The statute clarifies[23] (in § 1 I 2 AGBG) that the outward appearance of a contract does not influence its classification as a standard form contract. The statute notes as unimportant:

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[22] This is the common way to cite a regulation: the number of the section, followed by the sub-section, followed by the number of the sentence to be cited if there is more than one to the sub-section.

[23] Palandt-Heinrichs at § 1 Anm. 3 characterizes this section of the statute as essentially unnecessary as it just provides an explanatory statement.

• whether the standard terms form an external and separate portion of the contract; for example, terms being printed on the back of the contract document.

• whether the standard terms are integrated into the contract document; for example, standard terms not even printed on the contract document itself but readily available to every contractor.

• the extent of terms used; for example, one term printed on a ticket to exclude liability may be sufficient.

• the type-face used; for example, bold or "fine print".

• the form the contract is in; for example, notarized[24].

The statute does not apply to those terms of a contract which both parties agreed to as the result of a bargaining process. The legislature did not think that it was necessary to subject to the statute terms which are individually bargained for by the parties (§ 1 II AGBG). These terms do not threaten the principle of freedom of contract.

The definition complies with the legislative goal of re-establishing freedom of contract if this freedom is used by one party in an unfair and abusive manner by presenting or dictating contract terms to the other party.[25] The party

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[24] According to the German Civil Code, the parties are generally free to chose the form of their contract. Some contracts do, however, have to be in writing or be certified by a notary public in order to be valid. The regulations setting up form requirements are intended to fulfil a warning as well as an evidential function. The certification by a notary public - necessary, for example, for a land deal - serves to make sure that the contracting parties receive sufficient legal information and advice prior to the conclusion of the contract. See, for more details on form requirements, any commentary to §125 BGB and to § 313 BGB on the certification requirement with regard to land deals. "BGB" is the abbreviation for *Bürgerliches Gesetzbuch*, the German Civil Code. The statute can be found in Schönfelder Collection of Statutes.

[25] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/ 3919 at 9.

subjected to the unfair treatment was seen by the legislature as being in need of protection.

The definition creates the difficult task of determining whether a term is *ausgehandelt* or *gestellt* - individually bargained for or presented by one party.

The user of standard forms **presents** his contract if he " ... attempts to unilaterally establish the content of the contract simply by securing the assent of the other party to his terms."[26] The difficult question is whether the presentation of contract terms by just one party has to be accompanied by a lack of bargaining power of the other party, thus giving the presentation the character of dictation of terms. Many lawyers in Germany interpret the definition as including an element of dictatorship by one party.[27] For example, Wolf[28] notes that the pre-formulation of standard terms by just one party indicates this party's superiority of bargaining power, intellectually as well as economically.

A far more difficult interpretation concerns the element of an **individually bargained for** term. When can a term be seen as individually bargained for as opposed to being dictated by the user of a standard form contract? A consumer, for example, is confronted with the standard form contract of a business and some negotiations are held on the basis of the standard conditions presented. The consumer finally agrees to the contract, perhaps because a better price is offered, but no changes to the standard terms are

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[26] J. Gres and D. J. Gerber, The German Law Governing Standard Business Conditions supra n. 3 at 2.

[27] N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 299. H.-D. Hensen, "Das AGB-Gesetz" (1981) 13 Juristische Arbeitsblätter JA 133 at 135 opposes the understanding that the user of a standard form contract has to "dictate" his terms to the other party. The element of "presenting" addresses only the physical act of a presentation of standard terms by one party to the other.

[28] Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 17.

made. Are these unchanged terms dictated to the customer or are they individually bargained for because negotiations took place?

Many court cases and many legal publications[29] deal with this difficult task of interpretation. It is not possible to give an extensive account of all the suggested solutions to the problem, but the generally accepted opinion[30] is that a term or terms are individually bargained for if the customer has had a chance to take part in and influence the contract negotiations.

It is not sufficient if the user of a standard form contract is willing to negotiate, but real bargaining does not take place.[31] It is not sufficient that the user gives special notification of a standard term or includes a clause signed by the consumer stating that the contract has been individually bargained for.[32] Any interpretation of the requirement that a term must be "individually bargained for" should be guided by the intent of the AGB-statute which is to help the contracting party lacking intellectual and economic bargaining power.[33]

The importance of the distinction between a contract which is individually bargained for and one which is dictated by one party must be emphasized, because it is the central factor in determining whether the statute applies to a particular contract. A **single term** can be individually bargained for, thus

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[29] H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 134 notes that the problem is vividly discussed. See, for example, the article by W. Jaeger, " 'Stellen' und 'Aushandeln' vorformulierter Vertragsbedingungen" (1979) 32 NJW 1569.

[30] See, for example, H. Locher, Das Recht der Allgemeinen Geschäftsbedingungen (1980) at 24 -28.

[31] Palandt-Heinrichs at § 1 Anm. 4 b.

[32] Palandt-Heinrichs at § 1 Anm. 4 a.

[33] Palandt-Heinrichs at § 1 Anm. 4.

taking this term of the contract out of the reach of the statute. Fear has therefore been voiced that the AGB-statute might be circumvented by a user of a standard form contract using individually bargained for contract terms.[34] The statute itself prohibits circumvention by stating in § 7 AGBG that it applies even if its provisions are circumvented by deviating formulations.[35] But if a term is individually bargained for, this does not amount to a circumvention as (according to the AGB-statute) the statute does not apply.

A further problem[36] in interpreting the definition provided in the statute is the prerequisite that the form used has to be pre-formulated for a multitude[37] of contracts. The use of a standard form contract three to five times is generally accepted as satisfying the element of "multitude". It is not important whether a standard form contract is actually used frequently; it is sufficient that its user intends to use it frequently. If such intention is present, the first (possibly even the only) use will be covered by the term "multitude".[38]

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[34] H. J. Willemsen, "Schutz des Verbrauchers vor Aufrechterhaltung unwirksamer AGB-Klauseln als 'Individualvereinbarungen'" (1982) 35 NJW 1121 including further references.

[35] H. Brox, Allgemeines Schuldrecht (14th ed. 1986) at 33 gives an example of the AGB-statute being circumvented by a contract of sale made up as a corporate law contract, the latter not falling into the scope of the AGB-statute (§ 23 I AGBG). Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 36 and Soergel-Ursula Stein at § 7 Rdn. 1 note that so far § 7 AGBG (as a rule of last resort) had no significance. Soergel-Ursula Stein at § 7 Rdn. 2 further notes that a circumvention of §§ 10 and 11 AGBG is covered by § 9 AGBG and not by § 7 AGBG.

[36] H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 135 notes that the problem will not be discussed in an average case concerned with the AGB-statute.

[37] The translation used by J. Gres and D. J. Gerber, The German Law Governing Standard Business Conditions supra n. 3 at 21 is not "multitude", but "a significant number". The writer does however think that, in the context of § 1 II AGBG, the word *Vielzahl* is more accurately translated by using the word "multitude".

[38] Erman-H. Hefermehl at § 1 Anm. 8; J. Gres and D. J. Gerber, The German Law Governing Standard Business Conditions supra n. 3 at 2; Soergel-Ursula Stein at § 1 Rdn. 11 notes that the required time of usage varies from fewer than 3 to over 20.

Kramer[39] states that the element of "multitude" should be eliminated from the definition of a standard form contract. The protection of the consumer from standard form contracts should not depend on the frequency of their usage, because standard form contracts are characterized by their mass appearance. The consumer might need more protection from a standard form contract which the user intends to use only once, because the user will be more diligent in enforcing this contract than he might be with a contract which he intends to use frequently. Kramer's suggestion to eliminate the element of "multitude" from the definition is not convincing. Even though it is not as integral an element of the definition as the lack of individual bargaining, it still contributes to the difficult task of finding a definition of a standard form contract. Kramer's first argument, that standard form contracts are characterized by their mass appearance, suggests, as Lord Denning[40] commented, that everybody knows a standard form contract just by looking at it. His second argument is acceptable, but it does not justify the elimination of the element of "multitude" , even if it is acknowledged to create problems.[41]

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[39] E. A. Kramer, "Nichtausgehandelter Individualvertrag, notariell beurkundeter Vertrag und AGBG" (1982) 146 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht ZHR 105 at 109. The author notes at 110 that the element of preformulation should also be deleted. He refers to the "power of the preformulated word" (*Sog des vorformulierten Gedankens*), meaning that re-thinking and evaluating of a preformulated thought is typically extraordinarily difficult. See further on this idea H. Wiedemann, Inhaltskontrolle vorformulierter Verträge in: Recht und Wirtschaft heute, Festgabe (zum 65. Geburtstag von) Max Kummer 1980.

[40] See Lord Denning's comment: " [W]e always know standard terms and conditions when we see them" supra p. 6.

[41] There are some authors who consider to apply the test of content included in the AGB-statute (§§ 9-11 AGBG) even to preformulated **individually bargained for** contracts. Favouring this are besides E. A. Kramer supra n. 39, M. Lieb, "Sonderprivatrecht für Ungleichgewichtslagen? Überlegungen zum Anwendungsbereich der sogenannten Inhaltskontrolle privatrechtlicher Verträge" (1978)178 Archiv für die civilistische Praxis AcP 196 at 220-225 and H. Wiedemann, Inhaltskontrolle vorformulierter Verträge supra n. 39 at 187, 188. The majority of the legal community does however not approve as it does not comply with the AGB-statute which is not applicable to individually bargained for contracts. See with

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The statute applies to every contract that can be defined as a standard form contract whether the contract is concluded with a consumer or a merchant, even though some special rules apply if a merchant is involved.[42] The proposal prior to the enactment of the statute stated that the statute was not to be created exclusively to protect the consumer but to re-establish contractual justice to all parties.[43] The proposal emphasized that all parties subjected to standard contract terms, especially consumers, had to be protected from unfair, one-sided pre-formulated contract terms.[44] The range of application of the statute, which was subject to extensive discussion during the legislative process, is determined by a definition of what constitutes a standard form contract and not by restricting its application to standard form consumer contracts.[45] Even

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regard to the majority: Soergel- Ursula Stein Vor § 8 Rdn. 27; G. Stein, Die Inhaltskontrolle vorformulierter Verträge des allgemeinen Privatrechts (Schriften zum Bürgerlichen Recht vol. 71 1982) at 22-26 analysing the extent a test of content should have.

[42] See § 24 AGBG for some specific rules with regard to merchants. § 24 Nr. 1 AGBG states that the statute applies to a contract used against a merchant if the contract falls within the scope of the merchant's business. There are, however, some regulations of the statute that do not apply to these contracts (§§ 2, 10, 11 and 12 AGBG) because as Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 19 notes, special attention has to be paid to the special needs of business/trade. See on the classification as a merchant §§ 1- 6 of the *Handelsgesetzbuch* HGB, the German Commercial Code, to be found in Schönfelder Collection of Statutes; for more details on §§ 1-6 HGB see Baumbach - Duden - Hopt. See also J. Gres and D. J. Gerber, The German Law Governing Standard Business Conditions supra n. 3 at 5 and for more details: Palandt-Heinrichs at § 24 Anm. 3 b) aa); N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 301; H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 139 noting that a different degree of reasonableness has to be considered depending on a small or large business envolved.

[43] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/ 3919 at 9; Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 18.

[44] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/ 3919 at 1.

[45] Soergel-Ursula Stein at Einl. AGB-Gesetz Rdn. 8 notes that there was a choice between two concepts. The statute could apply to consumer contracts only, focusing on the protection of the weaker party from the economic and intellectual dominance of the user of a standard form contract; merchants would be excluded from the statute's application. Alternatively, the statute could apply to any abuse of the individual freedom of contract by one contracting party, including merchants, without paying special attention to a need of protection and an imbalance of bargaining power at the conclusion of an individual standard form contract. According to the author the AGB-statute has adopted the latter concept. Erman-H.Hefermehl at § 1 Anm. 2 and J. Schmidt-Salzer, "Das Gesetz zur Regelung des Rechts der Allgemeinen

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though this thesis concerns itself only with consumer contracts it has to be kept in mind that the AGB-statute is not restricted in its application to standard form consumer contracts.

The statute does not apply to some specific areas of law such as labour, inheritance, family and corporate law (§ 23 I AGBG). These areas either do not need the protection of the AGB-statute or the statute is not appropriate to regulate the specific area.

The catalogue of § 23 II AGBG, listing further exclusions to the scope of the statute, was developed during the legislative process after hearings involving approximately 150 business entities that would be affected by the proposed statute.[46] Excluded are, for example, contracts concerning public transit, public utilities and contracting rules for the construction industry.[47]

It has already been noted that a single term can be individually bargained for and the term is thus taken out of the reach of the statute. § 4 AGBG accordingly states that any individually bargained for term takes precedence over a comparable standard term. This regulation is of particular importance as many standard form contracts "contain a clause which provides that agreements between the parties shall only be effective if they are in writing and

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Geschäftsbedingungen" (1977) 30 NJW 129 at 130 states that the AGB-statute is not a special statute for consumer protection from economic power. Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 14-15 notes that the AGB-statute's intent is the protection of contractual justice. He underlines his statement by showing portions of the statute which are aimed at the protection of the freedom of contract forming the centre of the law of contracts. H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 134 and N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 289 note that contractual justice as well as the protection of the consumer were intended.

[46] H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 140.

[47] For more details see the text of § 23 AGBG. Further details to each exemption are given in Ulmer/ Brandner/ Hensen to § 23 AGBG.

that oral agreements shall be invalid"[48]. Under the AGB-statute, such a clause (known as *Schriftformklausel* or written form clause) will no longer render an oral agreement invalid as an individual agreement takes priority over a clause in a standard form contract (§ 4 AGBG).[49] The effect of an invalid term on the entire contract is dealt with in § 6 AGBG which will be discussed later.[50]

The user can also not circumvent the application of § 4 AGBG by including a clause (or getting a separate agreement) which states that an oral agreement will have no precedence over the standard form clauses. Even though § 4 AGBG does not change the principle that a contract document is assumed to give a complete and accurate account of the content of the contract, this presumption does not apply to a standard form contract that has been signed without any prior individual bargaini [51]

Who has to prove that the ...rd terms in question are to be judged according to the statute? The gener... ...ule with regard to the burden of proof in Germany is that the person who wants to apply a rule in his favour has to prove the necessary facts. If the consumer wants the statute to be applied, he has to prove that the standard terms in question are terms according to the statute and that the form was to be used by the business for a multitude of contracts. A number of presumptions assist the consumer; for example, the way a document

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[48] J. Gres and D. J. Gerber, The German Law Governing Standard Business Conditions supra n. 3 at 7; See also on such clauses: H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 136; Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 33. P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" (1985) 6 Zeitschrift für Wirtschaftsrecht ZIP 449 at 457. H. Locher, Das Recht der Allgemeinen Geschäftsbedingungen supra n. 30 at 51, 52.

[49] P. Baumann, "Schriftformklauseln und Individualabrede" (1980) 35 Der Betriebs-Berater BB 551 at 551, 552.

[50] Infra pp. 49-52.

[51] Soergel-Ursula Stein § 4 Rdn. 20.

is reproduced in multiple copies can indicate that the element of pre-formulation is present and the element of multiple use can be indicated by the presence of pre-formulated contract documents.[52] The business, in turn, may state that the standard form contract contains some individually bargained for terms or as a whole is individually bargained for, thus taking the contract or the terms out of the statute's reach. It is their responsibility to prove the fact that individual bargaining took place or that the customer had the opportunity to have some influence during the contract negotiations.[53]

2. INTEGRATION OF STANDARD TERMS INTO THE CONTRACT

(a) Requirements for integration of terms

In order to be enforceable standard terms have to be an integral part of the contract (§ 2 AGBG). To accomplish this integration, the user of standard terms has to expressly refer the other party to the existence of the terms prior to the conclusion of the contract. The user further has to give the other party a reasonable opportunity to get to know the content of the standard terms and the other party has to agree to these terms forming part of the contract. Should it be unreasonably difficult to advise the other party expressly of the existence of standard terms to the contract, a clearly visible notice at the place where the contract is concluded will be sufficient (§ 2 I No.1 AGBG).

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[52] N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 299.

[53] See with regard to the burden of proof: H. J. Willemsen, "Schutz des Verbrauchers vor Aufrechterhaltung unwirksamer AGB-Klauseln als 'Individualvereinbarungen' " (1982) 35 NJW 1121 at 1124. The author notes at 1125, 1126 that the user has to allow the consumer, prior to trial, to inspect the user's contract forms and their usage, especially if the consumer wants to prove that the forms are preformulated and intended to be used for a multitude of contracts.

The requirement that standard terms must be integrated into the contract shows that the statute considers them to have a contractual characteristic. Standard terms are only valid, and if necessary legally enforceable with the help of a court, if they are consented to by legally autonomous people on the basis of their individual freedom of contract. This approach sets aside the characterization of standard terms as statute-like regulations.[54] Much like a statute, they are created in an abstract manner and intended for a multitude of unspecified contracts and contracting partners. Even though the user of a standard form contract creates and uses a contract which is built like a statute he does not have any legislative power - as opposed to the elected members of parliament - which allows him to create regulations applicable to everybody with or without consent.[55]

The character of standard form contracts[56] as well as the reasons for their validity and enforceability have always been a centre of discussion in the German legal community. The interesting dogmatic problem of the characterization and integration of standard form contracts - well known as the opposing concepts of *Normentheorie*[57] and *Vertragstheorie*[58] - is still far from being solved[59]. The enactment of the AGB-statute did not provide a solution to

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[54] Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 13 and 21. See already on the legislative-like power of standard form contracts supra pp. 18-20.

[55] N. Fehl, Systematik des Rechts der Allgemeinen Geschäftsbedingungen Die Auswirkungen des AGB-Gesetzes auf den Hypothekarkredit nach dem Hypothekenbankgesetz (Abhandlungen zum Arbeits- und Wirtschaftsrecht vol. 33 1979) at 86-88.

[56] See supra Chapter One, especially the legislative-like power of standard form contracts at pp. 18-20.

[57] This theory categorizes standard form contracts as normative regulations.

[58] This theory categorizes standard form contracts as ordinary contract terms in need of consent in order to be valid.

[59] A recent publication on the subject by H.-J. Pflug, Kontrakt und Status im Recht der Allgemeinen Geschäftsbedingungen (Schriften des Instituts für Arbeits- und Wirtschaftsrecht

footnote continued on next page

the problem of integrating standard form contracts into the existing law of contracts. The mainstream opinion in the legal community is that the statute favours the *Vertragstheorie*[60] and the integration requirement (§ 2 AGBG) serves to prove this. The statute clearly puts an end to the previous court practice where the prerequisite of consent to the incorporation of standard terms was deemed to be satisfied if the other party knew or ought to have known about the existence of standard terms and if the consumer could see that the user wanted to contract only if the standard terms were included in the contract.[61]

With the statute in place how significant is the consumer's signature[62] to a standard form contract? Is the consumer's signature always a declaration of consent to the presented standard terms?[63] The consumer can accept the user's standard form contract offer by expressly declaring his consent, or by an action such as signing the contract document. It is the generally accepted

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der Universität zu Köln vol. 50 1986) and the review of this book by M. Rehbinder, Buchbesprechung zu H.-J. Pflug, Kontrakt und Status im Recht der Allgemeinen Geschäftsbedingungen, (1986) 39 NJW 2755.

60 N. Fehl, Systematik des Rechts der Allgemeinen Geschäftsbedingungen supra n. 55 at 86-88 notes that both theories are integrated into the AGB-statute; both are based on the position of inequality of bargaining power and both theories face dogmatic problems.

61 This practice was called *"Wissen-müssen-Formel"* or *"Unterwerfung" des Kunden unter die AGB*, meaning "The formula of having to know" or "Submission of the customer to the standard terms". Palandt-Heinrichs § 2 Rdn. 1 b) notes that the previous court practice set up less stringent requirements for the conclusion of a standard form contract than any other type of contract. With the inclusion of § 2 into the AGB-statute this previous practice was abandoned and it has made sure that the incorporation of standard terms really relies on the contractual intentions of **both** contracting parties. See also: G. Ernst, Zur Bilanz der Diskussion um die Allgemeinen Geschäftsbedingungen nach dem AGB-Gesetz - Konkretisiert am Beispiel der Geschäftsbedingungen für den Verkauf von gebrauchten Kraftfahrzeugen supra n. 17 at 121.

62 D. Schroeder, Die Einbeziehung Allgemeiner Geschäftsbedingungen nach dem AGB-Gesetz und die Rechtsgeschäftslehre (Schriften zum Bürgerlichen Recht vol. 82 1983) at 11, especially footnote 10.

63 N. Reich and K. Tonner, "Rechtstheoretische und rechtspolitische Überlegungen zum Problem der Allgemeinen Geschäftsbedingungen" (in: Hamburger Jahrbuch für Wirtschafts- und Gesellschaftspolitik 1973) 213 at 236 note that according to a strict contract theory - "Vertragstheorie"- an agreement cannot be achieved by a signature only.

opinion in the legal community that such a declaration of consent is valid, even if the consumer did not read the contract terms prior to signing.[64] He is taking a risk, because he will be held to an agreement which includes terms of which he was not aware.[65] According to § 2 I No. 2 AGBG it is sufficient in order to integrate standard terms into a contract that the user provide the consumer with the opportunity to get to know the content of the contract. If such an opportunity is provided, it will not be decisive whether the consumer actually used this opportunity or not.[66] It should be noted that the consumer may get some protection from the regulation of § 3 AGBG, which will not allow a standard term which can be judged as "surprising" to be included in the contract and thus prevent the term from binding the consumer, whether it is read or not.[67]

The requirement of consent provides the consumer with the opportunity to acknowledge the existence of terms about which he has been informed by the user prior to the conclusion of the contract.[68] Based on the knowledge of all the terms, the consumer can evaluate them and decide if the contract is a fair deal for him, even if it may include some disadvantageous terms.[69]

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[64] Soergel-Ursula Stein at § 3 Rdn. 5 and D. Schroeder, Die Einbeziehung Allgemeiner Geschäftsbedingungen nach dem AGB-Gesetz und die Rechtsgeschäftslehre (Schriften zum Bürgerlichen Recht vol. 82 1983) supra n. 62 at 51.

[65] D. Schroeder, Die Einbeziehung Allgemeiner Geschäftsbedingungen nach dem AGB-Gesetz und die Rechtsgeschäftslehre supra n. 62 at 50, 51 and 52, 53.

[66] Idem at 51.

[67] Idem at 52, 53 and infra pp. 45-47 with more details to § 3 AGBG.

[68] Erman-H.Hefermehl at § 2 Anm. 15; Staudinger - Schlosser at Einl. zum AGBG Rdn. 13 notes that while drawing up § 2 AGBG it was widely known that § 2 AGBG would not protect the consumer from one-sided standard form contracts; § 2 AGBG would however provide the consumer with some information about the contract terms.

[69] P. Schlosser, "Jura Repetitorium: Zivilrecht Allgemeine Geschäftsbedingungen" (1980) 2 Jura. Juristische Ausbildung 381-391 and 434-446. The author (at 386) characterizes consent as a *Risikoerklärung* - a declaration containing some risk for the consumer.

If the consumer decides, for whatever reason not to read the standard terms presented to him, this decision has to be taken seriously. The consumer is not to be protected from his own actions and not to be categorized with, for example, minors who cannot make a valid contract without the help of an adult.[70]

The protective effect of the requirement of consent should not be overestimated.[71] The duty of the user of a standard form to make his terms known and to ensure the consumer's consent to these terms is not immensely helpful to the consumer. A consumer who enters into negotiations with the user because he does not agree with the presented terms will frequently lack the necessary bargaining power to get his views incorporated into the contract. Entering into negotiations does create a danger, because as a result of the negotiations, an individually bargained for term may be present, thus taking that part of the contract (and maybe even the whole contract) out of the statute's scope (§ 1 II AGBG). This will leave the consumer in an even worse position.[72]

(b) Surprising clauses

Terms of a standard form contract which are correctly incorporated into the contract (according to § 2 AGBG) are nevertheless not a valid part of the

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[70] K. H. Neumayer, "Standard Form Contracts - Contracts of Adhesion" International Encyclopedia of Comparative Law vol. VII ch. 12 (in the process of being published) at 147, 148 of the manuscript as of January 1987. The writer would like to thank Herrn Prof. Dr. Neumayer for his permission to read parts of the manuscript.

[71] P. J. Witte, Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung Allgemeiner Geschäftsbedingungen (1983) notes at 34 that the notice requirement of § 2 AGBG does not help a lot. Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 31 notes that § 2 AGBG provides a good start towards better information of the consumer about the content of the contract.

[72] Palandt-Heinrichs at § 2 Anm. 1 a).

contract if they are surprising to the consumer. According to § 3 AGBG, a clause is surprising if, in view of all the circumstances, the consumer could not have expected the term to be used. This is especially true if the term, by its appearance, can be judged as being not in common usage. For example, a clause in a contract of sale which obligates the buyer of a coffee machine to also purchase a certain amount of coffee could be judged as "surprising".[73] It is irrelevant whether or not the consumer read the surprising clause prior to giving his consent. The characterization of a clause as surprising has to be arrived at according to an objective standard.[74] It has to be asked whether the clause in question would be judged by an average consumer[75] as being unusual, especially with regard to the outward appearance of the contract.

The regulation concerning surprising clauses takes into account that pre-formulated clauses are not individually bargained for and that the consumer's consent to a standard form contract cannot have the same impact as his consent given after a bargaining process. The consumer must be protected in the confidence that standard terms are at least used within the limits of what reasonably can be expected.[76] This pays tribute to the fact that the consumer frequently does not notice, read or understand the legal implications of standard forms.[77] It should be noted that the effect of the

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[73] This example is used by H. Brox, Allgemeines Schuldrecht supra n. 35 at 31.

[74] Palandt-Heinrichs at § 3 Anm. 2 b) giving some examples.

[75] Soergel-Ursula Stein at § 3 Rdn. 5 notes that an individualized standard is used while defining the average consumer. How would a person like the consumer in question judge the clause in question in a comparable situation? The author notes further that it is not important whether the individual consumer knew the content of the clause or not.

[76] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/3919 at 19; Palandt-Heinrichs § 3 Anm. 1; H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 35.

[77] Soergel-Ursula Stein at § 3 Rdn. 1.

"surprise" rule declines if a standard clause is used frequently because then the average consumer should not be "surprised" any more.[78]

The regulation concerning surprising clauses (§ 3 AGBG) may provoke a judgement on the content of a clause, a common occurrence prior to the enactment of the AGB-statute. However, judgements on a clause's content are now to be made exclusively with the help of §§ 10, 11 and 9 AGBG, which regulate a test of fairness for standard form contract terms. The characterization of a clause as surprising can no longer be used as a hidden test of fairness.[79]

(c) Rule of Non-clarity

Unlike the previously described sections of the AGB-statute, the rule of non-clarity deals with the interpretation of standard terms rather than their incorporation into the contract. The rule of non-clarity[80] - rooted in the Roman law[81] - determines that standard terms are to be construed against the user in a

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[78] Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 32.

[79] P. J. Witte, Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung Allgemeiner Geschäftsbedingungen supra n. 71 at 38; G. Ernst, Zur Bilanz der Diskussion um die Allgemeinen Geschäftsbedingungen nach dem AGB-Gesetz - Konkretisiert am Beispiel der Geschäftsbedingungen für den Verkauf von gebrauchten Kraftfahrzeugen supra n. 17 at 123, 124; P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" supra n. 48 at 456 notes that the usage of § 3 AGBG seems to have decreased.

[80] The rule of non-clarity also covers the principle of construing a contract term *contra proferentem* - in a way most advantageous to the consumer. See Palandt-Heinrichs at § 5 Anm. 5. See in general on the rule of non-clarity: C. Krampe, Die Unklarheitenregel (Bürgerliches und römisches Recht Schriften zum Bürgerlichen Recht vol. 83 1983).

[81] See with regard to the development of the rule of non-clarity from the Roman law rules of *ambiguitas contra stipulatorem* and *ambiguum pactum (ambigua lex) contra venditorem et locatorem* and its development to the general idea of *interpretatio contra proferentem* in the Roman law and the doctrine of *interpretatio contra eum qui clarius loqui debuisset* in the 18th and 19th century C. Krampe, Die Unklarheitenregel supra n. 80 at p. 11 and pp. 14 and 65.

case of doubt about the true construction of the contract.[82] The rule results from the fact that the user dictates his terms to the consumer; it is therefore up to him to express the terms in a sufficiently clear manner. The risk of invalidating a contract term due to uncertainty should not be borne by the consumer.[83]

The rule of non-clarity can only be invoked if the normal procedure of construing the contract terms cannot make its intended meaning sufficiently clear.[84] The normal procedure of construction (according to §§ 133, 157 BGB[85]) has to be based on the *Empfängerhorizont* , meaning the point of view of the party being addressed by the term.[86] The rule of non-clarity will only apply if, under the normal process of construction, the terms are judged to be ambiguous. This procedural sequence does not become apparent in all decisions, especially those prior to the enactment of the statute. The rule of

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[82] The rule of non-clarity is to be used differently if a court is asked to discontinue or revoke standard terms according to § 13 AGBG (See infra pp. 71, 72 on this procedure). Due to the preventive intention of this procedure the rule of non-clarity has to be reversed. An ambiguous standard term is to be interpreted in the way most **unfavourable** for the consumer. See with regard to this opinion of the majority of the legal community: Palandt - Heinrichs at § 5 Rdn. 4 b). Soergel-Ursula Stein at § 5 Rdn. 17 notes the majority opinion, but does not approve. The author wants to apply the rule of non-clarity to the procedure in § 13 AGBG in the usual way. But there might be a different understanding necessary of what is a favourable interpretation of a term for the consumer. T. Honsell, "Zweifel bei der Auslegung Allgemeiner Geschäftsbedingungen gehen zu Lasten des Verwenders" (1985) 17 Juristische Arbeitsblätter JA 264 notes that the majority opinion is at least misleading.

[83] T. Sambuc, "Unklarheitenregel und enge Auslegung von AGB" (1981) 34 NJW 313 at 314 remarks that the user has to bear the risk of unsolvable difficulties of understanding the meaning of a contract term.

[84] Soergel-Ursula Stein at § 5 Rdn. 1; T. Honsell, "Zweifel bei der Auslegung Allgemeiner Geschäftsbedingungen gehen zu Lasten des Verwenders" supra n. 82 at 261; BGH, Urt.v. 11.4.1984 in BGHZ 91, 98 , 103 = NJW 1984, 1818, 1819.

[85] BGB is the abbreviation for *Bürgerliches Gesetzbuch*, the German Civil Code. The statute can be found in Schönfelder Collection of Statutes.

[86] See with regard to *Empfängerhorizont* or an objective standard of interpretation: Palandt-Heinrichs at § 5 Anm. 3; Soergel-Ursula Stein at § 5 Rdn. 6, 7.

non-clarity will often be used without acknowledging a preceding "normal" interpretation.[87]

The rule of non-clarity provides an answer only to the question of the content of a clause that has been integrated into the contract.[88] It is not to be used to test the content of the clause with regard to its fairness and reasonableness. This test has to be reserved for the procedure described in §§ 8-11 AGBG.[89]

(d) Treatment of not integrated or invalid contract terms

Standard terms which are not entirely or partially incorporated into the contract (according to §§ 2, 3, 5 AGBG) do not render the whole contract invalid. § 6 AGBG rules that the term which is not integrated will be excluded from the contract and replaced by equivalent rules from the Civil Code BGB. In case of a sales contract, the user of a standard form might have intended to exclude his liability for the breach of a warranty. If the user attempts to accomplish this by using, for example, a "surprising" term, this term does not become a valid part of the contract (according to §§ 3 and 6 AGBG) and therefore the normally applicable rule of liability for the breach of a warranty under the Civil Code

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[87] E. von Hippel, Verbraucherschutz supra n. 17 at 123; P. J. Witte, Inhaltskontrolle und deren Rechtsfolgen im System der Überprüfung Allgemeiner Geschäftsbedingungen supra n. 71 at 22 describing the practice prior to the AGB-statute; T. Sambuc, "Unklarheitenregel und enge Auslegung von AGB" supra n. 83 at 314, 315 states that with the AGB-statute in place a covert control of content using § 5 AGBG would be a disadvantage to the consumer as it prohibits the application of the procedural innovations of the AGB-statute (§ 10, 11 and 9 in connection with § 13 AGBG)

[88] T. Sambuc, "Unklarheitenregel und enge Auslegung von AGB" supra n. 83 at 314 emphasizes that the rule of non-clarity does not provide for the invalidity of a contract term but asks to find the most favourable meaning with regard to the consumer.

[89] Palandt- Heinrichs at § 5 Anm. 4 a).

applies. Generally speaking the contract rules of the Civil Code can, as an expression of the principle of freedom of contract, be disposed of and replaced by different rules.[90] The AGB-statute limits this possibility. If a standard term is not in accordance with the AGB-statute, for example because it is not properly incorporated, it will be replaced by the applicable Civil Code rule (for example, the implied warranty rule). A problem arises[91] if the standard term does not have an equivalent in the Civil Code BGB; for example, a term in a lease with an option to purchase. In this case the gap in the contract terms has to be filled according to the principle called *ergänzende Vertragsauslegung*, meaning that the contract has to be construed with special attention to the general understanding of the type of contract in question.[92]

In order to give a complete description of the rule of § 6 AGBG it is important to note that the rule applies not only if a term is not properly integrated into the contract but also if a standard term has to be judged as "invalid" according to the rules governing the test of content (§§ 8-11 AGBG) which will be discussed in the following sections of this thesis.

The rule of § 6 AGBG, concerning the legal consequences to non-incorporated and invalid terms was necessary because the general Civil Code principle rules a contract which is partially invalid as being **entirely** invalid

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[90] There are of course exceptions to the general permission of substituting Civil Code contract rules. For example, § 276 II BGB states that the liability for intentional wrong-doing cannot be excluded. This regulation applies to contractual relations and cannot be substituted by a contractual term excluding such liability.

[91] N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 331 note that new questions are created by § 6 AGBG.

[92] Palandt-Heinrichs at § 6 Anm. 3 notes § 157 BGB and §§ 242, 315 BGB being applicable; H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 137. See with regard to the principle of *ergänzende Vertragsauslegung*: P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" supra n. 48 at 458.

(§ 139 BGB). This general rule would not suit the interests and need for protection of a person confronted by a standard form contract.[93] If the entire contract were invalid, the user of terms not permitted according to the AGB-statute would be free of all contractual responsibilities, leaving the person to be protected from unfair terms with no contractual rights.

The rule of § 6 AGBG provides for an exception, which allows the entire contract to be declared invalid if the above described procedure would cause an unreasonable hardship for any one of the contracting parties (§ 6 III AGBG). An unreasonable hardship for the consumer may exist, for example, if most of the clauses of the contract are invalid, thus creating uncertainty about the respective rights and obligations of the parties.[94]

A further problem arises if a clause states that the user will not be responsible for negligent acts. The AGB-statute allows the exclusion of "simple" negligence only, as opposed to deliberate and grossly negligent acts (§ 11 No. 7 AGBG). It is not clear whether a clause which excludes the user's liability for negligent acts would be entirely invalid, leaving the user responsible for deliberate, grossly and "simply" negligent acts; or whether it would have to be read as excluding the user's responsibility for "simply" negligent acts, but leaving him with the responsibility for deliberate and grossly negligent acts.

The problem above is an example of "reducing" an invalid clause to a valid "smaller version" - *gestaltungserhaltende Reduktion*.[95] The majority of the legal community does not approve of a reduction of an invalid clause to its

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[93] Palandt-Heinrichs § 6 Anm. 1.

[94] Palandt-Heinrichs § 6 Anm. 4 b).

[95] A common law equivalent to the *gestaltungserhaltende Reduktion* can be seen in the process of "reading down" a wide exclusion clause.

underlying valid core.[96] They reason that the user should not be encouraged to choose a clause with a wide range of application and trust the courts to cut it down to its valid core, because the user might rely on many cases never being litigated.[97]

3. TEST OF FAIRNESS APPLIED TO THE CONTENT OF A STANDARD FORM CONTRACT

The rules regulating the incorporation of standard terms into the contract have lost some of their importance because of other rules which regulate the content of clauses.[98] The AGB-statute limits the freedom of the user of standard form contracts to employ the contractual terms of his or her choice by submitting the content of these terms to a test of fairness - *Inhaltskontrolle* . The limiting regulations (§§ 8-11 AGBG) form the heart of the AGB-statute[99].

The test of content only applies to standard terms which deviate from or supplement a regulation included in the Civil Code BGB (§ 8 AGBG). This limitation to the scope of the test was necessary for constitutional[100] and economic reasons, in order to prevent courts from applying principles of fairness to the price of the goods or services offered in the contract.[101]

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[96] H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 137; Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 35; J. Schmidt-Salzer, "Das Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen" supra n. 45 at 140; P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" supra n. 48 at 458.

[97] Soergel-Ursula Stein at § 6 Rdn. 1.

[98] P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" supra n. 48 at 452.

[99] H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 134; Soergel-Ursula Stein at Vor § 8 Rdn. 1 notes that these regulations are to be seen as a compensation to the consumer for the inequality of freedom of contract with regard to the user of a standard form contract.

[100] Soergel-Ursula Stein at § 8 Rdn. 1 noting also economic reasons.

[101] Palandt Heinrichs at § 8 Anm. 1.

The statute provides these tools to perform a test of content:

- A catalogue of clauses that are invalid without any evaluation of their content (§ 11 AGBG).

- A catalogue of clauses that may be invalid after an evaluation of their content (§ 10 AGBG).

- A general principle permitting a comprehensive test of fairness (§ 9 AGBG).

The description of the test of content will follow the order prescribed by the law[102], even though it seems to be confusing to proceed from § 11 to § 10 to § 9, and within the latter from § 9 II to § 9 I AGBG.[103]

The extensive catalogues of clauses in §§ 10 and 11 AGBG were selected as a result of the experience with standard form contracts prior to the enactment of the AGB-statute. They try to cover the clauses which were frequently used to abuse the freedom of contract of the consumer, or were likely to do so.[104] It would, of course, be impossible for the catalogues to include every standard term considered to be unfair.[105]

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[102] This order is generally followed, but it may not become obvious in every case. Due to the special nature of the case some portions of the procedure may not be mentioned. For example, the clause in question may not fit any clause included in the catalogues.

[103] See supra p. 30 regarding some deficiencies in the composition of the AGB-statute.

[104] Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 22 notes that the catalogues summarize the court decision practice prior to the AGB-statute as well as include even stricter new restrictions; E. von Hippel, Verbraucherschutz supra n. 17 at 125; H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 138.

[105] H. Brox, Allgemeines Schuldrecht supra n. 35 at 33; Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 38 suspects that the number of clauses used that are not included into the catalogues is higher than the number included. This may be caused by the users avoiding the clauses listed in the catalogues, thus giving more importance to the general principle of § 9 AGBG.

For the purpose of this thesis it will not be necessary or even possible to analyse every item in the extensive catalogues, plus all the cases[106] and academic articles available. A few items from the catalogues will be selected to show the operation of the "test of content". Some cases, chosen because they are comparable to some of the Canadian cases, will be used as illustrations.

(a) Clauses invalid without any evaluation of their content

The usage of any clause listed in the catalogue of § 11 AGBG is absolutely forbidden; they are invalid whenever they are used in any standard form contract. The headings of the sixteen numbers of the catalogue[107] indicate the wide range of clauses which are considered "most dangerous".

Clause No. 5, which deals with liquidated damages, will serve as an example from the catalogue of § 11 AGBG. According to this regulation, liquidated damages or damages caused by a reduction in value, which are claimed by the user, are invalid if ...

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[106] P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" supra n. 48 at 450 states that more than 2000 case decisions have been published since the AGB-statute came into force.

[107] The headings are included in the complete translation of the statute, provided in an appendix to this thesis. The headings are, however, "unofficial" because they are put into the statute by the publisher without being part of the official and legitimate version of the statute. See H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 138 giving short explanations to each number; N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 294-297.

- the amount of liquidated damages exceeds the damage that would normally be expected in comparable cases or exceeds the normal reduction in value... or...
- the other party is not allowed to prove that damage or reduction in value has not occurred or is much smaller than the set amount of liquidated damages.

Clauses which provide for liquidated damages were very prevalent in the 1970's. Acknowledging their advantages, the AGB-statute was not intended to abolish these clauses, but it was designed to eliminate their unfair usage.[108] A clause which provides for liquidated damages is obviously advantageous for the user of a standard form contract as it aids his risk allocation. But it also has advantages for the consumer, who can make a quick judgement with regard to the consequences of terminating the contract; for example, he can decide whether or not to take court action.[109]

The following case, which concerns a flight cancellation[110], illustrates the application of § 11 No. 5 AGBG.

On June 9, 1981 the defendant bought four airline tickets, for herself and her family for a flight on August 12, 1981. The defendant, due to an illness, had to cancel the flight on July 27, 1981. Two of the cancelled tickets could be sold; the remaining two could not.[111] The plaintiff asked for the payment of

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[108] Coester-Waltjen in Schlosser/ Coester-Waltjen/ Graba at § 11 No. 5 Rdn. 32.

[109] Staudinger-Schlosser at § 11 No. 5 Rdn. 1.

[110] BGH, Urt.v. 25.10.1984 in 38 NJW (1985) at 633, 634.

[111] Even though they were eligible for special regulations that made it possible to sell up to 15 % of the tickets on a stand-by basis.

3188 DM[112], approximately the price of two tickets. The standard form contract agreed to by the defendant stated:

> ... In cases of cancellation the customer has to pay a deductible for the costs incurred by the plaintiff...
> - of 50 DM[113] up to the deadline for cancellation July 17, 1981 ...
> - of 100 % of the ticket price after the deadline for cancellation ...

The trial and the first appeal[114] court ruled the clause to be invalid; the *Bundesgerichtshof*[115] affirmed the decision. It held that a clause asking for a deductible of 100 % of the ticket price contravened the principle of good faith expressed in § 9 AGBG because it was not in accordance with the respective rules of the Civil Code BGB. These rules[116] state the principle of *Vorteilsausgleichung* , meaning that in case of a cancellation the interests of the business and the customer have to be balanced. The business can only ask for a reimbursement of the expenses incurred up to the cancellation date.

The *Bundesgerichtshof* specifically found that there was a contra-vention of two of the clauses catalogued in the AGB-statute. The contract clause in question did not expressly exclude the customer's right to prove that the cancellation expenses incurred by the business are smaller than the ticket price, but such a meaning is obvious and intended[117]. According to § 11 No. 5 b AGBG, a clause is invalid if it assesses an amount of liquidated

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[112] This was approx. $ 1450 CDN in 1984.

[113] This was approx. $ 23 CDN in 1984.

[114] The writer uses this expression to describe *Berufung* - an appeal procedure in the German Code of Civil Procedure ZPO, § 511-§ 544 ZPO. The procedure of *Berufung* has to be distinguished from the procedure of *Revision*, regulated in § 545-§ 566a ZPO.

[115] This is the highest court for civil matters, but -in limited cases- there is still the possibility to take the case to the Supreme Constitutional Court - the *Bundesverfassungsgericht.*

[116] The principle of § 645 I BGB in case of cancellation due to illness and § 649, 2 BGB in case of cancellation due to other reasons without the customer being responsible for them.

[117] See Wolf in Wolf/ Horn/ Lindacher at § 11 No. 5 Rdn. 28.

damages but excludes the right to prove a substantially lower actual damage. According to § 10 No. 7 b AGBG a clause can be invalid if a party withdrawing from a contract is ordered to pay an unreasonably high reimbursement of expenses to the other party. The *Bundesgerichtshof* judged the clause in question to be unreasonable because it allowed the business to collect the full ticket price in cases of a cancellation after the deadline; a reduction, acknowledging the customer's interests, was not possible.

In concluding this case it has to be noted that the *Bundesgerichtshof*[118] agreed to apply the element of an unrestricted right to prove that a smaller amount of loss had been suffered (included in § 11 No. 5 b AGBG, regulating liquidated damages) to § 10 No. 7 AGBG, which deals with the termination of contracts. The court justified its decision by stating, that in both instances the customer is in need of protection from clauses curtailing his rights.

(b) Clauses that may be invalid after evaluation of their content

In contrast to the clauses in § 11 AGBG, the usage of clauses listed in the catalogue of § 10 AGBG is not strictly forbidden. Each individual clause has to be evaluated and it has to be determined whether the clause in question is fair and reasonable. § 10 No. 4 AGBG, which concerns the reservation of the right to change the agreed upon obligation, is selected as an example from the catalogue[119].

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[118] BGH, Urt.v. 25.10.1984 in 38 NJW (1985) at 634.

[119] The "unofficial" headings (see supra p. 54 footnote 107) to the eight numbers of the catalogue provide an impression of the clauses listed. See the appendix to this thesis for a complete translation of the catalogue. See H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 139 giving short explanations to each number of the catalogue; N. Reich and

footnote continued on next page

A clause can be judged invalid if the user of a standard form contract reserves the right to change the obligation or not to fulfil his obligation at all. The clause will be judged invalid if the other party cannot reasonably be subjected to such treatment. In any case, the interests of both parties have to be considered.

The following case involving the conditions of transportation of the German national airline *Lufthansa* [120] serves as an illustration to the application of § 10 No. 4 AGBG. Because of the complexity of the contract in question, the decision also had to deal with a number of other sections of § 10 and § 11 AGBG and the following description will include some of the other aspects of the decision in order to reflect its impact and importance.

The plaintiff, a consumer protection agency, applied for a court order under § 13 AGBG[121] requiring the defendant *Lufthansa* to discontinue the usage of the standard terms included in their contracts of air transportation. The trial and the first appeal court ruled that most of the clauses in question[122] were not in accordance with the AGB-statute. The *Bundesgerichtshof* concluded that all clauses in question were invalid and not to be used by the defendant in the future.

H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 292, 293.

[120] BGH, Urt.v. 20.1.1983 in BGHZ 86, 294 = 23 NJW (1983) at 1322.

[121] See infra pp. 71, 72 for more details on the procedure according to § 13 AGBG.

[122] These are 5 out of 6 clauses. See for details the portion of the judgement called "Zum Sachverhalt" in BGH, Urt.v. 20.1.1983 in BGHZ 86, 294 = 23 NJW (1983) at 1322, 1323. P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" supra n. 48 at 450 mentioning that more than 20 clauses, being part of the *Lufthansa* contract, were held to be unusable in the future.

One clause included in the transportation contract stated:

> ... without prior notice, the defendant can unilaterally change flight schedules, switch an airport scheduled for a stop-over, ask the customer to travel with another airline or travel on a different airplane if all this is necessary according to the circumstances.

The *Bundesgerichtshof* ruled that this clause contravened § 10 No. 4 AGBG because it did not consider the interests of the customer who deliberately chose a specific travel route, a specific airline or a specific type of airplane for transportation. In order for a clause to comply with § 10 No. 4 AGBG, it was not sufficient that exceptions take effect only if "necessary according to the circumstances". Unilateral changes, such as those above, were a significant change from the service contract. While considering the interests of the defendant, the customer was not obligated to agree to these changes.[123]

The transportation contract further included a clause that gave the defendant the right

> ... to change or cancel a flight without prior notice if this is necessary according to the circumstances... .

This clause was held to be in contravention of § 10 No. 3 AGBG. The clause did not state the conditions for the change or cancellation of a flight which would enable the customer to know in advance when a flight might be changed or cancelled; the customer would then have been able to judge these

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[123] R. Schmid, "Der Wechsel der Fluggesellschaft - ein Reisemangel?" (1986) 22 Betriebs-Berater BB 1453 at 1455 especially notes what passengers can do if they are supposed to fly with another than the contracted for airline.

conditions according to their reasonableness. The statement that the defendant would only act "if this is necessary according to the circumstances" was not a sufficient statement of conditions. The clause was also held to be in contravention of § 10 No. 4 AGBG because there was no basis for evaluating whether the modification of the contract by the defendant was reasonable with regard to the customer.[124]

Another clause included in the transportation contract read:

> ... the flight schedules - noted in the flight ticket and in the flight schedule - are not included in the contract ... they are in no way guaranteed by the airline ... the airline is not responsible for customers catching connecting flights...

This clause was invalid because it contravened § 11 No. 8 b AGBG. The customer may deliberately choose a certain flight in order to catch a connecting flight. By providing a flight schedule, the defendant expresses that it wants to give transportation to the customer at a specific time. It was therefore the defendants' contractual responsibility to fulfil the customer's expectations with regard to the flight schedule. The defendant did not have to guarantee that the consumer would catch a connecting flight, because the character of air travel makes this impossible, but the defendant could not exclude its liability for damages incurred by the customer because of a change in the flight schedule for which the defendant could be held responsible.

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[124] According to *Oberlandesgericht* OLG Hamburg, Urt. v. 26.3.1986 in 23 NJW - Rechtsprechungs-Report Zivilrecht NJW - RR (1986) at 1440 a clause similar to the above is only valid if important and specified reasons are given to justify a modification of the contract.

The following should be noted to emphasize the importance given to the AGB-statute by the *Bundesgerichtshof*. *Lufthansa* had asked to be allowed to use up its old tickets, but the *Bundesgerichtshof* stated that there could be no period of grace. The intent of the AGB-statute is to prohibit the use of invalid standard form contracts. This intention would be neglected if the defendant would be allowed to use tickets - even for a transition period - which included invalid clauses. The defendant could be expected to change the already existing tickets by adding a notice that the above clauses were invalid.

(c) General test of content[125]

The codification of the general principle permitting a test of content in § 9 AGBG consists of two parts.[126] There is the general statement, that standard terms are invalid if they are unreasonably disadvantageous to the consumer and are in contravention of the principle of good faith (§ 9 I AGBG). This statement is followed by a more detailed description of what is considered to be unreasonable. A standard term is further assumed to be unfair if it is not in harmony with the essential principles of the applicable Civil Code BGB regulation (§ 9 II No. 1 AGBG) or if it limits essential rights or duties arising from the nature of the contract and if it jeopardizes the achievement of the purpose of the contract (§ 9 II No. 2 AGBG).

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[125] M. Wolf, "Freizeichnungsverbote für leichte Fahrlässigkeit in Allgemeinen Geschäftsbedingungen" (1980) 33 NJW 2433 at 2437 with regard to the balance of interests in order to perform the test. Soergel-Ursula Stein at § 9 Rdn. 9-12 noting general aspects of the test, Rdn. 13-20 with regard to the balance of interests and Rdn. 21-30 providing special aspects for the test of content.

[126] N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 290.

With regard to the incorporation of the general test of content included in § 9 AGBG, the legislative proposal by the cabinet noted the following: Although extensive, the catalogues of § 10 and § 11 AGBG do not cover every possible term of a standard form contract. The inclusion of a general test of content such as § 9 AGBG was necessary to provide a regulation that could cover every possible term. The regulation of § 9 AGBG is a formalization of the standards already in use by the courts for deciding the reasonableness of standard terms. A legislative regulation was considered to be necessary because it was becoming increasingly difficult to monitor the numerous and often contradictory court decisions. The courts further relied on the element of reasonableness, but they used it in many different and often contradictory ways. The lack of legislation might have influenced the use of standard forms to the point where they had become understood by the general public as being almost without limitation. The inclusion of a general test of content eliminates the abusive dominance of one-sided interests. It also emphasizes that the content of a standard form contract has to be tested for a reasonable balance of the interests of **both** contracting parties.[127]

The general principle expressed in § 9 AGBG applies only if the clause in question does not fall into the catalogues set out in § 10 and § 11 AGBG, with one important exception. Only the general principle applies in relation to merchants[128], although the usages and practices of the business community

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[127] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/ 3919 at 22. The above paragraph is a translation of content, not a literal one. Another reason for the *Generalklausel* (general principle) of § 9 AGBG being necessary is noted by H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 137: A general principle was necessary because of the broad definition of standard form contracts provided in § 1 I AGBG.

[128] § 24, 1 No. 1 AGBG excludes the application of the catalogues of § 10 and § 11 AGBG to standard form contracts which are presented to a merchant.

which may be expressed in the catalogues are to be appropriately considered.[129] The freezer warehouse - *Kaltlager* - case[130] serves to illustrate these unnecessarily complicated regulations[131].

The plaintiff and the defendant were both merchants[132] who had been in business contact for over seven years. The defendant ran a freezer warehouse for food and the plaintiff rented space therein to store frozen meat. The meat was partially spoiled due to inadequate temperature levels caused by the grossly negligent actions of the defendant's employees. The meat could only be sold at reduced prices. The defendant attempted to limit its damage payment (approx. 6000 DM[133]) under the following standard terms of the contract:

> ... the freezer warehouse company is only liable for damages caused by intentional or grossly negligent actions ... of its employees.
>
> ... damages are limited to six times the highest amount of rent paid during the last six months or ... if the defendant provides additional services (other than renting the warehouse space), damages are limited to six times the amount of compensation paid for the service rendered at the time the damage occurred ...

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[129] According to § 24, 2 AGBG.

[130] BGH, Urt.v. 19.1.1984 in 23 NJW (1984) at 1350. See also a case commentary by H. Kötz, "Zur Wirksamkeit von Freizeichnungsklauseln" (1984) 37 NJW 2447, especially at 2248.

[131] J. Gres and D. J. Gerber, The German Law Governing Standard Business Conditions supra n. 3 at 13.

[132] See supra p. 38 footnote 42 with regard to the application of the AGB-statute to merchants.

[133] This was approx. $ 2750 CDN in 1984.

The plaintiff[134] asked for damages of approx. 9000 DM[135]. The trial court and the first appeal court judged the clause to be invalid; the *Bundesgerichtshof* confirmed the judgements. The court could not use the regulation of § 11 No. 7 AGBG according to which the liability for intentional[136] and grossly negligent actions of employees cannot be excluded, because § 24, 1 No. 1 AGBG does not permit the use of § 11 AGBG (or § 10 AGBG) for a contract concluded by merchants. However, the court found the clause invalid because it limited essential rights of the customer arising from the nature of the contract and jeopardized the achievement of the purpose of the contract (§ 9 II No. 2 AGBG). The defendant had contracted to freeze the customer's food and it was the defendant's responsibility to keep it frozen. If the defendant wanted to exclude its responsibility for intentional and grossly negligent actions of its employees[137] it could do so in an individually bargained for contract with the customer. He could not unilaterally limit its responsibility for damages as intended with the above clause. The customer would be seriously disadvantaged as he would have to settle for damages well below the ones to be expected if the freezer failure had occurred by means other than intentional or grossly negligent actions.

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[134] An insurance company which succeeded into the rights of the contracting party subjected to the standard form contract.

[135] This was approx. $ 4100 CDN in 1984.

[136] It has to be noted that § 11 No. 7 AGBG is based on an understanding of intentional action which differs from that found in the common law. Unlike an intentional tort in the common law where the intent has to be directed at the action of the tortfeasor, the intent according to § 276 BGB has to be directed at the damage to be caused (In common law the tortfeasor wants to pick up the rock; he wants it to hit the window. In German law the tortfeasor wants to pick up the rock; he wants it to hit the window and he knows and wants it to cause damage.).

[137] This is possible according to § 278, 2 BGB in accordance with § 276 II BGB.

The following cases, which involve a car rental contract, the purchase of a used car and a carpet cleaning contract further illustrate the general test of content included in § 9 AGBG.

(i) Case concerning a car rental[138]

The defendant rented a truck from the plaintiff, a car rental agency. Another person, who was allowed by the defendant to drive the truck, drove it off the road, damaging the truck. On the rental contract, in the space to indicate additional drivers, it was written: *keine* (none)

These standard terms were included in the contract:

No. 3: ... persons permitted to drive the rental car have to have a valid driver's licence ... and have to be listed in the rental agreement...

No. 11: ... in case of an accident the lessee will be liable for all damages to the car up to the amount of the repair costs ... . For an additional fee all liability of the customer will be excluded...

No. 12: ... the lessee will however be liable for damages even if an additional fee has been paid if the damage is caused by

a) an intentional or grossly negligent causation of the accident, or of damage to the car; if the car is driven while under the influence of alcohol or if the driver left the scene of the accident

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[138] BGH, Urt.v. 16.12.1981 in 35 NJW (1982) at 987. See K. Roussos, Freizeichnung von Schadensersatzansprüchen im Recht der Allgemeinen Geschäftsbedingungen (Ein Beitrag zur Bedeutung der Organisationspflichten im Zivilrecht Berlin 1981 veröffentlicht im Mai 1982 als vol. 31 der Berliner Juristischen Abhandlungen) with regard to the problem of extending exclusion clauses to persons who are not privy to the contract. The author describes the problem at 7 of the introduction. The problem is comparable to the one included in the so called "stevedore-cases": Scruttons v. Midland Silicones. [1962] A. C. 446, [1962] 1 All E. R. 1 (H.L.) and New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd. [1975] A. C. 154, [1974] 1 All E. R. 1015 (P. C.).

b) in contravention of term No. 3 of the standard form contract.

The plaintiff asked for all the damages which he incurred (6200 DM[139]) and based his claim on the fact that the driver causing the damage was not listed as an additional driver in the rental agreement. The trial court decided in favour of the defendant, the first appeal court reversed the decision, but the *Bundesgerichtshof* re-affirmed the trial court's decision. As the plaintiff did not claim that the driver acted grossly negligent, the *Bundesgerichtshof* could not scrutinize the case under § 11 No. 7 AGBG which states that a clause is invalid if it restricts or excludes liability based on the grossly negligent behaviour of the user of the standard form or the intentional or grossly negligent behaviour of an employee (*Erfüllungsgehilfe* [140]). But the *Bundesgerichtshof* ruled that clause No. 12 b) of the rental agreement is unreasonable and therefore invalid (§ 9 I AGBG). A car rental agency which promises a lessee that he will not be liable for any damages caused by an accident if he pays an additional fee comparable to an insurance premium, has to construe their contract according to the regulations applicable to the owner of a car who took out no-fault insurance.[141] According to these regulations[142] the use of a car by a third person with the permission of the owner is also insured. With payment of the additional fee, the lessee demonstrates to the agency that he does not want to bear a higher risk with regard to damages than the owner of a car who has

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[139] This was approx. $ 3300 CDN in 1981.

[140] *Erfüllungsgehilfe* has been translated as "employee" even though it means everybody to whom the contracting party has delegated any of his contractual duties; see for more details, especially with regard to definition problems in regard to who is a *Erfüllungsgehilfe*: Palandt-Heinrichs § 278 Anm 3.

[141] BGH, Urt.v. 19.6.1985 in 1 NJW RR (1986) at 51 notes that this way of construing the contract cannot be excluded by a term in the standard form contract saying so.

[142] Here especially § 2 II b AKB *Allgemeine Kraftfahrzeug Bedingungen* - General Conditions for the usage of Automobiles.

taken out no-fault insurance. If the liability of the lessee is excluded by payment of an additional fee, the driver of the car - a third person and not party to the contract[143] - cannot be held liable by the lessor.[144] If the lessor could collect damages from the driver, he in turn could hold the lessee liable[145] and thus destroy the effect intended by the additional payment of the lessee. Such circumvention has to be prevented in order to protect the lessee's confidence that he has purchased an equivalent to no-fault insurance.[146]

(ii) Case concerning the purchase of a used car[147]

A clause in a contract between a car dealer and a consumer stated that the car was "used and sold **as is,** excluding all warranties". This clause was judged to be reasonable (according to § 9 AGBG) after balancing the following interests of both contracting parties:

- It is always difficult to detect the deficiencies of a used car at the time of conclusion of the contract.

- It is difficult for the car dealer to appraise the accurate value and state of repair of a used car. It is therefore reasonable that he wants to eliminate

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[143] The Civil Code BGB in § 328 BGB allows a third party to be the beneficiary to a contract with an enforceable right of his/her own. The principle of privity is unknown.

[144] The lessor - when agreeing on the additional payment by the lessee - has given up his right to damages from the driver. The driver, if nevertheless asked or sued for damages by the lessor, can refuse payment for the above reasons.

[145] One possibility is the notion of *stillschweigender Haftungsausschluß aufgrund eines Gefälligkeitsverhältnisses,* which describes a relationship where one party is providing the other with a favour (for example giving somebody a free ride in a car) and where liability is excluded in a silent, not openly expressed way.

[146] A similar decision by *Oberlandesgericht* OLG Köln, Urt.v. 13.1.1982 in Entscheidungen der Oberlandesgerichte in Zivilsachen OLGZ (1982) at 371-375.

[147] BGH, Urt.v. 11.6.1979 in BGHZ 74, 383-393; MünchKomm/Ergänzung-Kötz at § 9 Anm. f.

the strict liability which normally applies to the sale of a car, by allocating the risk to the buyer.

• The buyer has to be familiar with this risk allocation.

• The dealer cannot exclude his liability for basic safety features[148] nor a complete cessation of the normally understood functions of the car. This liability applies only to conditions at the time of sale and does not have to extend beyond. [149]

(iii) Case concerning a carpet cleaning contract[150]

The defendant gave a valuable Persian rug to the plaintiff for dry-cleaning. Defendant and plaintiff[151] (both merchants) had been in business contact for several years. After the dry-cleaning process the rug showed stains and its edge was torn. The parties agreed that the plaintiff would re-clean and restore the rug, free of charge. The plaintiff's efforts failed, leaving the rug completely worthless. The plaintiff paid damages (approx. 640 DM[152]) under a liability clause included in his standard form contract which read in part:

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[148] These are prescribed and controlled according to Government Regulations.

[149] Idem at 386-389. Attention should be drawn to § 11 No. 10 b AGBG which sets limitations to the possibility of excluding warranties with regard to the purchase of **new** items and goods.

[150] BGH, Urt. v. 12.5.1980, BGHZ 77, 126 = Monatsschrift für Deutsches Recht MDR 1980, 838. The contract was concluded prior to AGB-statute being in force (§ 28 I AGBG), but it still can serve as an illustration, especially with regard to the decision of the *Landgericht* München, infra p. 70 in mind. MünchKomm/Ergänzung-Kötz at § 9 n states that if the clause is used in a contract with a consumer it is not valid if the notice that additional insurance can be purchased is hidden (and not read by the consumer) among the standard terms.

[151] This is just a simplified description of the case. No attention has been paid to details of procedure.

[152] This was approx. $ 400 CDN in 1980.

> If rugs are concerned we are liable for damages only up to 15 times of our service charge. ... With regard to our limited liability we recommend additional insurance if extremely valuable rugs ... are concerned.

The defendant asked for additional damages (in the amount of approximately 14,800 DM[153]), stating that the limitation clause was invalid.

The trial court and the first appeal court both ruled the clause valid. The *Bundesgerichtshof* confirmed the appeal. The court stressed that if a dry-cleaning business is at fault, it must pay for all damages incurred; the price charged for the service cannot be taken into account. In case of the dry-cleaning of a valuable item the business is allowed to limit its risk of incurring high damages by recommending additional insurance to the customer as well as making such insurance readily available. The business does not have to include the risk of damages to valuable items in its general price calculation, for this would make every customer pay for the risk of damage to valuable items. The business does not have to charge a higher price for valuable items, for it then would be paid by the customer to take on the higher risk. The recommendation and the supply of additional insurance provides the same effect to the customer but avoids possible problems such as a difficult evaluation of the item. If the evaluation is left to the customer he can choose not to estimate any value or choose not to take out additional insurance. The risk of damages to valuable items has to be born by the customer not the dry-cleaning business.

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[153] This was approx. $ 9500 CDN in 1980.

The *Landgericht* München[154] agreed with the above decision of the *Bundesgerichtshof*. In a comparable case the *Landgericht* München stressed that a dry-cleaning business, if at fault, is responsible for all damages typically caused by the dry-cleaning process. However, this court held a clause invalid (according to the general principle expressed in § 9 AGBG) which limited damages to an amount up to 15 times of the service charge. The clause in question could not limit the liability of the business that lost some items supplied for dry-cleaning, because the loss of items is not a typical risk of the dry-cleaning business, but a risk that the business has to bear (according to § 644 I BGB).

4. RULES OF PROCEDURE EXCLUSIVELY CONCERNING STANDARD FORM CONTRACTS

Despite the established importance of rules of procedure[155], none were originally to be included in the AGB-statute since an extensive future reform concerning the statute of civil procedure ZPO[156] was planned.[157] The rules of procedure were included as a last minute change to the proposed statute[158] but

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[154] *Landgericht* LG München I, Urt. v. 3.12.1980 in 35 Monatsschrift für Deutsches Recht MDR (1981) at 405.

[155] P. Reinel, Die Verbandsklage nach dem AGBG: Voraussetzungen, Entscheidungswirkungen und dogmatische Einordnung (in Erlanger Juristische Abhandlungen vol. 23 1979) at 21, 22.

[156] This stands for *Zivilprozeßordnung*. The statute can be found in Schönfelder Collection of Statutes.

[157] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/ 3919 at 62. Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 10 notes that the *Bundesrat* initiated the inclusion of rules of procedure.

[158] N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 316; Staudinger - Schlosser at Einl. Rdn. 11 e notes as a reason for the change the legislative proposal of the opposition - which included rules of procedure. During the enactment procedure, the AGB-statute was rejected by the *Bundesrat*. The problem was a disagreement on the jurisdiction of a *Oberlandesgericht* -court of appeal- to hear cases

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were criticized by the legal community[159] as not being well considered and integrated into the statute and therefore not presenting the best possible solution.

By including some rules of procedure, closely paralleling those of the statute against unfair competition (UWG)[160] and the statute concerning patents (PatG)[161], the legislature intended to ensure that *Breitenwirkung*, meaning a broad scope of effectiveness[162], was to be given to the test of content. Especially to achieve this goal, the following rules of procedure were included in the AGB-statute.

(a) Right of discontinuance and revocation

An important innovation to the area of standard form contracts[163] is the inclusion of a right of discontinuance and revocation into the AGB-statute (§ 13 AGBG). Anybody who uses or encourages others to use clauses that are ruled to be invalid according to §§ 9 -11 AGBG can be ordered by a court to

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involving the right of discontinuance and revocation. Following an adjustment in this matter the statute was finally passed, containing some rules of procedure. See Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 11.

159 P. Reinel, Die Verbandsklage nach dem AGBG supra n. 155 at 22 calling the action unnecessarily rushed. Ulmer/ Brandner/Hensen at Einl. vor § 13 Rdn. 17.

160 *Gesetz gegen unlauteren Wettbewerb*; the statute is included in Schönfelder Collection of Statutes.

161 *Patentgesetz*; the statute is included in Schönfelder Collection of Statutes.

162 Commenting on the slogan of *Breitenwirkung* or broad scope of effectiveness are: M. Dietlein, "Neues Kontrollverfahren für Allgemeine Geschäftsbedingungen?" (1974) 27 NJW 1065 and P. Reinel, Die Verbandsklage nach dem AGBG supra n. 155 at 7; J. Schmidt-Salzer, "Das Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen" supra n. 45 at 140 notes the resignation of the consumer with regard to unfair standard form contracts as a reason for the incorporation of § 13 into the AGB-statute; see supra pp. 16-18 giving reasons why the consumer rarely takes the user of a standard form contract to court. P. Schlosser, "Jura Repetitorium: Zivilrecht Allgemeine Geschäftsbedingungen" supra n. 69 at 442 remarks that § 13 AGBG helps to take unfair standard terms "out of circulation" prior to causing an individual conflict.

163 Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 23 marks it as the most important.

discontinue or not to encourage their usage in the future. An application for such a court order can only be brought forward

- by consumer protection agencies - *Verbraucherverbände* (§ 13 II No. 1 AGBG)[164],
- by agencies to further the development of commercial interests (§ 13 II No. 2 AGBG),
- or by chambers of commerce or chambers of craftsmen (§ 13 II No. 3 AGBG).

It must be noted that the right of discontinuance and revocation cannot be claimed for standard terms which are used against a merchant (§ 13 III AGBG).

An example of an application according to § 13 AGBG by a consumer protection agency can be found in the *Lufthansa*-case[165], where the court tested the fairness of many standard terms included in an airline ticket.

Even though the scope of this thesis does not allow a detailed discussion, a major dogmatic problem with regard to § 13 AGBG should be noted. The problem lies in the agency's right to take the user of a standard form contract to court. Does the agency have a right of its own or is it a right derived from the individual consumer or from all consumers?[166] The majority in the legal community seems to favour the opinion that the consumer agency has a procedural right of its own.[167]

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[164] See § 13 II No. 1 AGBG for a more detailed description; also N. Reich and H.-W. Micklitz, Verbraucherschutzrecht in der Bundesrepublik Deutschland supra n. 17 at 316 with more information with regard to the importance of consumer protection agencies.

[165] Supra p. 58 footnote 120.

[166] See with regard to this interesting question and its impact: P. Reinel, Die Verbandsklage nach dem AGBG supra n. 155 starting at 93.

[167] Idem at 148.

(b) Right to publish a court decision

In order to increase effectiveness, a certain amount of publicity for decisions under the AGB-statute is needed. The statute recognizes this necessity by installing a right to publish the court decision (§ 18 AGBG). The right of publication of the court decision is given to any successful applicant for a court order and, significantly, the defendant is responsible for the costs of publication (§ 18, 1 AGBG)[168]. However, the defendant only has to pay for a publication in the Federal Official Legal Journal[169], which is obviously not frequently read by consumers and thus does not have much impact on public awareness of invalid standard form contract terms.[170]

(c) Register for court decisions on standard form contracts

Pursuing the intention of making court decisions more public, the statute calls for a register to be kept at the Federal Cartel Office[171] (§ 20 AGBG). The court has to inform the Cartel Office of its decision and everybody has the right to consult this register (§ 20 IV 1 AGBG)[172] thus confirming the intended wide scope of court decisions. The rule is a start in the right direction, but the results are not as impressive as might have been expected.[173]

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168 Every plaintiff can publish the court's decision if he is willing to pay for it. See P. Reinel, Die Verbandsklage nach dem AGBG supra n. 155 at 67, 68.

169 That is the *Bundesanzeiger.*

170 P. Reinel, Die Verbandsklage nach dem AGBG supra n. 155 at 67 remarks that the consumer protection agencies will not have funds to publish decisions in other publications.

171 *Bundeskartellamt*, abbreviated as BKartA.

172 See § 20 IV 2 AGBG for further details about the information given upon request; Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 24 states that on April 30, 1983, 463 cases were listed in the register. Some cases are counted more than once since every decision will be listed; for example, the trial and appeal stage of the same case.

173 P. Reinel, Die Verbandsklage nach dem AGBG supra n. 155 at 69 and J. Crentzig, "Das AGB-Register beim Bundeskartellamt - Hilfe für die Praxis?" (1979) 32 NJW 20 note the

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(d) Expansion of the legal effect of a judgement

Apart from giving it publicity, the effectiveness of a judgement can further be increased by expanding its legal force. In general, a judgement has effect only between the parties to the trial.[174] The AGB-statute expands this rule by giving anybody, even if not a party to the original trial, the right to have the same or a similar standard form declared invalid on the basis of the previous judgement (§ 21 AGBG).

(e) Experience with the rules of procedure

The majority of claims are made by consumer protection agencies, but their financial capabilities are restricted.[175] This makes it questionable whether these agencies are "private" as understood by the statute, or if they come close to being public agencies, which excercise in effect an *ex post* administrative control of standard form contracts of a type that was rejected during the legislative debates concerning the AGB-statute.[176] Agencies to

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following shortcomings: • The decisions listed in the register do not reproduce the reasoning of the decisions. • Not all decisions are listed, in particular, any court action taken by an individual is not included. There are numerous suggestions for improvements especially from lawyers specializing in the field of standard form contracts. For example, J. Crentzig, "Das AGB-Register beim Bundeskartellamt - Hilfe für die Praxis?" suggests at 21: • The paragraph of the AGB-statute that forms the basis of the decision should be listed at the head of the decision. • The main industry where the standard term(s) in question are used or recommended should be noted. • There should be only one page for each case, combining the trial and possible appeal stages of the case. • The decisions should be stored in the data bank of JURIS at the Federal Ministry of Justice. • The publications should be expanded to include decisions not yet legally binding. • The value of the claim should be noted in every publication. D. Seiffert, "Gerichtliche Entscheidungspraxis in Verfahren nach § 13 AGBG Im Anschluß an Hennig/Jarre BB 1981, 1161" (1982) 37 Der Betriebs-Berater BB 464. T. Hardieck, "Die gerichtliche Entscheidungspraxis in Verfahren nach § 13 AGBG" (1979) 34 Der Betriebs-Berater BB 708.

[174] See with regard to the *Rechtskraftregelung*, for example, § 325 of the *Zivilprozeßordnung* ZPO, the statute of civil procedure.

[175] H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 140.

[176] Wolf in Wolf/Horn/Lindacher at Einl. Anm. 26; P. Schlosser, "Entwicklungstendenzen im Recht der Allgemeinen Geschäftsbedingungen" supra n. 48 at 450 notes that one consumer

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further the development of commercial interests will hardly ever bring forward a claim.[177]

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protection agency - the *Berliner Verbraucherverein* - is financed almost 100 % by the Federal Government, receiving in excess of one million DM (approx. $ 800,000) per year. M. Rehbinder, Allgemeine Geschäftsbedingungen und die Kontrolle ihres Inhalts (1972) at 43 doubts whether consumer protection agencies can really be industry independent.

[177] Wolf in Wolf/ Horn/ Lindacher at Einl. Anm. 25; H.-D. Hensen, "Das AGB-Gesetz" supra n. 27 at 140 blames the double role these agencies would have to play while providing standard form contracts and then bringing them to court.

CHAPTER THREE

TECHNIQUES USED IN COMMON LAW IN CANADA TO DEAL WITH STANDARD FORM CONSUMER CONTRACTS

A. INTRODUCTION

The Canadian common law[1] does not use a specific body of law to deal with standard form consumer contracts. It applies the rules of general contract law and there does not seem to be a single distinctive or easily recognizable technique which is used to deal with unfair terms included in standard form consumer contracts.

A standard form contract, just like any other contract, is subject to the application of all contractual rules. This chapter will therefore not deal with standard form contracts which are unenforceable due to a missing element which is essential for the validity of every contract. For example, if a term in a standard form contract can be judged as being uncertain, as well as potentially unfair to the consumer, it is unenforceable already according to the requirement that a contract term has to be certain.

This chapter will not discuss the principle of privity and its application by the common law to deal with unfairness in standard form contracts. The principle, which is not known in German law[2], means that only a person who gave consideration (again an element of a contract not known in German law)

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1 Legisiative changes that have been implemented in Alberta, for example, the Alberta Unfair Trade Practices Act (R. S. A. 1980, c. U-3) will not be analyzed.

2 The closest comparison - and a clear opposite to the principle of privity - is a contract for the benefit of a third person, *Vertrag zugunsten Dritter.* See supra p. 67 footnote 143.

can be a party to the contract and only a contracting party can have an enforceable right flowing from this contract. It is controversial whether a person who is not party to a contract can nevertheless rely and be protected by an exemption clause or a clause limiting liability.[3] This chapter will not attempt to answer this question because the unique problems of privity and consideration provide too wide a range of possible comparison with the German system.

This chapter will not try to give an exhaustive account of all cases, case commentaries and academic journal articles dealing with standard form consumer contracts. The extent of material available demands a more focused approach.

This chapter will not restrict itself to an analysis of exclusion or exemption clauses, even though the topic of standard form contracts is often dealt with as if it involved only exclusion clauses. A distinction between standard form terms in general and exclusion clauses in particular, which is common in the German law, is rarely made in common law.[4]

This chapter will analyse some cases which involve a commercial standard form contract rather than a standard form consumer contract. This approach is necessary because not every case supplies sufficient information to identify the type of contract in question. An exact description of the techniques employed by the common law would be incomplete without an

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[3] For example, the "stevedore cases" Scruttons v. Midland Silicones [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.) and New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. [1975] A.C. 154, [1974] 1 All E.R. 1015 (P.C.). Also Mida Electronic Inc. v. Mitsui O.S.K. Lines Ltd. (1981) 124 D.L.R. (3d) 33 (Fed. C.A.).

[4] W. Schlochtermeyer, Das Recht der Allgemeinen Geschäftsbedingungen in Kanada (1985) at 11.

analysis of these techniques, even though they may not necessarily be applied to a standard form consumer contract.

This chapter will provide a detailed description of techniques used to deal with unfair terms included in standard form consumer contracts. It will analyse the rule of construction or interpretation including the *contra proferentem* and the parol evidence rule. It will look at the theory of fundamental breach, followed by the theories of inequality of bargaining power and unconscionability. The chapter will end with a brief description and evaluation of the theory of an articulate notice, the Plain English movement and the expectation theory.

B. RULE OF CONSTRUCTION OR INTERPRETATION TECHNIQUE

I. GENERAL DESCRIPTION

The writer found that the major technique for dealing with unfair terms in consumer standard form contracts is the rule of construction to which contracts in general and standard form contracts in particular are to be subjected.

The rule of construction[5] or interpretation technique requires that a contract be interpreted where its meaning is not clear in order to find its true meaning.[6] Based on the principle of freedom of contract[7] a court cannot make a

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5 Using this term is, for example: G. H. Treitel, The Law of Contract (6th ed. 1983) at 176.

6 S. M. Waddams, The Law of Contracts (2nd ed. 1984) at 351: "The court's only power and duty was to determine the true meaning of the agreement and enforce it.".

7 On the principle of freedom of contract and its effect on standard form consumer contracts: supra pp. 21-24.

contract for the parties or rewrite it; its only function is the interpretation of the parties' agreement.[8]

The rule of construction emphasizes that it is not the task of the courts to rewrite a contract. The meaning of the words in a contract is to be interpreted according to the intention of the parties when they included the terms in the contract.[9] If the terms are unambiguous they must be given their literal meaning.[10] "...[W]ords must be given their plain, ordinary meaning, at least unless to do so would result in absurdity. That is what the parties are presumed to have intended by the words that they used."[11]

2. RULE OF CONSTRUCTION WITH REGARD TO STANDARD FORM CONTRACTS

The importance of the rule of construction with regard to standard form contracts was stressed in Photo Production Ltd. v. Securicor Transport Ltd.[12], decided by the House of Lords in 1980. This case concerned a contract between the parties by which a security service agreed to provide their night patrol service for a small weekly charge. A watchman, employed by the security

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8 F. Kessler, "Contracts of Adhesion" (1943) 43 Col. L. Rev. 629 at 633. McGillivray C. J. A. notes in the case of Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd. (1983) 44 A. R. 67 (C. A.) (infra p. 92) at 75: "The court does not make contracts for the parties. The court is not to impose its idea of fairness and interpret the plain wording of a contract to give it a meaning other than that which the language can bear because a court thinks that this could be a fair method of handling the matter.".

9 G. H. Fridman, The Law of Contract in Canada (2nd ed. 1986) at 443 describing the intention of the parties as the "paramount test".

10 Idem at 441.

11 Idem at 442.

12 [1978] 3 All E.R. 146, reversed [1980] A.C. 827, [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556 (H.L.).

service, deliberately[13] started a fire which caused part of the factory premises to burn down.

A clause of the standard form contract between the owner of the factory and Securicor stated:

> Under no circumstances shall the company [Securicor] be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event shall the company be held responsible for (a) any loss suffered by the customer through burglary, theft, fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment. ...[14]

The main issue of the case was whether the above exclusion clause could exclude Securicor's liability for the damage caused by the fire set by its employee.

The trial judge found that Securicor's liability was excluded or limited by the above clause. The Court of Appeal came to the opposite decision relying on the doctrine of fundamental breach[15].

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[13] Photo Production Ltd. v. Securicor Transport Ltd. [1980] 2 W. L. R. 283 at 286. It could however not be established that he "deliberately burnt or intended to burn the ... factory". Lord Wilberforce cited the findings of the Court of Appeal: " Whether ... [the employee] intended to light only a small fire (which was the very least he meant to do) or whether he intended to cause much more serious damage, and in either case, what was the reason for his act, are mysteries I am unable to solve." The court seems to be distinguishing between the small fire that was deliberately set and the larger fire that resulted. This distinction makes it very difficult for the writer to understand whether the House of Lords based its decision on a deliberate or a negligent action of the employee. The writer cannot see the decision being based on a negligent action of the employee as it does not scrutinize the part of the exclusion clause which states that: "... the company shall be held responsible for ... any loss suffered by the customer [if the] loss is solely attributable to the negligence of the company's employees acting within the course of their employment. ...". The application of this part of the exclusion clause would probably have resulted in Securior's liability for all the damages caused by the fire.

[14] Idem at 286.

[15] Infra pp. 97-105.

In the House of Lords, Lord Wilberforce noted that Securicor was in breach of its contractual duty; it had to provide a service and there "must be implied an obligation to use due care in selecting their patrolmen, ... and ... to operate the service with due and proper regard to the safety and security of the premises"[16]. Securicor's liability for failing to discharge this obligation was excluded by the clause set out above. The clause "is drafted in strong terms [using the terms] 'Under no circumstances' [and] 'any injurious act or default by any employee'. These words have to be approached with the aid of the cardinal rules of construction that they must be read *contra proferentem* and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary."[17] Lord Wilberforce concludes that "these words are clear".[18]

Lord Diplock emphasizes in his judgement that

> A basic principle of the common law of contract ... is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do so, the statement is determinative;[19]
>
> Since the presumption is that the parties[,] by entering into the contract[,] intended to accept the implied obligations[,] exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. ... the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the

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[16] Photo Production Ltd. v. Securicor Transport Ltd. supra n. 13 at 291, 292. More on the *contra proferentem* rule infra pp. 91-96.

[17] Idem at 292.

[18] Idem.

[19] Idem at 294.

> exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only.[20]

While judging the facts of the case at hand Lord Diplock states that one consideration is the question of who should take out insurance for the risk of fire at the factory.

> The risk that a servant of Securicor would damage or destroy the factory or steal goods from it, despite the exercise of all reasonable diligence by Securicor to prevent it, is ...something which reasonable diligence of neither party to the contract can prevent. Either party can insure against it. It is generally more economical for the person by whom the loss will be directly sustained to do so rather than that it should be covered by the other party by liability insurance.[21]

Lord Salmon says in his judgement that

> There can be no doubt that but for the clause in the contract .... Securicor would have been liable for the damage which was caused by their servant ... whilst indubitably acting in the course of his employment ... . To my mind, however, the words of the clause are so crystal clear that they obviously relieve Securicor from what would otherwise have been their liability for the damage caused ...[22].

The case emphasizes the importance given to the rule of construction with regard to standard form contracts. It shows as well the problems involved while finding the "crystal clear" meaning of a contract term. Is it really "indubitable" that the employee was acting within the course of his employment when he deliberately set the fire? Is a deliberate act - as opposed to a negligent action - covered by the "crystal clear" words of the exclusion clause which holds the company responsible for a fire caused solely by the negligence of its employees acting within the course of their employment? The clause does not express anything with regard to deliberate actions. Do these really fall under

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[20] Idem at 296.
[21] Idem at 296, 297.
[22] Idem at 297.

the expressions that the company shall not be held responsible "in any event ... under no circumstances ..." ?

A sufficiently clear contract clause excluded the employer's liability for the action of an employee who deliberately caused damage to the other party's property. Applying the same clause the court would probably not have excluded the employer's liability if the employee's action had been negligent. The exclusion clause stated that "... the company shall be held responsible for ... any loss suffered by the customer [if the] loss is solely attributable to the negligence of the company's employees acting within the course of their employment. ..."[23]. If the employee's action had been seen as falling within the course of his employment, the company would have been liable for his negligent action. The writer thinks that this result of the Photo Production case is astounding as it finds liability in case of negligent actions of employees, but no liability for the deliberate actions of an irresponsible employee. She does not agree with an interpretation of the intentions of the parties which comes to the above result. It has to be kept in mind that it is the employer who incorporates an employee into the contractual relationship in order to fulfil his obligation to the other party. If the employee chosen by the employer is not reliable, the employer should at least be liable for deliberate actions of this employee causing damage to the property of the other party.

The Photo Production case, while stressing that the function of the courts is merely to construe standard form contracts, deals with a commercial rather than a consumer contract[24]. But there is no indication that the decision is to be

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[23] Idem at 286.

[24] See with regard to a definition of what constitutes a commercial contract supra Preface p. viii footnote 3.

restricted to commercial contracts only.[25] The emphasis of the decision is that a standard form contract is to be subjected to the rule of construction, regardless of whether the standard form contract involved is a consumer or a commercial contract.[26]

The decision in the Photo Production case was expressly approved and followed[27] by the Supreme Court of Canada in the case of Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.[28] in 1980 by Madam Justice Wilson, with Mr. Justice Ritchie concurring.

3. APPLICATION OF THE RULE OF CONSTRUCTION

From the multitude of Canadian cases applying the rule of construction, the following illustrating cases have been especially chosen because they are factually comparable to some of the selected German cases in the previous chapter.

(a) Exclusion of liability[29]

Many standard form contracts use terms which exclude the user's liability, restricting the legal position of the consumer that would prevail without these particular contract terms. Such terms were in question in the case of Drake and

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[25] E. J. Hayek, "Exemption Clauses" (1983) 15 Ottawa Law Rev. at 622.

[26] Even though Lord Diplock stresses at 296 that the Photo Production case supra n. 12 concerned a commercial contract, negotiated between "business-men".

[27] G. H. Fridman, The Law of Contract in Canada supra n. 9 at 552.

[28] [1980] 2 S. C. R. 718, 15 R. P. R. 62, 13 B. L. R. 119, 116 D. L. R. (3d) 193, 33 N. R. 460. The case dealt with a contract, which was probably in a standard form although this is not expressly stated in the facts of the case.

[29] The term "exemption" is used as a synonym; see supra p. 2 footnote 7.

Drake v. Bekins Moving and Storage Co.[30], which dealt with a Persian rug handed into the possession of a moving company for storage. The plaintiffs bought a separate insurance coverage on the rug, as was recommended by the moving company. Part of the contract of storage read :

> "IT IS AGREED that goods are to be stored on the terms set out in your Non-negotiable Warehouse Receipt and contract, the provisions, limitations, terms and conditions of which are shown on the back thereof; ...
>
> VALUATION ..... (fill in) 30..... cents per pound; and unless higher valuation be declared the value of this shipment shall be deemed to be THIRTY CENTS per pound. Your liability in moving, packing, storing, handling and shipping, in case of loss or damage, is limited to the declared valuation, or if none be declared, then to THIRTY CENTS per pound. ...
>
> Under the heading of "Provisions, Limitations, Terms and Conditions of Contract" on the reverse of the contract document:
>
> 6. LIABILITY OF COMPANY
>
> (a) Said goods and chattels are accepted for storage at the exclusive risk of the Depositor for damage thereto from moth, rust, fire, vermin, rodent, deterioration by time, leakage, heat, Acts of God or any other cause beyond the control of the Company.

The rug "mysteriously" disappeared before ever reaching the moving company's warehouse. The court decided, upon a strict construction of the contract[31], that the limitation of liability applied only to loss or damage arising from the performance of the contractual duty. "The total and unexplained loss

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[30] [1982] 6 W. W. R. 640 (B. C. Co. Ct.).

[31] The decision was alternatively based on the rule of construction. It was further based on the doctrine of fundamental breach. It is noted at 640: "Although the defendant's liability for loss or damage was clearly limited in the contract of storage, it was fundamental to the contract that the goods would be safely hauled to the warehouse, and breach of that obligation was fundamental to the performance of the contract. It would be unreasonable to permit the exclusion clause to govern the fundamental term." The decision, although using the concept of a strict construction **and** the doctrine of fundamental breach states at 648 that the approach of a strict construction is "a perhaps more cautious approach on these limitation and exemption clauses". See with regard to the doctrine of fundamental breach infra pp. 97-106.

...[of the rug]... is clearly not within the contractual contemplation of the parties."[32]

The case of Levison and Another v. Patent Steam Carpet Cleaning Co.[33] dealt with an unexplained loss of a Chinese carpet by the cleaning company. The order form, signed by the customer, contained ten clauses in small print which specified the "terms and conditions for processing". Immediately above the space designated for the consumer's signature it read: "I/ WE ... agree to the terms and conditions set out above."

Clause 2 (a) said:

> The maximum value of any carpet, rug or tapestry delivered to the company for any purpose whatsoever shall if the area thereof exceeds four square yards be deemed to be £2 per square yard, and if the area does not exceed four square yards shall be deemed to be £10.

Clause 5 said:

> All merchandise is expressly accepted at the owner's risk and owners are recommended either to insure such merchandise in such a manner as to cover them whilst in the company's hands or to instruct the company to insure it as their agents in such sum and in such manner at their cost as they shall specify.

In his judgment, Lord Denning did not use a strict construction of clause 2 (a) and clause 5 of the contract because they were "... not susceptible to that treatment. ... Like other limitation clauses, the words are too clear to permit of

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[32] Wetmore Co. Ct. J. in Drake and Drake v. Bekins Moving and Storage Co. [1982] supra n. 30 at 649.

[33] [1977] 3 W. L. R. 90. The case is based on Woolmer v. Delmer Price Ltd. [1955] 1 Q. B. 293 involving the loss of a fur coat. The latter case is based on Alderslade v. Hendon Laundry Ltd. [1945] 1 K. B. 189, [1945] All E. R. 244 (C. A.), concerning linen handkerchiefs lost in the laundry. Lord Greene M. R. stated at 245: "... if a common carrier wishes to limit his liability for lost articles and does not make it quite clear that he is desiring to limit it in respect of his liability for negligence, then the clause will be construed as only extending to his liability on grounds other than negligence.".

such manipulation."[34] Basing its decision on the notion of fundamental breach the court held that "although the effect of the words in clause 5 of the contract that all goods were 'expressly accepted at the owner's risk' gave exemption from liability for negligence they did not exclude liability for fundamental breach of the contract."[35]

It has to be noted that the Levison case was clearly overruled by the Photo Production case[36] which stressed that there was no seperate doctrine of fundamental breach. The influence of the Photo Production case on the theory of fundamental breach of contract will be dealt with in a later section of this thesis. Even though the Levison case has been overruled, it still demonstrates the courts' difficult task of interpreting a contract. A standard form clause stated that "all merchandise is expressly accepted at the owner's risk". This term can be seen as excluding the company's liability even for an unexplained loss of merchandise, or it can be seen as not covering a loss of merchandise which remains unexplained. The court will always have to face the challenge of finding the true meaning of a contract term and determining the parties' intentions when concluding the contract. The court in Drake and Drake also had the difficult task of determining whether or not the words used in an exclusion clause clearly expressed what had been determined as the parties' intentions. The clause in question expressly limited the moving company's liability for the loss of an item stored in its warehouse. But the court decided

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[34] Levison and Another v. Patent Steam Carpet Cleaning Co. supra n. 33 at 95. Orr L. J. at 98 and Sir David Cairns at 99 agree with Lord Denning that the words "[a]ll merchandise is expressly accepted at the owner's risk" are not sufficiently clear to cover the company's liability for a fundamental breach.

[35] Idem at 91. The technique of a fundamental breach of contract is described in detail infra pp. 97-103.

[36] Supra n. 12.

that this clearly worded limitation of liability did not cover a "mysterious", unexplained loss. The writer agress with the court's decision, that the parties, when concluding their contract, did not intend for the limitation clause to cover every, and especially an unexplained, loss. It should further be noted that the court did not consider only the contract terms in question but based its interpretation of the terms on its understanding of the contract as a whole. While both cases (Drake and Drake and Levison) illustrate the interpretation of standard form contracts, they also show that the courts will not ask whether or not the terms used are fair to the consumer.

(b) Exclusion of liability for damages

Besides excluding liability for negligent actions, standard form clauses can also exclude liability for damages or limit the amount of recoverable damages.[37] The latter clauses are based on the principle of liquidated damages, which addresses the difficulty of predicting actual possible damages at the time of the conclusion of the contract.[38] By allowing the user of a standard form to limit his liability for damages in case of a default, his allocation of the contractual risk is simplified. The consumer benefits as he gains certainty about the extent of recoverable damages in case of default.[39]

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[37] 7 C. E. D. (West 3rd) § 558.

[38] In the Dunlop Pneum. Tyre v. New Garage case [1915] A. C. 79 (H. L.) the difficulty of assessing the actual damages is mentioned as the prime justification for such clauses.

[39] Supra pp. 12, 13 on the risk allocation as an important element of standard form contracts and supra pp. 54, 55 on the character of liquidated damages in the German system. Illustrating cases are, for example, those that concern agreements of non-competition, where in case of default fixed damages are to be paid by the party violating the contract.

The case of J. Nunes Diamonds Ltd. v. Dom. Elec. Protect. Co.[40] illustrates the concept of liquidated damages. Diamonds were stolen from a safe equipped with an alarm system, which an employee of the seller had represented as being foolproof. A burglar alarm service contract[41] had been concluded, limiting the recoverable damages to $50. Nunes Diamonds brought an action for all the damages resulting from a burglary. The action was dismissed at the trial and the dismissal was upheld by the Ontario Court of Appeal and the Supreme Court of Canada, proving that the amount of recoverable damages can be limited.

The concept of liquidated damages allows the user of a standard form contract to include a clause in the contract which limits his liability. There is, however, a major problem in determining whether or not a clause deals with liquidated damages. Is the clause in question really a pre-estimate of possible damages or a hidden penalty clause which is unenforceable[42]? Lord Diplock states in the Photo Production case with regard to penalties:

> Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation.[43]

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[40] [1972] S. C. R. 769 at 777 (S. C. C.). The main issue of the case was the relationship between tort liability (the application of the Hedley Byrne principle) and contract liability in case of a misrepresentation.

[41] This was a commercial contract, probably concluded in a standard form.

[42] See Collins (J.G.) Ins. Agencies Ltd. v. Ellsley [1978] 2 S.C.R. 916, 3 B.L.R. 183, 83 D.L.R. (3d) 1, 36 C.P.R. (2d) 65, 20 N.R. 1 which deals with a restrictive covenant of employment.

[43] Photo Production Ltd. v. Securicor Transport Ltd. supra n. 13 at 295, 296.

The key consideration in assessing whether the clause is penal in nature is the reasonableness of the sum stipulated to be paid on breach. The Dial Mortgage Corp. v. Baines[44] case concerned a mortgage that required the payment of all brokerage and legal fees if the promised mortgage funds were not borrowed. It was held that:

> ... The clause was a penalty clause, not a genuine pre-estimate of damages. The court's primary concern was to allow fair compensation, and all the circumstances of the case had to be considered. The clause did not take into consideration a possible loss to the plaintiff from a mortgage rather than a straight aspect. Further, its losses under the brokerage aspect of the contract could range from a very minor loss if the contract was breached early in the dealing to a loss close to the estimate if breach occurred at a later stage. **Clauses applying indiscriminately to widely varying circumstances, or clauses where the sum agreed upon exceeded the foreseeable damages in all but an unusual case, have been held to be penalty clauses. Reasonableness of the sum was the key consideration.** The clause in this case was penal.[45]

The case of Meunier v. Cloutier[46] shows that a court will tend to conclude that any stipulated sum is not a genuine pre-estimate of loss, if the parties have not discussed or even directed their minds to damages. The case dealt with a covenant where the vendor of a hotel promised not to compete with the buyer. Upon a breach of contract the sum of $50,000 had to be paid as liquidated damages. The evidence showed that the sum had been agreed upon with little thought. The vendor competed in breach of covenant, but no loss could be proved to have been caused to the purchaser by this competition. The court held that

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[44] (1981) 15 Alta L. R. (2d) 211 (Alta Q. B.). In light of a mortgage agreement being involved, it may be assumed that a standard form was used.

[45] Idem at 211. Emphasis added.

[46] (1984) 46 O. R. (2d) 188 at 195 (Ont. H. C.). The facts do not mention whether the contract was concluded in a standard form.

> ...the proper test for enforceability was whether the clause was unconscionable, a matter that could not be determined without regard to the actual circumstances of the breach. In the circumstances where the stipulated sum was agreed upon without careful thought, and no actual loss had been proved, the clause should be struck down as a penalty ... .

When interpreting a clause it is further important to note that the words used are not conclusive for the character of the clause in question.[47] In the case of B. L. T. Holdings Ltd. v. Excelsior Life Ins. Co.[48] it was decided that a 2% standby fee on a large mortgage loan commitment was a penalty because it was disproportionate to the loss despite the clause characterizing the fees as "liquidated damages".

(c) The *contra proferentem* rule - a tool used to help the interpretation process

One rule of construction playing a major role with regard to standard form contracts is the rule of interpretation *contra proferentem* [49]. This rule can be seen as an element of the rule of construction and similarly it was not specifically designed or developed for standard form contracts. The rule applies if a contract uses an ambiguous term which is reasonably capable of more than one construction; it will be interpreted against the party responsible for drafting and tendering the contract and in favour of the opposite party.[50] The ambiguous term will be interpreted in the way least favourable to the party relying on it and most favourable to the consumer.[51]

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[47] 7 C. E. D. (West 3rd) § 549.

[48] [1986] 6 W. W. R. 534, 47 Alta L. R. (2d) 1, especially at 7 - 13 (Alta C. A.).

[49] The complete Latin expression is *in dubio contra proferentem, quia clarius loqui debuisset.* This can be translated as: if in doubt, interpret against the stipulator, because he should have expressed himself more clearly. See C. Krampe, Die Unklarheitenregel (Bürgerliches und römisches Recht Schriften zum Bürgerlichen Recht vol. 83 1983) at 24.

[50] Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd. (1983) 44 A. R. 67 at 74 (C. A.); G. H. Treitel, The Law of Contract supra n. 5 at 168.

[51] G. H. Treitel, The Law of Contract supra n. 5 at 172.

One of the many applications of the rule can be found in cases involving a dispute about the point in time a commission - usually to a real estate agent - has to be paid.

In the case of Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd.[52] the issue was whether an ambiguous term in the contract meant that a realtor's commission was to be paid in case of a "completed sale" or in case of a "binding contract of sale". The realtor claimed his commission when a potential buyer signed an agreement for sale, but was later not ready, willing and able to close the sale. Based on the *contra proferentem* rule the court decided that the expression "sale" had to be interpreted to mean that the commission was payable on completion of the sale and not upon the introduction of a purchaser.

In the case of Rody v. Re/Max Moncton Inc.[53] it was disputed whether a real estate agent had to pay damages to his employing company upon termination of his contract. The court, relying on the rule of *contra proferentem* decided in favour of the real estate agent. The decision stated:

> The form of the contract was prepared by the defendant or its affiliates. The contra proferentem rule must apply in such circumstances. The ambiguity, if any, must be construed against the party responsible for drafting the document.[54]

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[52] (1983) 44 A.R. (C.A.) 67. The facts of the case do not specify the contract as being in a standard form but this can probably be assumed with regard to the contract involving a real estate action.

[53] (1986) 72 N. B. R. (2d) 430 especially at 436 [27], 183 A. P. R. 430 (N. N. Q. B.). The contract was probably concluded as a standard form contract.

[54] Idem at 436. It is however questioned whether or not any ambiguity did exist. But "[i]f there is any ambiguity in the meaning of the termination provisions, this ambiguity must be interpreted to the benefit of the plaintiff.".

The rule of *contra proferentem* cannot be employed if there is a reasonable certainty as to the proper meaning of a provision, even though some difficulty in construction may exist.[55] In the Delaney v. Cascade River Holidays Ltd.[56] case, the majority held that the exclusion clause of the contract was clear enough and therefore excluded the liability of one of the contracting parties. They relied on the principles stated in L'Estrange v. F. Graucob Ltd., stating that there was "no sufficient ground for making an exception to the general principles [that parties to a contract are bound by their signature] enunciated in that case"[57].

Cascade River Holidays Ltd. had contracted to take Dr. Delaney on a raft trip. During this trip Dr. Delaney drowned. He had been added to the passenger list as a late comer and, unlike the other passengers, had not received an information brochure. He did however, like the others, sign a release of liability in favour of Cascade, although it was signed in a hurried manner prior to the departure to the place of embarkation and probably without having been read. The "Standard Liability Release" read in part as follows:

> ... DISCLAIMER CLAUSE: Cascade River Holidays Ltd. is not responsible for any loss or damage suffered by any person either in travelling to the location of the trip, before, during or after the trip, for any reason whatsoever including negligence on the part of the company, its agents or servants.
>
> AGREEMENT: I agree to assume all risks involved in taking the trip including traveling before and after .... I agree to Cascade River Holidays Ltd. its agents and servants relieving themselves of all liability for losses and damages of all and every descriptions. I

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[55] 7 C. E. D. (West 3rd) § 520.

[56] (1983) 44 B. C. L. R. 24, 24 C. C. L. T. 6 (B. C. C. A.). C. Boyle and D. R. Percy, Contracts (3rd ed. 1985) note at 456 that leave to appeal to the Supreme Court of Canada was granted, but the appeal was discontinued.

[57] The decision in Delaney v. Cascade River Holidays Ltd. (1983) 44 B. C. L. R. 24 at 44 as per McFarlane J. A. with Taggart J. A. concurring.

> acknowledge having read this Liability release ... and my acceptance of the above disclaimer clause by my signature ...

Nemetz C. J. B. C. commented in his dissenting judgement[58] that the liability release was not "effective".[59]

> The release contained provisions so onerous and unusual that it was the duty of Cascade to see that the provisions were 'effectively called to the attention of the other party under the penalty of their being held non-binding on the latter party' ... A reasonably intelligent person was entitled to assume that a form titled 'standard' did not contain the unusual provisions contained in this one.[60]

The decision in the Delaney case shows that an exclusion clause can be found not to be ambiguous, thus prohibiting even the application of the *contra proferentem* rule. However, the dissent emphasizes the wide latitude that the courts enjoy in deciding whether a clause is ambiguous and illustrates one of the techniques of applying the *contra proferentem* rule if a clause is found to be ambiguous.

The case of Cathcart Inspection Services Ltd. v. Purolator Courier Ltd.[61] also shows that an ambiguity in an exclusion clause can be construed against

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[58] Nemetz C. J. B. C. in Delaney v. Cascade River Holidays Ltd. supra n. 57 at 38 relying on the Tilden Rent-A-Car case - Tilden Rent-A-Car Co. v. Clendenning (1978) 83 D. L. R. (3d) 400 (C. A.) - and especially Lord Denning's judgement in the Photo Production case - supra n. 12. In the latter (supra n. 13) Lord Denning states at 865: "Thus we reach, after long years, the principle which lies behind all our striving: the court will not allow a party to rely on an exemption or limitation clause in circumstances in which it would not be fair or reasonable to allow reliance on it; and, in considering whether it is fair and reasonable, the court will consider whether it was in standard form, whether there was equality of bargaining power, the nature of the breach, and so forth." The decision was subsequently reversed [1980] A. C. 827, [1980] 1 All E. R. 556 (H.L.).

[59] Nemetz C. J. B. C. in Delaney v. Cascade River Holidays Ltd. supra n. 57 further states at 33-35 that according to the principle of "past consideration" no consideration was given for Dr. Delaney's signature on the release form. But the majority of judges in the Delaney case held that the argument of "past consideration" did not succeed because in exchange for signing the release form Dr. Delaney was allowed to proceed with the trip and embark on to the raft.

[60] Delaney v. Cascade River Holidays Ltd. supra n. 57 at 39.

[61] (1981) 128 D. L. R. (3d) 227 (Ont. H.C.).

the party relying on the clause. A carrier failed to deliver a tender for a construction contract, with the consequence that the other contract party did not get the contract it was bidding for. The bid would have won the contract and a profit of $ 37,000. The bill of lading signed by the plaintiff included under the heading "Delay and Limitation of Value" an exclusion of liability for "any special [,] consequential or other damages for any reason whatever including delay in delivery".

It was held that "... the effect of the contractual limitation depended on its true construction, but it was to be construed against the interest of the carrier and in a way that would give business efficacy to the contract. In view of the heading referring to delay the clause should be construed to apply to delay only and not to non-delivery ... it would contradict the main purpose of the contract to construe the clause to enable the defendant to be free of any obligation to deliver."[62]

The Cathcart case shows that the application of the *contra proferentem* rule allocates the risk of something happening that is not clearly expressed in the contract to the user of a standard form contract. The writer agrees with this allocation of risks, because the user wants to exclude his normally present liability and he is unilaterally drawing up the contract. If he fails to foresee or clearly describe a certain event or circumstance, this should not be a disadvantage to the consumer. In order to exclude liability for non-delivery, the user would have had to express this more clearly in his contract terms. If the user were to re-draft his standard form contracts accordingly, the *contra*

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[62] Idem at 228. It is noted at 231, 232 of the decision that the Public Commercial Vehicles Act did not apply.

proferentem rule could not be applied because the exclusion clause would no longer be ambiguous. But, as mentioned earlier, is the meaning of a contract term ever "crystal clear"? It is left to the courts to decide whether a term is ambiguous, thus allowing the rule of *contra proferentem* to be applied.

The Cathcart case further shows that exclusion clauses are to be construed in a strict or narrow way. This principle of strict or narrow construction is closely related to the *contra proferentem* rule.[63] It requires, like the *contra proferentem* rule, that the clause be ambiguous so that more than one interpretation is possible. But unlike the *contra proferentem* rule, the interpretation will not focus on what is favourable for the consumer but rather on what wording can be seen as the narrower, stricter one. However, the rules of *contra proferentem* and the strict construction of a contract term are rarely distinguished from each other when a standard form contract is concerned. In the Cathcart case the term "delay in delivery" was construed in a strict and narrow way when it was decided that it did not cover a "non-delivery", but it was also construed *contra proferentem*, meaning against the interest of the user of the standard form contract.[64]

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[63] G. H. Treitel, The Law of Contract supra n. 5 at 172 notes under the heading of the *contra proferentem* rule that exemption clauses are strictly construed against parties who rely on them. S. M. Waddams, The Law of Contracts supra n. 6 at 347, 348 parallels "strictly" construed and *contra proferentem*.

[64] A further example for the narrow construction of a contract term is the case of Transcan Pipelines Ltd. v. Northern and Central Gas Corp. (1981) 128 D. L. R. (3d) 633 (Ont. H. C.); affirm. (1983) 41 O. R. (2d) 441 (Ont. C. A.). In this case it was held that the proper construction of an ambiguous "force majeure" clause did not exclude liability for strikes and explosions suffered by customers of the buyer, events which were not expressly mentioned by the clause.

4. THEORY OF FUNDAMENTAL BREACH OR BREACH OF A FUNDAMENTAL TERM

The theory of fundamental breach or breach of a fundamental term is another technique used by the common law to deal with unfairness in standard form contracts.

Prior to the Photo Production case there was some lack of clarity in the common law with regard to the state of the law, especially with regard to the theory of fundamental breach. The main question was whether the theory was to be used as a rule of construction or as a rule of law.

The theory of fundamental breach addresses the problem that the user of a standard form contract[65], even though he breaches the contract, nevertheless wishes to avoid the consequences of breach by sheltering behind the exclusion clause. If the breach of contract by the user of the standard form is judged as "fundamental", the user cannot rely on the exclusion clause and the consumer is entitled to treat the breach "... as repudiation, to terminate or rescind the contract and to claim damages at common law."[66]

A variation of the theory of fundamental breach involves the notion of the breach of a fundamental term of the contract. It asks whether or not the breached term itself was a fundamental term. Its main focus is not on the effect the breach has to the performance of the contract as a whole, but on the nature of the term broken.

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[65] N. S. Wilson, "Freedom of Contract and Adhesion Contracts" (1965) 14 I.C.L.Q. 172 at 177 notes that the doctrine is closely related to standard form contracts because the majority of cases dealing with a fundamental breach include some exclusion clauses.

[66] Lord Reid in Suisse Atlantique Société d' Armement Maritime S. A. v. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, [1966] 2 All E. R. 61 (H. L.).

The aspect of fundamental breach of a contract seems to be more appropriate as it has a wider scope. It avoids the determination of what a fundamental term is even though the question remains whether the contract has been breached in a fundamental way.

A differentiation[67] between the theory of the breach of a fundamental term and the theory of the fundamental breach is however of no real importance[68] and the terms are often used in an interchangeable way.

(a) Application of the theory

The theory of fundamental breach was used as a rule of law - that is as a matter of substantive law[69] - especially by Lord Denning. Of particular relevance are his judgements in the Karsales case[70] and in the Harbutt's

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[67] See with regard to the differences of theories: Viscount Dilhorne notes in the Suisse Atlantique case [supra n. 66] that a fundamental breach differs from a breach of a fundamental term. Citing Devlin in Smeaton Hanscomb & Co. Ltd. v. Sasson I. Setty, Son & Co. ([1953] 2 All. E. R. 1471) Viscount Dilhorne describes a **fundamental term** as " 'something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates.' In relation to a **fundamental breach**, one has to have regard to the character of the breach and determine whether in consequence of it the performance of the contract becomes something totally different from that which the contract contemplates." S. M. Waddams, The Law of Contracts supra n. 6 at 350 footnote 108: " The phrase **'breach of fundamental term'** implies, however, that the court must go back to the point of formation of the contract and identify a term which at that time was 'fundamental'. The phrase **'fundamental breach'** leaves the court with more freedom to look at the consequences of the breach without regard to the parties' presumed initial classification of obligations." The same author remarks at 442 that the term fundamental breach is used for the control of unfair exclusion clauses as differing from the question whether a party should be excused on the ground of the other's non-performance. (Emphasis added.)

[68] S. M. Waddams, The Law of Contracts supra n. 6 at 350 footnote108 states that the expressions have been used with much the same effect.

[69] G. H. Treitel, The Law of Contract supra n. 5 at 175.

[70] Karsales (Harrow) Ltd. v. Wallis, [1956] 1 W. L. R. 936, [1956] 2 All E. R. 866 (C. A.). This case concerned the sale of a car which was badly damaged. It was held that, due to the extensive damages, the car delivered to the buyer was not the car that he had contracted for.

"Plasticine" case[71]. Liability for a fundamental breach could not be excluded even if the words of the clause were sufficiently clear.[72] No matter how clearly the clause excluded the user's liability, if he breached the contract in a fundamental way he could not rely on the exclusion clause.

In contrast to the approach adopted by Lord Denning and others[73], the House of Lords suggested in the Suisse Atlantique case[74] that the theory of fundamental breach could only be used as a rule of construction. Liability even in case of a fundamental breach could be excluded if a clearly worded exclusion clause was present. The case concerned a contract by which a vessel was chartered to provide carriage of coal from the United States to Europe. Some clauses of the contract stated that the vessel had to be loaded at a specified rate per running day and, if she was detained beyond the loading time, the charterers were to pay $1,000 a day demurrage. Similarly if she was detained longer than was required to unload her at the stipulated rate per day and that was not due to strikes or other causes beyond the control of the

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71 Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q. B. 447, [1970] 1 All E. R. 225 (C. A.). In this case Wayne Tank and Pump Co. Ltd. agreed to design and install equipment that could be used to store and carry molton stearine in the factory of Harbutt's "Plasticine" Ltd.. The pipe installed was totally unsuitable for this purpose and as a result the factory burned down. The contract contained a clause limiting the liability of Wayne Tank and Pump Co. Ltd. .

72 G. H. Treitel, The Law of Contract supra n. 5 at 175.

73 Idem and the cases of Karsales (Harrow) Ltd. v. Wallis, and Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. .

74 Suisse Atlantique Société d'Armement Maritime S.A. v. N. V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, [1966] 2 All E.R. 61 (H.L.). Ritchie commenting on the Suisse Atlantique case in Beaufort Realties [1980] 2 S. C. R. 718 at 723: "Stated bluntly, the difference of opinion as to the true intent and meaning of their Lordships' judgment in the *Suisse Atlantique* case centred around the question of whether a rule of law exists to the effect that a fundamental breach going to the root of a contract eliminates once and for all the effect of all clauses exempting or excluding the party not in breach from rights which it would otherwise have been entitled to exercise, or whether the true construction of the contract is the governing consideration in determining whether or not an exclusionary clause remains unaffected and enforceable notwithstanding the fundamental breach.".

charterers, the charterers were to pay demurrage at the rate of $1,000 a day. The owners of the Suisse Atlantique Société alleged that the vessel did not make as many voyages as she should have with the result that they were deprived of the freights they would have earned on those voyages. They claimed the loss of freight on the voyages which should have been performed, stating that their claim was not limited to the demurrage payments, because the defendant was in fundamental breach of the contract. The House of Lords decided that even though the charterers might have committed a very serious breach of contract, the demurrage clauses, properly construed, limited their liability to the agreed upon demurrage for the detention of their vessel. In contrast, Lord Denning's view that the doctrine of fundamental breach is a rule of law rather than of construction would have meant that the charterers could not limit their liability even by a clearly expressed clause.

Lord Reid stated, with regard to the notion that the doctrine of fundamental breach was a rule of law:

> ... if there is to be a universal rule that, no matter how the exclusion clause is expressed, it will not apply to protect a party in fundamental breach, any such rule must be a substantive rule of law nullifying any agreement to the contrary and to that extent restricting the general principle of English law that parties are free to contract as they may see fit. ...In my view no such rule of law ought to be adopted.[75]

Lord Wilberforce remarked, with regard to the theory of fundamental breach applied as a the rule of construction:

> The principle that the contractual intention is to be ascertained - not just grammatically from words used, but by consideration of those words in relation to commercial purpose (or other purpose according to the type of contract) - is surely flexible enough, and though it may

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[75] Suisse Atlantique Société d' Armement Maritime S. A. v. Rotterdamsche Kolen Centrale [1966] 2 All E.R. 61 (H.L.) at 71, 76.

> be the case that adhesion contracts give rise to particular difficulties in ascertaining or attributing a contractual intent, which may require a special solution, those difficulties need not to be imported into the general law of contract nor be permitted to deform it.[76]

The Canadian Supreme Court approved the Suisse Atlantique case in Linton (B. G.) Const. Ltd. v. C.N.R.[77]. This case dealt with a delay in delivery of a rush telegram which contained a tender for construction of a bridge. Due to negligence of the defendant's employees the message did not arrive in time and the contract was not awarded to the plaintiff. Even though the case dealt with the interpretation of section 322 of the Railway Act[78] Ritchie J. commented that the case of Suisse Atlantique

> ...is one of many authorities indicating that although in cases of ambiguity an exemption clause is to be strictly construed against the party relying on it, it is nevertheless to be given full force and effect if the language in which it is drafted is sufficiently clear to leave no doubt as to its meaning.[79]

Despite the Suisse Atlantique case favouring the rule of construction, the law remained uncertain and dubious. Cases were decided using either approach[80], or the decisions stated that the rule of construction was applied, when in fact the theory of fundamental breach was used as a rule of law. With the decision of the Photo Production case by the House of Lords and its approval by the Supreme Court of Canada in the Beaufort Realties case, the notion that the doctrine of fundamental breach constitutes a rule of law seems finally to have been put to rest. But the writer agrees with Waddams[81] who

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[76] Idem at 94.

[77] Linton (B. G.) Const. Ltd. v. C.N.R. [1975] 2 S. C. R. 678, [1975] 3 W. W. R. 97, 49 D. L. R. (3d) 548, 3 N. R. 151.

[78] R. S. C. 1970, c. R-2, s. 322.

[79] Linton (B. G.) Const. Ltd. v. C.N.R. [1975] 2 S. C. R. 678 at 679.

[80] G. H. Fridman, The Law of Contract in Canada supra n. 9 at 551, 552.

[81] S. M. Waddams, The Law of Contracts supra n. 6 at 356.

notes that the current state of the law in Canada still remains unclear. Waddams predicts that

> ... it seems probable that the law in Canada will continue as before with the courts paying lip service to the principles of construction but in practice striking down clauses they consider to be unfair.[82]
>
> ...lip service must be paid to the principle that the parties are free to contract as they wish, but that in practice the courts continue to strike down clauses found to be objectionable.[83]

It has to be noted that the decision in the Photo Production case was given with the English Unfair Contract Terms Act of 1977[84] in mind. This Act allows

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[82] Idem at 344. The publication date of the book (1984) should be noted.

[83] Idem at 345.

[84] Lord Diplock (in agreement with Lord Wilberforce) in the Photo Production case (supra n. 13) notes at 296 that in case of consumer contracts any need for " judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977." Section 11 of the Unfair Contract Terms Act 1977 reads as follows:

The "reasonableness" test

11. - (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, Section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to-

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and (b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

More on this Act can be found in an appendix in: D. Yates, Exclusion Clauses in Contracts (2nd ed. 1982) at 289-303. See a comparison of the Unfair Contract Terms Act and the AGB-statute: G. Weick, "Unfair Contract Terms Act und AGB-Gesetz" (1981) 145 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht ZHR 68.

exclusion clauses to be tested against a standard of what is just and reasonable in consumer transactions. In Canada, where no comparable statute is in force[85], the rule of construction has gained importance, at least with regard to standard form consumer contracts. With the approval of the Photo Production case by the Supreme Court of Canada, the tools available to a Canadian court to deal with unfairness in standard form contracts were limited because the theory of fundamental breach is to be approached as a rule of construction and no longer as a rule of law. But unlike the English Unfair Contract Terms Act of 1977, there is no statute in place in Canada to fill the gap in order to deal with unfairness in standard form consumer contracts.

(b) Difficulties with regard to the theory

In addition to the debate as to whether or not the doctrine of fundamental breach amounts to a rule of law or construction, there are difficulties related to the theory itself.[86] Lord Wilberforce points at the following in the Photo Production case:

> At what point does the doctrine (with what logical justification I have not understood) decide , ex post facto, that the breach was (factually) fundamental before going on to ask whether legally it is to be regarded as fundamental? ... [and] ... **there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis** [meaning the theory of fundamental breach] ..[87]

The major problem lies in determining what "fundamental" means. Defining a fundamental breach more accurately than something that goes "to

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[85] S. M. Waddams, The Law of Contracts supra n. 6 at 356.

[86] Idem notes at 352 that the doctrine has serious deficiencies as a techniques of controlling unfair agreements.

[87] Photo Production Ltd. v. Securicor Transport Ltd. supra n. 13 at 289. Emphasis added.

the root of the contract ... to the foundation of the whole"[88] is so difficult that the application of the doctrine tends to be somewhat haphazard."[89] In concentrating on the nature of the breach (is the user of the standard form trying to escape liability for a very serious breach?) the courts risk interfering with the parties' allocation of risk[90] and they may substitute their own idea of what constitutes a fundamental breach for what the parties agreed to in their contract.

It is very difficult to predict whether a court will find a fundamental breach to be present or not. The case of Gafco Ent. Ltd. v. Schofield[91] may serve as an example. A used car was sold on an "as is" basis for $ 12,750. Immediately after being driven off the sales lot a serious engine problem developed causing repair costs of $ 4000. It was held at the trial that a fundamental breach was present but the Court of Appeal found that the defects did not amount to a fundamental breach of the contract after all. The Gafco case also shows that Canadian courts are taking the Photo Production case seriously. They use the theory of fundamental breach as a rule of construction rather than a rule of law despite its shortcomings (which are described in detail in a following section of this thesis) and the fact that there is no statute to rely on in order to deal with unfair terms in standard form contracts.

In evaluating the theory of fundamental breach as a solution to the problem of unfair terms in standard form contracts it also has to be noted that it

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88 Humboldt Flour Mills Co. v. Hume (1983) 28 Sask. R. 249.

89 N. S. Wilson, "Freedom of Contract and Adhesion Contracts" supra n. 65 at 177.

90 For example, in Canso Chemicals Ltd. v. Can. Westinghouse Co. Ltd. (1974), 10 N. S. R. (2d), 54 D. L. R. (3d) 517 (C. A.).

91 (1983) 25 Alta. L. R. (2d) 238 (C. A.).

does not apply to all standardized contracts but only to those where a fundamental breach of the contract or a breach of a fundamental term occurred.

5. PAROL EVIDENCE RULE

According to the parol evidence rule[92] a term previously agreed upon between the parties but not included into the final written form of the contract will not later be permitted if its effect is to add or contradict the contract.[93] In this context the word "parol" means "extrinsic to" or "outside" of the written agreement.[94] The rule applies to all sorts of extrinsic evidence and is not limited to parol evidence. The name of the rule is further misleading as it is not a true rule of evidence but a rule of substantive law.[95] "It has evidentiary consequences in that it makes evidence of such extrinsic statements irrelevant,

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[92] A historical perspective is given on the rule of parol evidence by G. L. Birnbaum et al., "Standardized Agreements and the Parol Evidence Rule" 26 Arizona L. Rev. (1984) 793 at 800-802.

[93] Still a major case on the subject of parol evidence is L'Estrange v. Graucob (F.) Ltd. [1934] 2 K. B. 394 wherein Scrutton L. J. at 403 states that "[w]hen a document containing contractual terms is signed ... in the absence of fraud ... misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.".

[94] J. E. Smyth et al., The Law and Business Administration in Canada (5th ed. 1987) at 269; In footnote 6 at 269 further references to a more extensive discussion of the meaning of the parol evidence rule are provided. G. H. Fridman, The Law of Contract in Canada supra n. 9 notes at 316, 317 that some provincial statutes (in British Columbia, Ontario, Newfoundland and Prince Edward Island) permit the admission of oral or parol evidence to prove that some wrongdoing has taken place within the meaning of the statute ... where the common law would not allow such evidence to be adduced under the parol evidence rule. There is no equivalent regulation in the Alberta Unfair Trade Practices Acts. S. M. Waddams, "Two Contrasting Approaches to the Parol Evidence Rule" (1986/87) 12 Can. Bus. L. J. at 207 describes the following as a common formulation of the parol evidence rule: "... where a contract has been reduced to writing, extrinsic evidence is inadmissable to add to, vary or contradict the writing." A description of the rule is given in by S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" (1971) 49 Can. Bar Rev. 587 at 588, 589.

[95] S. M. Waddams, "Two Contrasting Approaches to the Parol Evidence Rule" supra n. 94 at 207; G. L. Birnbaum et al., "Standardized Agreements and the Parol Evidence Rule" supra n. 92 at 800.

and for that reason inadmissible, but this is no more of an evidentiary consequence than is imported by every rule of substantive law."[96] The rule applies only if the contract has been "reduced to writing", which means that the parties must have had the intention that the writing should be the final and exclusive record of their agreement.[97]

(a) Rule with regard to standard form consumer contracts

A standard form contract, as any contract, is subject to the parol evidence rule. Instances where the rule can be applied may be even more numerous in standard form contracts. The consumer is concluding the contract without bargaining about the terms, but often after statements made by a sales representative with regard to the subject of the contract.[98] "... [I]f the language of the written contract is clear and unambiguous ... no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing."[99] However, " [w]here the contract as written is ambiguous, extrinsic

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[96] S. M. Waddams, "Two Contrasting Approaches to the Parol Evidence Rule" supra n. 94 at 207.

[97] Idem; the author states and comments on a different formulation used by the English Law Commission which disregards the above element of a contract being reduced to writing.

[98] See, for example, the case of Harvest Holdings Ltd. v. Bohun et al. (1984) 34 Sask. R. 127. A party to a real estate contract failed to read the document and later claimed an oral agreement in contradiction to a written term. The court held that the written document was binding and the commission payable to the real estate broker.

[99] G. H. Fridman, The Law of Contract in Canada supra n. 9 at 433 noting the case of Hawrish v. Bank of Montreal [1969] S. C. R. 515 (S. C. C.), 66 W. W. R. 673, 2 D. L. R. (3d) 600. The case concerned a guarantee given by Hawrish for a newly formed company by signing a standard form of a bank. The guarantee form stated that existing as well as future indebtedness was to be covered. Hawrish did, however, obtain an oral assurance from the assistant manager of the branch that the guarantee was to cover only existing indebtedness. When the company became insolvent, the bank called in the guarantee for its full amount. The Supreme Court of Canada held that the collateral agreement - allowing Hawrish to be freed of the guarantee - could not stand as it clearly contradicted the terms of the guarantee bond which state that it is a continuing guarantee.

evidence can be admitted to resolve such ambiguity. ..."[100] and thus help to interpret ambiguous terms[101].

(b) Problems created by the use of the parol evidence rule

The parol evidence rule creates a number of problems in the law of contracts. The value of the rule has diminished as many apparent exceptions have arisen, with the result that it has become difficult to predict when the rule applies.[102] If the parol evidence rule applies, the effect is that a very strong presumption is raised that "a document which *looks* like a contract is to be treated as the *whole* contract. [But] ... it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."[103] Even though this chapter cannot address to any extent the problems connected with the rule of parol evidence, the following should be noted. The writer agrees with a comment by Waddams[104] who states that an

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[100] G. H. Fridman, The Law of Contract in Canada supra n. 9 at 434. The author states further that "... injustice would be perpetrated if the written document were accepted as the sole source of the contractual obligations of the parties...".

[101] S. M. Waddams, "Two contrasting approaches to the parol evidence rule" supra n. 94 at 207 notes that all "... evidence must be allowed in order to decide the question whether the contract has been reduced to writing".

[102] M. McLauchlan, The Parol Evidence Rule (1976) at 29 notes that the " ... major difficulty with the parol evidence rule today is not the effect of its application, but rather, when it applies". G. H. Treitel, The Law of Contract supra n. 5 at 158 notes that the "exceptions" have become for practical purposes more important than the rule. S. M. Waddams, "Two contrasting approaches to the parol evidence rule" supra n. 94 at 207 states that the "... invocation of the rule has often had the effect of preventing courts from facing directly questions of mistake and unconscionability, by excluding the evidence that would support relief on these grounds".

[103] R. Wedderburn, Collateral Contracts (1959) Cambridge L. J. 58 at 62.

[104] S. M. Waddams, "Two contrasting approaches to the parol evidence rule" supra n. 94 at 207.

"... invocation of the rule has often had the effect of preventing courts from facing directly questions of mistake and unconscionability, by excluding the evidence that would support relief on these grounds." Further to be kept in mind is the doctrine of collateral contract, "... seen by some courts that wanted to provide a remedy where a party had breached the main contract, but was immune from liability (or limited liability) under the terms of that contract."[105] This doctrine could help the consumer if the parol evidence rule applies, but the doctrine is also not without problems, especially after the decision in Carman Const. Ltd. v. C. P. Ry. Co.[106], which stated that an exclusion clause can also apply to a collateral agreement. A consumer may have to rely on this doctrine if t' e user of a standard form takes extra care to express his terms clearly in the written contract. The consumer will have to hope that he can prove the presence of a collateral oral contract if, for example, the sales representative for the user of the standard form gave a different impression of the content of the form - short of a misrepresentation - resulting in the inclusion of a term in the contract which is unfair to the consumer.

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[105] G. H. Fridman, The Law of Contract in Canada supra n. 9 at 483 expressing a major need for this doctrine with regard to exclusion clauses.

[106] [1982] 1 S.C.R. 958, 18 B.L.R. 65, 136 D.L.R. (3d) 193, 42 N.R. 147.

6. ASSESSMENT OF THE RULE OF CONSTRUCTION

(a) Possibility of re-drafting unenforceable terms

One of the major shortcomings of the rule of construction is the fact that users will try to avoid its consequences by an endless re-drafting of the terms of standard forms.[107]

Llewellyn[108] describes the problem as follows:

> Case No. 1 comes up. The clause is perfectly clear and the court said ' Had it been desired to provide such an unbelievable thing, surely language would have been made clearer'. Then counsel redrafts, and they not only say it twice as well, but they wind up saying, 'And we mean it' , and the court looks at it a second time and says, ' Had this been the kind of thing really intended to go into an agreement, surely language could have been found', and so on down the line.
>
> This kind of thing does not make for good business, it does not make for good counseling, and it does not make for certainty. It

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[107] K. L. Llewellyn Book Review (1939) 52 Harv. L.Rev. 702,703 notes that "... the 'interpretation' device ... results in a constant struggle between draftsman of standardized contracts and courts". R. S. Johnston, Unfair Contracts: an Analysis of Regimes of Legal Protection in Canada (1980) at 127 speaks of a "fruitless battle against draftsmen". D. Tiplady, "The Judicial Control of Contractual Unfairness" (1983) 46 M. L. Rev. 601 sees an " ... implicit invitation to ... try again ...". See as well L. M. Friedman, "The Impact of Large Scale Business Enterprise upon Contract" VII International Encyclopedia of Comparative Law at point 20; S. Deutch, Unfair Contracts (1977) at 17; H. C. Havighurst, The Nature of Private Contract (1961 Rosenthal Lectures) Lecture II at 104; R. Cranston, Consumers and the Law (2nd ed. 1984) at 70 remarks with regard to the interpretation that it has "only limited effect ... because businesses properly advised incorporate widely-drawn exclusion clauses in their contracts covering every contingency." F. Kessler, "Contracts of Adhesion" supra n. 8 at 633 notes in an article that focuses mainly on insurance contracts: "Handicapped by the axiom that courts can only interpret but cannot make contracts for the parties, courts have to rely heavily on their prerogative of interpretation to protect a policy holder. To be sure many courts have shown a remarkable skill in reaching 'just' decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity. ... They felt that freedom of contract prevented them from saying so. Instead they disguised as 'interpretation' their efforts to change warranties into representations. But this makeshift solution tempted insurance companies to try the usefulness of 'warranties' again and again."

[108] R. S. Johnston, Unfair Contracts: an Analysis of Regimes of Legal Protection in Canada supra n. 107 at 128 citing K. L. Llewellyn, Report of the N.Y. State Law Revision Commission, N. Y. Leg. Doc. (1954) no. 65, 177-178.

> means that you never know where you are, and it does a very bad thing to the law indeed. The bad thing that it does to the law is to lead to precedent after precedent in which language is held not to mean what it says and indeed what its plain purpose was, and that upsets everything for everybody in future litigation.

An example for the 'evolution' of standard terms by way of a re-drafting process is given by Wilson[109] as he notes "... the growth of the exemption clause from the unsophisticated 'with all faults' ... to the exclusion of 'any express or implied condition, statement or warranty, statutory or otherwise' ... ".

(b) Application of the rule of construction by the judiciary

Trakman[110] expresses a further shortcoming of the rule of construction. "Judges can stress or downplay the sanctity of promises expressed without condition in writing. They can pay homage to the will of the parties or to the will of the court. They can enforce the literal letter of the contract or they can comply with the judges' own sense of equity in the context."

Another important factor which concerns the interpretation of a contract, is the split in views in the judiciary with regard to the underlying philosophy of the law of contracts. Some judges use an approach of strict construction, emphasizing the freedom of contracts. The parties are making their own contract and they get its benefit but also suffer its consequences. The role of the court is seen as **simply applying** the contract. Other judges see the role of the court to include **effecting a fair result.**[111]

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[109] N. S. Wilson, "Freedom of Contract and Adhesion Contracts" supra n. 65 at 178 footnote 37.

[110] L. E. Trakman, "Interpreting Contracts" (1981) 59 Can. Bar Rev. 241 at 256. The article focuses mainly on non performance and the interpretation of the parties' will by the judges in cases concerning commercial contracts.

[111] These opposing views and the resulting unpredictability of the construction of contract terms can clearly be seen in the Dennis Read v. Goody [1950] 1 All E. R. 919 (C. A.) case on one

footnote continued on next page

(c) Effects of the application of the rule of construction

The rule of construction when applied to a standard form consumer contract can create the following effects:

- If the terms used are precise enough, their content - even if unfair - is (in theory) of no importance.[112]

- The user of a standard form can go through a learning process and re-draft the terms, as Llewellyn emphasizes[113], until they are precise enough but still give him the desired advantages over the consumer who is confronted with 'unfair' terms.

- The rule of construction technique - particularly when c al ith a standard form contract - relies more than any other rule on t act that every case turns on its own facts. Even a decision in a fundamental case does therefore not necessarily provide help for future comparable cases. A prediction for consumers and users alike of standard forms with regard to how a term will be 'construed' becomes a very difficult task.

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hand and the Christie Owen & Davies v. Rapacioli [1974] 2 W. L. R. 723 (C. A.) on the other. In Alex Duff Realty v. Eaglecrest Holdings (1983) 26 Alta L. R. (2d) 133 (Alta. C. A.) (supra p. 92) the Alberta Court of Appeal preferred the Christie Owen approach over the Dennis Read one. McGillivray C. J. did however (in the same judgement) state a preference for the Dennis Read approach. See also the recent decision of Century 21 v. Trickett (1986) 47 Alta. L. R. (2d) 137, with Kerans J. A. in support of the Dennis Read approach. The Supreme Court of Canada decided a similar case in H. W. Liebig & Co. Ltd. v. Leading Investments Ltd. (1986) 25 D.L.R. (4th) 161 (S. C. C.), with four judges using the Christie Owen's approach, three judges the Dennis Read one instead.

[112] J. D. Crothers "Faute Lourde and Exclusion Clause" (1985) 26 Les Cahiers de Droit 881 at 896 puts it succinctly that at "common law a properly worded clause is sacrosanct".

[113] Supra pp. 109, 110.

Belobaba[114] remarks with regard to this last mentioned effect of the rule of construction that "... [the] focus of the common law is limited to the case at bar. ... the most we can expect from the common law courts is sporadic, *ex post, ad hocery*. In the context of a modern, high-speed, technologically innovative consumer market the suggestion that systematic policy development can be achieved through case-by-case sniping is absurd."

(d) Rule of construction as a possible solution to the problem of unfairness

Is the rule of construction, including the rule of *contra proferentem* and all other construction rules, a solution to the problem of unfairness? The rule of construction forces the user of a standard form to formulate the terms of the contract precisely so that the consumer knows exactly what he is agreeing to. However, even if he does read all the terms, he may not understand the legally precise terms which cover every possible situation.[115] Most importantly it seems doubtful that the consumer would avoid a contract due to the information provided through more precise terms. The rule of construction, while striving for the use of precise terms in a contract, does not provide a solution to the problem of unfair terms. A step towards the development of a solution could however be done if the courts were to articulate the true grounds of their

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[114] J. Swan and B. J. Reiter, Contracts (2nd ed. 1982) at 6-370.

[115] A. D. Forté, "Standard Form Contracts" (1981) 26 Journal of the Law Society of Scotland J. L. S. 380 notes at 382 that the terms "...are frequently so prolix that they are seldom read or understood by the offeree." A. D. Forté, "Unfair Contract Terms" [1985] Lloyd's Maritime and Commercial L. Q. 482 at 495, 496 notes: "... the problem of understanding what the effect of certain terms really is, rather than the fact that they are found in standard forms, which represents the real danger in many cases. This is not, of course, to deny that unfair terms when expressed in clear language ought not to be controlled but merely to suggest that sophisticated problems require a sophisticated response." Forté therefore suggests "... to remove the adjudication of unfairness from the courts and place it before an administrative body ... ." The author further points out that "... [t]he administrative control of standard form contracts ... should be viewed as the shape of things to come ... .".

judgements[116] and deal with the real issue of unfairness in standard form contracts. The rule of construction approach tries to find the true meaning of a contract term, which is the meaning that was intended by the contracting parties. It does not deal with the issue of an inequality of bargaining power and the fact that not all terms in a standard form contract are expected to be read by the consumer. As found earlier, both factors are important characteristics of standard form contracts. The writer agrees with Wilson[117] who remarks

> ... **to consider cases concerning adhesion contracts in terms of general contractual principles obscures the true issue.** For example, insistence on strict construction instead of questioning whether, because of the inequality of the parties, a "bargain" can be said to exist can never lead to the enlightenment of judicial reasoning in the latter respect. Such a practice has the added disadvantage that by taking "interpretation" beyond its real possibilities it embarrasses attempts at true construction.

If the courts were to address the real issue of fairness, it might however become necessary to differentiate between two kinds of contracts, ordinary and standard form contracts, thus preventing the application of the same contract rules to every contract.[118]

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[116] N. S. Wilson, "Freedom of Contract and Adhesion Contracts" supra n. 65 at 192 states that "... concealing the true problem, is both misleading and dangerous. Only a forthright understanding of the nature of the problem can ever lead to the formulation of the necessary curative principles."; Corbin, Contracts (2nd ed. 1960), Vol. 3 § 561 at 279 gives a vivid and marked comment: "A better brand of justice may be delivered by a court that is clearly conscious of its own processes, than by one that states hard-bitten traditional rules and doctrines and then attains an instinctively felt justice by an avoidance of them that is only half conscious, accompanied by an extended exegesis worthy of a medieval theologian.".

[117] N. S. Wilson, "Freedom of Contract and Adhesion Contracts" supra n. 65 at 178, 179; emphasis added.

[118] N. S. Wilson, "Freedom of Contract and Adhesion Contracts" supra n. 65 at 179 notes that "[w]hilst superficially attractive such an answer is not without difficulties for it involves the construction of a dual system of contracts and thus an invidious process of demarcating the dividing boundary." The author notes further that the systems in France, Germany, Austria rely on the courts. Decisions are based on "blanket concepts" contained in their Codes which have a positively statutory generality. Favouring administrative or legislative supplementation of the courts' powers are, for example, Italy, Belgium, and Sweden. The author tends to favour the courts as the place to solve the problem.

C. INCORPORATION OF STANDARD TERMS INTO THE CONTRACT

All contract terms have to be incorporated into the contract and consented to by the consumer as part of the contract in order to be valid. The problem arises that - as a feature of standard form contracts - the consumer often does not read all the terms nor is he expected to do so.[119]

1. "TICKET CASES"

In the "ticket cases"[120] a sufficient notice[121] of the terms has to be present before or at the time of the conclusion of the contract alerting the consumer especially to onerous terms of the contract. It is commonly contended that "... the more unusual or unexpected a particular term is the higher will be the degree of notice required to incorporate it."[122]

In the case of Kowalewich v. Airwest Airlines Ltd.[123] the plaintiff was a passenger on a regularly scheduled flight of the defendant airline, which made a forced landing in the sea. The camera equipment of the plaintiff was damaged by immersion in salt water. Airwest admitted its negligence but said its liability was limited by the terms and conditions of tariff Item 35, which was printed on p. 3 of the ticket and which was filed with the Canadian Transport Commission. Tariff Item 35 read in part:

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[119] Supra p. 14.

[120] Supra p. 1 footnotes 2-5 providing examples.

[121] Supra p. 4 with Lord Denning's statement that a notice should be: "printed in red ink with a red hand pointing to it".

[122] G. H. Treitel, The Law of Contract supra n. 5 at 170.

[123] [1978] 2 W. W. R. 60 (B. C. S. C.). In this case description, an extensive reproduction of some contract terms is provided in order to allow for a comparison with the contract terms in the German *Lufthansa* case.

ACCEPTANCE OF THIS TICKET SUBJECT TO TERMS AND CONDITIONS OF CARRIAGE BELOW

(1) This ticket is sold and the transportation and services covered hereby are furnished or agreed to be furnished, subject to the terms and conditions of the applicable tariffs of the Company on file with the Air Transport Board, Ottawa, Canada, the Civil Aeronautics Board, Washington, D. C., and/ or other Government agencies having jurisdiction in the premises. ...[further reference was made to the International WARSAW Convention].

(2) All stops between the original place of departure and the place of final destination scheduled by the Company as shown in the schedules or timetables of the Company (which schedules and timetables are made a part hereof for that purpose only) shall constitute 'agreed stopping places'; and the Company reserves the right to alter the 'agreed stopping places' in case of necessity.

(3) The liability of Air West Airlines Ltd. and/ or subsidiaries thereof shall not exceed $100.00.

The reverse of the third page of the passenger ticket contained among others the following statements:

35. LIMITATION OF LIABILITY FOR BAGGAGE

(1) The liability, if any, of the carrier for the loss of, damage to, or delay in the delivery of any personal property, including baggage (whether or not such property has been checked or otherwise delivered into the custody of the carrier) will be limited to an amount equal to the value of such property, which shall not exceed $100.00 for each ticket unless the passenger, at the time of presenting such property for transportation, when checking in for flight, has declared a higher value and paid an additional transportation charge, at the rate of 10 cents for each $1000.00 or fraction thereof, by which such higher declared value exceeds the applicable amount set forth above, in which event carrier's liability will not exceed such higher declared value ...

(3) The carrier will not accept for transportation or for storage personal property including baggage, the declared value of which exceeds $1,000.00.

The court held that Airwest was liable. Trainor J. stated that the question to be determined was whether or not the conditions printed on the back of the last page formed a part of that contract.[124] The conditions on the ticket were not brought to the plaintiff's attention, nor had Airwest posted a notice of the conditions in accordance with s. 75 of the Air Carrier Regulations. In the alternative, tariff Item 35 did not exempt Airwest from liability for negligence as its language, which referred only to "the liability, if any, of the carrier for the loss of, damage to, or delay in the delivery of any personal property," was not so plain as to include negligence.[125]

The writer thinks that, provided the terms limiting Airwest's liability are unfair to the consumer (which has not been decided at all), it does not improve the consumer's position if the terms were brought to his attention prior to the conclusion of the contract. The consumer would probably have concluded the contract anyway, a fact which shows that the problems of notice and fairness are quite distinct from each other. However, a reasonable notice alerting the consumer to terms which limit the user's liabilty would at least have given the consumer a chance not to conclude the contract.

2. SIGNED DOCUMENTS

The situation is slightly different if a written, signed contract is involved. The signature to the contract is usually sufficient to document the consumer's assent to all the terms. "When a contract is signed, the normal rule is that the person signing is bound by all the terms on the signed contract whether he had

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[124] Idem at 66.

[125] Idem at 60. The court uses the technique of interpreting an exemption clause as described supra pp. 78-96.

notice of them or not."[126] The authoritative case for this statement is L'Estrange v. Graucob, Ltd.[127] wherein Lord Scrutton[128] states: "When a document containing contractual terms is signed ... in the absence of fraud ... [or] misrepresentation, the party signing is bound, as it is wholly immaterial whether he has read the document or not."

An exception to the normally binding effect of a signature may be possible, relying on the case of Tilden Rent-A-Car Co. v. Clendenning[129]. The consumer's assent, expressed by way of a signature, was not given any effect, at least in relation to some contract terms. The consumer had not read the document in its entirety before signing it and an employee of the other contracting party was aware of this fact. The contract document contained, among others, the following clause:

> 7. The customer agrees that the vehicle will not be operated:
>
> (a) By any person who has drunk or consumed any intoxicating liquor, whatever be the quantity ... .

Dubin J. A. states in the Tilden Rent-A-Car case:

> The signature to a contract is only one way of manifesting assent to contractual terms.[130]
>
> ... it is to be observed that an essential part ... is whether the other party entered into the contract in the belief that Mr. Clendenning was assenting to all such terms. ... it was apparent to the employee of Tilden Rent-A-Car that Mr. Clendenning had not in fact read the document in its entirety before he signed it. It follows ... that Tilden-

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126 J. Swan and B. J. Reiter, Contracts supra n. 114 at 6-73 adding that "[s]igning disposes conclusively of the issue of notice.".

127 [1934] 2 K. B. 394 (C. A. England)

128 Idem at 403.

129 (1978), 18 O.R. (2d) 601, 4 B. L. R. 50, 83 D. L. R. (3d) 400 (C. A.).

130 Tilden Rent-A-Car Co. v. Clendenning supra n. 58 at 404.

> Rent-A-Car cannot rely on provisions of the contract which it had no reason to believe were being assented to by the other contracting party.[131]

The core of the decision is that Tilden Rent-A-Car could not rely on stringent and onerous terms (like the clause cited above) without first having taken reasonable measures to draw such terms to the attention of the other party, as in the ticket cases. The court does not specify the "reasonable measures". Was a notice in red ink necessary or would an oral warning by the employee have been sufficient?[132] The case also does not answer the question of what are "unfair" terms as it does not state whether the onerous terms are unenforceable because of their unfair content, or because of a lack of notice. The writer suggests however that the true reason for the decision was that the content of some clauses was seen as "unfair", rather than the lack of notification to the consumer. This also seems to be the understanding of Lacourciere J. A. [133] when he notes in his dissent:

> It is not for a Court to nullify ... [the] effect [of a strict clause] by branding it unfair, unreasonable and oppressive. It may be perfectly sound and reasonable from an insurance risk viewpoint, and may indeed be necessary in the competitive business of car rentals ... .

The decision in the Tilden Rent-A-Car case relies heavily on the special circumstances of the case, what makes it more than questionable whether the case contains a general statement regarding the effect of a signature to a standard form contract. On the basis of this, the binding effect of a signature will not easily be overcome.

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[131] Idem at 405.

[132] R. Hasson, "Unconscionability in Contract Law and in the New Sales Act" [1979-80] 4 Can. Bus. L. J. 383 at 388.

[133] Idem at 414.

3. ASSESSMENT OF THE INCORPORATION OF STANDARD TERMS INTO THE CONTRACT

Standard terms are incorporated into a contract if the consumer has been given reasonable notice or if by his signature declares that he knows of their existence. These measures are used to make the consumer aware of what he is agreeing to. However, does this procedure help to reach or secure fairness in standard form contracts?

It is understood that the consumer normally does not read all the terms of a standard form contract prior to the its conclusion. The position of a consumer would be improved if the user of a standard form contract were required (by the penalty of the contract not being enforced) to inform the consumer of all the clauses included in the contract. The consumer would have the opportunity to make an informed decision.[134] But his position with regard to unfair contract terms would not improve significantly because the problem of unfairness is distinct from the problem of notice.[135] An unfair contract term does not change its character if the consumer knows of its existence nor does the consumer necessarily avoid making a contract which includes an unfair provision.[136] The writer does not think that the consumer for example in the Kowalewich[137] or the Tilden Rent-A-Car[138] case would have avoided entering into the contract if he had been informed of every clause included in the contract.

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[134] G. Gluck, "Standard Form Contracts: The Contract Theory Reconsidered" (1979) 28 I.C.L.Q. 72 at 79, a statement made with regard to the theory of an articulate notice; see infra p. 131, 132.

[135] S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" supra n. 94 at 597.

[136] See infra p. 131, 132: The theory of an articulate notice and the Plain English Movement provide a comparable argument.

[137] Kowalewich v. Airwest Airlines Ltd. supra n. 123.

[138] Tilden Rent-A-Car Co. v. Clendenning supra n. 58.

D. THEORY OF INEQUALITY OF BARGAINING POWER

Besides the approach of the rule of construction, the theory of inequality of bargaining power is used to fight unfair terms in standard form contracts.

1. CHARACTERIZATION OF THE THEORY

The theory of inequality of bargaining power addresses one of the dominant elements of standard form contracts: the lack of consumer bargaining power.[139] Tiplady[140] characterizes the theory as the "... most radical development of the English law of contract towards an overtly justice-based general principle ...". Forté[141] points out that ". a justice-based approach to the problem of contractual unfairness might succeed where traditional, legalistic might fail.".

The theory was described by Lord Denning in his judgement in the case of Lloyds Bank Ltd. v. Bundy [142]. The case dealt with an action for possession of a farmhouse. The defendant, an elderly farmer and long-standing customer, had given the house to the bank as security for his son's company's overdraft. The majority of judges of the Court of Appeal dismissed the action for possession because the bank had violated its fiduciary duty to the defendant.

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[139] Supra pp. 20, 21; A. D. Forté, "Unfair Contract Terms" supra n. 115 at 488 states that "Consequently, it is the lack of any true alternative to contracting with someone other than the supplier or someone outside a narrow cartel which really represents the unfairness.".

[140] D. Tiplady, "The Judicial Control of Contractual Unfairness" supra n. 107 at 610; A. D. Forté, "Unfair Contract Terms" supra n. 115 at 486 states that "[o]f the several ways in which the courts have attempted to combat unfairness in contracts, the approach which most closely represented an attempt to formulate an 'overtly justice-based principle' was that typified by the concept of inequality of bargaining power.".

[141] A. D. Forté, "Unfair Contract Terms" supra n. 115 at 486.

[142] [1975] Q. B. 326, [1974] 3 All E. R. 757 (C. A.); with regard to the inequality of bargaining power as understood and developed by Lord Denning see G. H. Fridman, The Law of Contract in Canada supra n. 9 at 306, 307 and D. Tiplady, "The Judicial Control of Contractual Unfairness" supra n. 107 at 610.

Lord Denning dismissed the action on the additional ground that the contract both in its terms and the circumstances in which it was made, reflected an excessive inequality of bargaining power. According to Lord Denning, a contract is liable to be set aside on this ground if someone

> without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.[143]

Tiplady[144] remarks that the theory is distilled from five separate categories: duress of goods, unconscionable transactions, undue influence, undue pressure, and maritime salvage. According to Lord Denning, these categories are united and identified by the single principle of inequality of bargaining power despite the wide differences of situations which they cover.[145] Lord Reid states that a contract party is exercising a superior bargaining power if this party can say: " 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.' "[146]

2. CRITIQUE REGARDING THE THEORY OF INEQUALITY OF BARGAINING POWER

The theory of inequality of bargaining power tries to solve the problem of unfair terms in standard form contracts by addressing the lack of consumer bargaining power. Unlike the rule of construction this theory focuses on one of

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[143] Lord Denning in Lloyds Bank Ltd. v. Bundy [1974] 3 All E. R. 757 (C. A.) at 765.

[144] D. Tiplady, "The Judicial Control of Contractual Unfairness" supra n. 107 at 611.

[145] Lord Denning in Lloyds Bank Ltd. v. Bundy supra n. 143 at 763.

[146] Lord Reid in Macaulay v. Schroeder Publishing Co. Ltd. [1974] 1 W.L.R. 1308 (H.L.) at 1316.

the major elements of a standard form contract. Is this enough to provide an acceptable solution? What elements have to be considered before making the judgement that an inequality of bargaining power is present, rendering the questionable term unenforceable? Is it possible to prevent a judgement made only on an intuitive basis?

Addressing these questions, Tiplady[147] asks whether the theory "Is ... in fact anything more than a slogan for unstructured distributive justice? The doctrine invites comparison between the particular situation and some benchmark or norm of 'common fairness'; but the factors of comparison are not identified.". Tiplady[148] also succinctly notes a major point of criticism when he states that

> [t]he doctrine of inequality of bargaining power does not assist us to distinguish legitimate forms of advantage-taking from illegitimate. Its appearance of content is apocryphal, since only in some cases is advice relevant, only in some is the disparity of terms relevant, and only in some is the positive use of influence or pressure of any importance. An appeal to common justice carries the seductive implication that we all intuitively understand what it is. **As a legal principle, however, an appeal to instinct is a poor substitute for the clear articulation of rational standards.**
>
> [There is the] danger that such wide and imprecise principles can be a swift road to sloppy analysis, flaccid reasoning, and ultimately incorrect conclusions ...[149]

Trebilcock[150], while mainly analysing the economic aspect of the doctrine of inequality of bargaining power, comes to a similar conclusion when he cautions: "For a general doctrine such as inequality of bargaining power to be

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147 D. Tiplady, "The Judicial Control of Contractual Unfairness" supra n. 107 at 612.

148 Idem at 613, 614.

149 Emphasis added.

150 M. Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26 U.T.L.J. 359.

an effective instrument in controlling transactional abuses, it needs to be sharp in its focus, conceptually sound and explicit in its policy underpinnings ... .".

Trebilcock[151] does not object to the adoption of the theory, but he thinks that the doctrine of inequality of bargaining power[152] will not be able to affect the broad balance of advantage between buyers and sellers. In other words, the theory, while addressing the inequality of bargaining power, will likely not change this inequality.

3. EVALUATION OF THE THEORY OF INEQUALITY OF BARGAINING POWER

The name of the theory may suggest that any contract made with an inequality of bargainir g power existing between the parties is unenforceable. An exactly equal amount of bargaining power will, however, rarely be existent and the theory therefore asks for a "superior bargaining power"[153] to be present. But what difference in bargaining power is necessary to create an inequality, especially when a standard form contract is involved?

According to Lord Denning[154] the theory is defined by elements which are taken from the categories of duress of goods, unconscionable transactions, undue influence, undue pressure, and maritime salvage. An element special to the theory of inequality of bargaining power cannot be detected, especially an element which determines when a term reflects an excessive amount of

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151 Idem at 382.

152 As employed in the Schroeder Music Publishing Co. v. Macaulay (formerly Instone), [1974] 1 W. L. R. 1308, [1974] 3 All E. R. 616, affirming [1974] 1 All E. R. 171 (H. L.).

153 Lord Reid in Schroeder Music Publishing Co. v. Macaulay [1974] 1 W.L.R. 1308 (H.L.) at 1316.

154 Lord Denning in Lloyds Bank Ltd. v. Bundy supra n. 143 at 763.

inequality. The definition of when a contract is unenforceable on the basis of the theory of inequality of bargaining power is therefore very wide indeed. As the theory does not provide a crucial element or at least a guide-line to determine when a term has to be considered unfair, the writer does not see why the categories that compose the theory of inequality are not in themselves sufficient and why (on this basis) there is a need for a theory of inequality.

Besides a lack of clarity concerning the amount of inequality of bargaining power, it has to be asked whether an inequality necessarily creates unfairness? An inequality of bargaining power, specifically the lack of consumer bargaining power, has been noted earlier to be a characteristic of standard form consumer contracts. The writer thinks, however, that even when there is an excessive inequality of bargaining power, parties **can** make a contract which consists of terms which are fair to both parties. The bargaining process in itself does not guarantee that only fair contract terms are used but an inequality of bargaining power makes it more likely that unfair terms will be found.

Considering the difficulty of defining what amount of inequality of bargaining power is necessary in order to apply the theory of inequality, a further question needs to be addressed. Are judges who decide whether an inequality of bargaining power is present supposed to make such a wide ranging decision? As Belobaba[155] puts it: "... is it legitimate to allow a non-elected, non-representative institution these wide supervisory powers?".

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[155] E. P. Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention" Study #12 in J. Swan and B.J. Reiter, Contracts (2nd ed. 1982) at 6-373.

Belobaba[156] answers the question by pointing out that "[t]he common law ... does not require an electoral mandate. Its legitimacy is derived from community consensus. There are certain identifiable shared values of commercial morality which the common law strives to articulate in its supervision of the bargaining process. This is all that the court is doing when it considers the overall fairness or reasonableness of a particular trade practice or standard form term.".

The writer agrees that judges can decide whether an inequality of bargaining power is present or not. A decision on the amount of bargaining power present does not differ from a judicial determination, for example, on the reasonableness of actions in the law of torts. Judges will always have to make value choices and they will always have to have some discretion. However, the writer sees a major problem embedded in the theory of inequality of bargaining power as it does not present any guide-lines to help judges to detect inequality of bargaining power to an extent which makes a standard form contract invalid.[157]

E. THEORY OF UNCONSCIONABILITY

Another approach to solve the problem of unfair terms in standard form consumer contracts is the theory of unconscionability. "One of the most important legal phenomena of the seventies was the resurgence of

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[156] Idem.

[157] E. P. Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention" supra n. 155 at 6-372 states that "[i]nequality of bargaining power is too blunt a tool to deal with the variations of market place abuse. It is arbitrary and indiscriminate. What is needed is a problem-specific regulatory response [as opposed to a judicial approach] that can be geared to a particular abuse in a particular market.".

unconscionability as a vital contract doctrine enabling courts to police the fairness of bargains where advantage appears to have been taken of a manifestly weaker party."[158]

1. DESCRIPTION OF THE THEORY

Unconscionability is " ... not fraud in the classical, common-law sense, involving misrepresentations of the truth. Nor is there any improper application of pressure amounting to duress or its equitable analogue of undue influence. ... the conduct of one party in obtaining the assent of the other to a particular contract was of such a character that a court might well consider that to uphold the ensuing contract would be to perpetrate an injustice and produce an unfair result. A contract may be rescinded if the behaviour of one contracting party was unconscionable."[159] Such unconscionable behaviour is present, if the consent of one party was given while being "... physically, emotionally, or intellectually free and competent to give it ... [but the consent was nevertheless] the product of some minatory, overweening or improperly persuasive conduct on the part of the guilty party".[160] In the previously mentioned case of Lloyds Bank v. Bundy[161] Lord Denning states that an "unconscionable transaction" can be found in all cases "where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a

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158 Editorial on unconscionability as a vital contract doctrine in (1986) 4 Can. Bus. L. J. 381-382.

159 G. H. Fridman, The Law of Contract in Canada supra n. 9 at 303.

160 Idem at 293.

161 Lloyds Bank Ltd. v. Bundy supra n. 143. The fact that this case was previously cited to illustrate the theory of inequality of bargaining power shows the close connection of inequality of bargaining power and unconscionability. See infra p. 129 on the relationship between the theory of inequality of bargaining power and the theory of unconscionability.

weaker.". Lord Denning further characterizes such an "unconscionable transaction":

> A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the "expectant heir". But it applies to all cases where a man comes into property, or is expected to come into it - and than being in urgent need - another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him. ... Even though there be no evidence of fraud or misrepresentation, nevertheless the transaction will be set aside.[162]

2. RELATIONSHIP OF THE THEORY TO THE DOCTRINES OF DURESS AND UNDUE INFLUENCE

There is a close relationship between the doctrines of undue influence and duress, and the theory of unconscionability. "In contracts with an attack upon consent, which is what is involved in a plea of undue influence, a plea that a bargain is unconscionable, or has been obtained by unconscionable means or methods, permits a court to invoke relief against an unfair advantage gained by an unconscientious use of power by a stronger part, against a weaker. Where such misuse of power is shown, it creates a presumption the stronger party must repel by proving that the bargain was fair, just and reasonable. The

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[162] Further cases which concern an unconscionable transaction: Knupp v. Bell (1966) 58 D.L.R. (2d) 466, affirmed 67 D.L.R. (3d) 256 (Sask. C.A.). An agreement for the sale of land was set aside as unconscionable. A senile woman of no business experience was induced to sell her lands to a neighbour at a grossly inadequate price without taking independent advice from competent members of her family. The case of Marshall v. Can. Permanent Trust Co. (1968) 69 D.L.R. (2d) 260 (Alta S.C.) also concerned an agreement for the sale of land. The deal was held to be unconscionable because the seller was found to be "ignorant, wanting skill in business, and comparatively an imbecile of intellect, and the transaction [was] one into which he would not have entered had he been properly advised and protected." The case of Bomek v. Bomek [1983] 3 W.W.R. 634, 21 B.L.R. 205, 146 D.L.R. (3d) 141, 20 Man.R. (2d) 150 dealt with a mortgage which was declared to be unconscionable due to the special circumstances of the case (the mortgage to the family home was given by elderly, not well educated parents to their son), but especially because of the absence of independent legal advice.

two doctrines are closely related. Indeed the latter is obviously an offshoot of the former."[163]

Even though there is a close relationship, one should avoid a confusion of terms between duress, undue influence and mistake; and unconscionability.[164] The principles of duress, undue influence and mistake - in general the protection of weaker parties - mean that a contract has been entered into without genuine consent. The contract can therefore be avoided. Unconscionability is present if a contract, which includes oppressive terms or where the stronger party exercises his rights under the contract in a manner which is harsh and unfair, is willingly but foolishly accepted. There is relief available against an oppressive term or the exercise of rights by the stronger party; but the whole contract cannot be avoided.[165] But Fridman[166] makes the important point that even though equitable relief might be given concerning unconscionable transactions, not all transactions which may prove to be foolhardy, burdensome or otherwise undesirable or improvident, can be considered to be unconscionable. The protection of the consumer should not be overdone. A balance has to be kept as he cannot be protected against every deal that he later (for whatever reason) regrets.

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163 G. H. Fridman, The Law of Contract in Canada supra n. 9 at 304, 305.

164 Idem at 304, 305 notes that the doctrines are distinct, although their parentage is the same.

165 A. H. Angelo and E. P. Ellinger, "Unconscionable Contracts" (1979) 4 Otago L. Rev. 300 at 303, 304.

166 G. H. Fridman, The Law of Contract in Canada supra n. 9 at 304, 305.

3. RELATIONSHIP OF THE THEORY TO THE THEORY OF INEQUALITY OF BARGAINING POWER

The theory of unconscionability can be compared to the theory of inequality of bargaining power.[167] Waddams[168] states that the test of unconscionability accepted by the courts is an improvident agreement combined with unequal bargaining power. Fridman[169] notes that the theories "appear to be almost interchangeable" and "... perhaps the doctrine of inequality of bargaining power can be regarded as an updated version of the traditional notion of what is unconscionable."[170]

4. EVALUATION OF THE THEORY OF UNCONSCIONABILITY

According to the theory of unconscionability a standard form contract is unenforceable if the assent of one party was obtained in an unconscionable way. This gives the courts the opportunity of not enforcing a contract which is perceived to come to an unfair result.

The theory of unconscionability seems to provide a general, overall solution to the problem of standard form contracts. But, as observed in the analysis of the theory of inequality of bargaining power, the theory of unconscionability leaves as well too much discretion to the courts. Again there

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167 D. Tiplady, "The Judicial Control of Contractual Unfairness" supra n. 107 at 615.

168 S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" supra n. 94 at 591.

169 S. M. Waddams, The Law of Contracts supra n. 6 at 307 and at 309 mentioning again the close connection between the principles.

170 Idem at 310.

are no guide-lines determining when unconscionability is present.[171] The predictability of the law is limited as the courts might decide at any time that a contract is unconscionable and therefore unenforceable.

The predictability of the law is a major problem connected with the theory of unconscionability as well as with the theory of inequality of bargaining power because both theories come very close to forming a **general rule** which allows judges to set unfair clauses aside. A general rule provides a broad standard which can cope with the unforeseen and perhaps marginal features of consumer transactions.[172] But a general rule can also create a loss of certainty in contractual dealings[173] because the interpretation of the rule by the court can be unpredictable. The element of certainty should not be given too much weight. The writer agrees with Waddams[174] who states that "certainty can be purchased at too high a price. Moreover, in the present state of affairs there is neither justice nor certainty. No justice, because unfair contractual provisions are often enforced; no certainty, because one never knows when an ingenious court will find some reason to avoid the effect of the contractual provision.". Even though the writer does not object to a general rule of inequality of bargaining power or a general rule of unconscionability she thinks that the

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[171] J. R. Peden, The Law of Unjust Contracts including the Contracts Review Act 1980 (NSW) 1982 notes at 24 that the "... absence of clear criteria for determining unconscionability ... is worrying.".

[172] R. Cranston, Consumers and the Law (2nd ed. 1984) at 78 referring to the main justification for an unconscionability provision.

[173] S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" supra n. 94 at 598; R. Cranston, Consumers and the Law (2nd ed. 1984) at 78.

[174] S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" supra n. 94 at 598: further to be noted is the statement of Kessler "Contracts of Adhesion" supra n. 8 at 64 " In the development of the common law the ideal tends constantly to become the practice. And in this process the ideal of certainty has constantly to be weighted against the social desirability of change, and very often legal certainty has to be sacrificed to progress. The inconsistencies and contradictions within the legal system resulting from the uneven growth of the law and from conflicting ideologies are inevitable.".

existing theories are too vague and in need of some guide-lines in order to make their application more predictable.

F. DOCTRINE OF AN ARTICULATED NOTICE

Gluck[175] sees a solution to the problem of unfair terms in standard form contracts in a doctrine of an articulated notice. This doctrine addresses the aspect that standard form contracts are rarely read in full by the consumer prior to their conclusion.

> The doctrine of informed notice recognizes the central problem raised by the standard form contract and states in positive terms that an offeror must point out any onerous or unexpected term of his contract to an offeree at the risk of it not being enforced.[176]

Gluck judges this approach to be better than the "elusive" inequality of bargaining power or fundamental breach theories. He notes that "... [t]he doctrine of informed notice is an attempt to bridge the gap between traditional contract theory and the modern standard form contract."[177]

The writer cannot see a major influence coming from this theory. The writer doubts that the decision process which has to be made by the consumer will be influenced by an articulate notice to the contract terms. Consumers will often not understand the legal terminology used in the contract. These are as well two major criticisms articulated with regard to the Plain English Movement which has developed in the United States. This movement cannot be dealt

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[175] G. Gluck, "Standard Form Contracts" supra n. 134 at 77-80.

[176] Idem at 82 and 84, 85. It has to be kept in mind that the author bases his article on the English situation with, for example, the Unfair Contract Terms Act of 1977 in place.

[177] Idem at 90.

with in the scope of this thesis. It can only be noted that it tries to bring more fairness to standard form contracts with the requirement that information must be disclosed to the consumer in a comprehensible manner by using "plain and simple language".[178]

G. EXPECTATION THEORY

Another solution to the problem of unfair terms in standard form contracts is proposed by Birnbaum[179]: the expectation theory. The theory, which derived from the concept of mutual assent, often called "meeting of the minds", states that the court should honour the "reasonable expectations" of the contracting parties when it determines and interprets the terms of a contract.[180] The scope of this thesis does again not allow for a close look at this theory, keeping in mind that Birnbaum is basing his article on the American situation, especially the doctrine of unconscionability[181], and that the Uniform Commercial Code is

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178 C. Felsenfeldt, "The Plain English Movement in the United States" (1981-82) 6 Can. Bus. L. J. 408; D. S. Cohen, "Comment on the Plain English movement" (1981-82) 6 Can. Bus. L. J. 421; M. Fingerhut, "The Plain English movement in Canada" (1981-82) 6 Can. Bus. L. J. 446.

179 G. L. Birnbaum et al., "Standardized Agreements and the Parol Evidence Rule" supra n. 92. A virtually identical theory was also proposed by W. D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power" (1970-71) 84 Harv. L. Rev. 529 and W. D. Slawson, "The new meaning of contract" (1984) 46 U. Pitts. L. Rev. 21.

180 G. L. Birnbaum et al., "Standardized Agreements and the Parol Evidence Rule" supra n. 92 at 802.

181 This doctrine is very much alive in the United States where it is embedded in the Uniform Commercial Code. 2-302 of the Uniform Commercial Code reads as follows:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.See

footnote continued on next page

in place to deal with standard form consumer contracts. The writer further thinks that the expectation theory does not add a significant new aspect to the treatment of unfair terms in standard form contracts but is closely related to the interpretation technique discussed above.

As stated at the beginning of this chapter, the Canadian common law does not use a specific body of law to deal with standard form consumer contracts. The problem of unfairness in these contracts is mainly dealt with by using the traditional construction or interpretation approach, which does not directly deal with the real problems of standard form contracts. However, the theories of inequality of bargaining power and unconscionability may have opened a door towards a more direct approach. But these theories have problems of their own; they especially do not deal with the central problem of unfairness in standard form contracts.

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for a reference J. J. White and R. S. Summers, Uniform Commercial Code (2nd ed. 1980) chapt. 4, at 147-169 on Unconscionablity; further § 4 -1 an introduction to the principle of unconscionability and § 4-2 on unconscionability in general. See further S. Deutch, Unfair Contracts (1977) supra n. 107 as one of the many authors writing on this subject.

CHAPTER FOUR

COMPARISON OF THE GERMAN AND COMMON LAW SYSTEMS WITH REGARD TO STANDARD FORM CONSUMER CONTRACTS

A. INTRODUCTION

The previous chapters have described the character of standard form consumer contracts, their advantages and disadvantages and the different techniques used in the common law in Canada and in the civil law in Germany to deal with unfair terms in these contracts. This chapter will show that some techniques used in both systems are surprisingly similar and the writer thinks that this similarity is quite remarkable in systems as different as common and civil law. The detailed German statute concerning standard form contracts provides rules to test the content of clauses with regard to their fairness. The common law does not perform an open test of content. The writer suggests that an adoption of rules similar to the ones included in the German statute into the common law (by statute or by way of development by the judiciary) would improve the present state of the common law regarding the fairness of standard form contracts.

As with every comparative study, this thesis has to face the question of how a comparison can benefit the respective legal communities. Even though a comprehensive answer to this question is beyond the scope of this thesis, the following analysis will show that this comparative study can help to find the best solution to a problem which has a major impact on the law of contracts in both systems.

In general, a comparative study provides information about the solutions found for similar problems in another, often very different system. The information can bring new ideas into each system and each system can profit from the past experience of the other, share current new ideas and their implementation and possibly adjust its rules. Before considering any adjustment to one system it should be kept in mind that there are limits to the conclusions which can be drawn from a comparative study. New ideas discovered in one system can rarely be simply transferred into the other. The problem has to be comparable and the solution must be in harmony with the overall system. A comparable solution may already exist, and there may be no need for a transplantation of "foreign" rules. Every transformation process will further have to account for social, political, economic and cultural differences as well as differences of the system itself. As examples, standard form consumer contracts used in Germany may not be as onerous as those used in Canada; a different court cost system may be responsible for more cases being brought to the courts' attention in Germany; or consumers in Germany may be more "litigious" than consumers in Canada. Despite all the differences, the writer thinks that solutions can be transformed or transplanted without giving up the existing legal tradition or adopting the other system as a whole.

A comparative study can also minimize misunderstandings of the different systems in the legal communities and thereby promote a better understanding of the respective systems. Mutual understanding can help to develop closer relations between different systems which are already moving closer towards each other as the common law institutes more statutes and the civil law

develops more "case law"[1]. Nevertheless differences between the systems will not cease to exist.[2]

B. General comparison between the AGB-statute and common law

Standard form consumer contracts are subjected to the detailed AGB-statute in Germany, while there is no comparable statute in Alberta or any other Canadian common law jurisdiction to complement the common law. This difference in itself is not unusual, because Germany relies mainly on statutes and the common law relies mainly on case law. In both systems standard form contracts are not given special treatment, but like every contract they are subjected to the general law of contracts. This is true even in Germany, where the special AGB-statute is in place. In fact, as noted earlier[3], one reason for the enactment of this statute was the re-establishment of the contract theory and its foundation in the principle of freedom of contract with regard to standard form contracts.

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[1] I. Zajtay, "Begriff, System und Präjudiz in den kontinentalen Rechten und im Common Law" (1965) 165 / 45 (of the new sequence) Archiv für die civilistische Praxis AcP 97 at 102; G. Weick,"Unfair Contract Terms Act und AGB-Gesetz" (1981) 145 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht ZHR 68 at 82 notes (regarding the British Unfair Contract Terms Act 1977) that there is a certain advance of the common law towards the design of continental reform statutes which in turn are developing away from the European model of codification.

[2] I. Zajtay, "Begriff, System und Präjudiz in den kontinentalen Rechten und im Common Law" supra n. 1 notes at 114 that the permanent difference between continental civil laws and the common law lies in its structual difference which will have an effect on every development in the respective systems.

[3] See supra p. 29.

The problems of standard form consumer contracts seem to be more prevalent in Germany than in Canada, if the amount of literature available on the topic can be used as an indication of its importance. In Germany, textbooks and especially commentaries are used to interpret a statute and there are several special commentaries available which deal with the AGB-statute. The German legal system may also be more interested in finding a doctrine which solves a fundamental problem. While pursuing this goal, the legal community creates a lot of literature dealing with the often controversial problem. The common law is not as much interested in finding a general solution to a fundamental problem, but in finding a solution to the case at hand and developing a general solution on a case-by-case basis. The writer admits that this statement does not go into any depth to explain the different approaches taken by the two systems when dealing with a fundamental problem. It can, however, be concluded that the existence of more literature in Germany than in Canada does not suggest that the problem is taken more seriously in Germany or not seriously enough in Canada.

The common law seems to restrict the problem of unfairness in standard form contracts to "exemption, exclusion, exception, limited liability, exculpatory ... disclaimer clauses"[4], whereas the AGB-statute covers standard form contracts in general[5]. The statute scrutinizes, for example, a clause which eliminates the consumer's right to set-off an undisputed, legally established claim (§ 11 No. 3 AGBG). Such a clause does not technically limit or exclude the liability of the user of a standard form contract. The writer admits that exclusion clauses are

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[4] W. Schlochtermeyer, Das Recht der Allgemeinen Geschäftsbedingungen in Kanada (1985) at 11.

[5] See supra pp. 38, 39, noting standard form contracts to which the AGB-statute does not apply.

more prone to unfairness than clauses which do not concern the user's liability. This may be the reason why the common law often describes the problem of unfairness in standard form contracts exclusively as a problem of exclusion clauses. But, as the example from the AGB-statute shows, clauses other than exclusion clauses can disadvantage the consumer. The writer suggests that the common law should move away from its practice of seeing the problem of exclusion clauses to seeing the problem of standard terms in general.

The AGB-statute covers contracts which are made with consumers as well as commercial contracts[6]. Even though commercial contracts are not dealt with in this thesis, it should be noted that the AGB-statute includes some special rules for commercial contracts in order to address their special features.[7] The common law does not expressly give special treatment to commercial contracts. But, as the case of Photo Production Ltd. v. Securicor Transport Ltd.[8] shows, common law judges may allocate the risks intended by the parties differently if only businessmen are involved in a contract[9]. The writer thinks that a consumer contract is in many ways different than a commercial contract and should therefore be treated differently. Any special treatment should however be given openly and a statement should be required declaring the contract at hand to be a commercial one.

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[6] See supra Preface p. viii, especially footnote 3.

[7] See supra p. 37, especially footnote 42.

[8] [1978] 3 All E. R. 146, reversed [1980] A. C. 827, [1980] 2 W. L. R. 283, [1980] 1 All E. R. 556 (H. L.). Lord Diplock stresses at 296 that the contract in question was concluded between "business-men".

[9] This point can further be illustrated by the case of Canso Chemicals Ltd. v. Can. Westinghouse Co. (1974) 10 N.S.R. (2d) 306, 54 D.L.R. (3d) 517 (C.A.). It can be argued that in this case the court should not have interfered with the risk allocation of the contracting business parties.

C. SPECIAL FEATURES OF THE AGB-STATUTE COMPARED TO COMMON LAW

1. DEFINITION

In order to determine its application, the AGB-statute includes a definition of what constitutes a standard form contract. One advantage of having a definition is obvious: every contract that fits the definition will be treated according to the statute which acknowledges the special features of a standard form contract. There is also the effect that in every case concerning a standard form contract, reference has to be made to the fact that such a contract is under scrutiny and its special features are taken into account.

The common law does not have an "official" definition of what standard form contracts are and, as noted earlier[10], some authors even question the necessity and possibility of a definition. Common law judges nevertheless categorize some contracts as being in a standard form, but there seems to be no reason felt to emphasize that a contract is a standard form contract. For example, the case of Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.[11] and the case of J. Nunes Diamonds Ltd. v. Dom. Elec. Protect. Co.[12] do not state clearly whether or not the court is dealing with a standard form contract.[13] The writer thinks that it would help to fight unfairness in standard form contracts if common law judges were to clearly state and give their

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[10] See supra p. 6.

[11] [1980] 2 S.C.R. 718, 15 R.P.R. 62, 13 B.L.R. 119, 116 D.L.R. (3d) 193, 33 N.R. 460.

[12] [1972] S. C. R. 769 at 777 (S. C. C.).

[13] W. Schlüter, Das obiter dictum Die Grenzen höchstrichterlicher Entscheidungsbegründung, dargestellt an Beispielen aus der Rechtsprechung des Bundesarbeitsgerichts (1973) 88-94 and J. G. Wetter, The Styles of Appellate Judicial Opinions A Case Study in Comparative Law (1960) with remarks on the structual differences of how decisions in continental European legal communities are handed down as compared to the procedure in the common law.

reasons why the contract at hand can be characterized as a standard form contract.

There is, however, a disadvantage to having a definition. As noted earlier[14], it is very difficult to find a comprehensive definition, especially with a topic as wide as standard form contracts. The German statute asks, as a main element of definition[15], whether a contract term is individually bargained for or presented by one party to the other without bargaining. By putting emphasis on an individual bargaining process, the statute acknowledges one important feature of standard form contracts. Standard form contracts are not the result of a deal between the contracting parties, but they are mass-produced contracts, concluded without any bargaining taking place.

The common law does not distinguish between contract terms which are individually bargained for and terms which are "dictated" by one party.[16] The parol evidence rule, which will later be compared in detail to some rules of the AGB-statute, seems to make the above distinction impossible[17]; terms which are individually bargained for are subject to extrinsic evidence which cannot be used if the parol evidence rule applies. However, as noted earlier[18], the parol evidence rule does not always apply to standard form contracts.

It is not surprising that the definition used in the AGB-statute presents some problems of interpretation to the German legal community. Even though

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[14] See supra pp. 6, 7.

[15] See with regard to the other elements supra pp. 36, 37.

[16] W. Schlochtermeyer, Das Recht der Allgemeinen Geschäftsbedingungen in Kanada supra n. 4 at 73.

[17] G. Schmitz, Haftungsausschluß in allgemeinen Geschäftsbedingungen nach englischem und internationalem Privatrecht (1977) 28.

[18] See supra pp. 106, 108.

the definition is far from perfect, the writer does not see more problems with it than with any interpretation of the rules of a statute. No rule of a statute can cover every potential situation; every application of the statute to a real life situation makes some interpretation of the rule necessary. But the writer considers it to be better to have a definition which provides a guide-line of what can be categorized as a standard form contract than not to have a definition at all. Even though a definition may not be comprehensive and all-inclusive, it helps to cure unfairness in standard form contracts.

2. PRIORITY OF AN INDIVIDUALLY BARGAINED FOR CLAUSE OVER A STANDARD FORM CLAUSE COMPARED TO THE PAROL EVIDENCE RULE

Closely connected to the definition provided in the AGB-statute is the regulation in § 4 AGBG which states that the statute will not apply to a single term in a standard form contract, if this term is individually bargained for. The term which is individually bargained for takes precedence over a comparable standard term in the written contract as well as over a clause therein which declares every agreement other than the written one invalid. In German law it is assumed that a written contract gives a complete and accurate account of the content of the agreement. If a standard form contract is involved and no individual bargaining has taken place prior to its conclusion, it cannot be presumed that it shows the whole agreement.[19] This leaves room for the consumer to argue that a term, which was not included in the written contract, has been individually bargained for and extrinsic evidence can be used to prove the presence of such a term. The AGB-statute will not assist the

[19] Soergel - Ursula Stein § 4 Rdn. 20.

consumer, but the individually bargained for term will be a valid part of the parties' contract.

The parol evidence rule used in common law also includes the presumption that a contract document contains the whole agreement. But the rule further states that evidence from outside of the contract document is not allowed to show a different content of the contract and this is true for standard form contracts as well. It has been shown earlier[20] that this is detrimental to the consumer because it restricts the evidence that can be brought by him to prove an oral agreement which is not manifested in the contract document. The consumer has to rely on his ability to prove that a collateral agreement, different from the written signed contract, is in place. But to do so has become more difficult since the decision in Carman Const. Ltd. v. C. P. Ry. Co.[21], which stated that an exclusion clause can also apply to a collateral agreement.

At first sight, oral agreements which have not been included into the contract document, seem to be handled differently in both systems. The German system does not rely exclusively on the contract document to determine the whole content of the contract. A special oral agreement beside the written contract may take its terms out of the range of the AGB-statute, if these terms were individually bargained for. The common law, on the other hand, seems to be unwilling to look beyond the contract document. But there are, as mentioned earlier[22], various exceptions to the parol evidence rule which reduce its application. As a result, the German and the common law approach are not that different in their outcome. Both systems try to interpret the

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[20] See supra p. 108.
[21] [1982] 1 S.C.R. 958, 18 B.L.R. 65, 136 D.L.R. (3d) 193, 42 N.R. 147.
[22] See supra p. 107.

intentions of the parties and ask what the parties wanted as the content of the **whole** contract.

D. TECHNIQUES TESTING THE FAIRNESS OF TERMS USED IN STANDARD FORM CONTRACTS

According to Raiser[23], unfair terms in standard form contracts can be approached in three steps. These are, given in the order of the severity of their impact on the contract:

- A standard form contract term suspected of unfairness has to be correctly **included** into the contract.

- A standard form contract term suspected of unfairness is subject to the rules of **interpretation**.

- A standard form contract term suspected of unfairness is subject to an **openly admitted test of** its **content**. This test evaluates fairness and an unfair term will be declared invalid.

1. TEST OF INCORPORATION

The incorporation of a term into the contract is not a true test of fairness, but it can be used (and often is used) as a covert test of content. The German law as well as the common law require that every contract term must be

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[23] L. Raiser, "Die richterliche Kontrolle von Allgemeinen Geschäftsbedingungen" in: Richterliche Kontrolle von Allgemeinen Geschäftsbedingungen; Verhandlungen der Fachgruppen für Grundlagenforschung und Zivilrechtsvergleichung anläßlich der Tagung der Rechtsvergleichung in Berlin vom 27. bis 30. Sept. 1967 in: Arbeiten zur Rechtsvergleichung Schriftenreihe der Gesellschaft für Rechtsvergleichung vol. 41 (1968) 123 at 127, 128.

incorporated into the contract. Without having to test the content of the clause with regard to its fairness (an often very difficult task), a case is easily solved if the clause in question did not become part of the contract. The main regulation dealing with the incorporation of standard form terms in German law is § 2 AGBG; in common law the incorporation of standard form terms is dealt with by the notice and signature requirement.

§ 2 of the AGB-statute provides special rules to ensure that a standard term is correctly included into the contract. The rules require that the consumer is provided with the opportunity to get to know the content of the contract and (one step further) the consumer has to agree to the terms being part of the contract. The consumer must be given the choice to get to know the content of the contract, but it is not necessary that he actually knows the content. He is not to be treated like a person who cannot look out for himself. The writer acknowledged earlier[24] that this is a very fine line to draw.

The common law asks for the consumer's agreement to the incorporation of the term into the contract and the notice as well as the signature requirement serve to ensure this incorporation. The notice requirement is used to alert the consumer to the presence of standard terms. But it is questionable, as noted earlier[25], if the alerting effect really helps the consumer, who normally does not read and is not expected to read the terms of the contract. If the consumer is not even expected to read all the terms of the contract, a notice alerting him to these terms will not have a great impact. Even if the consumer reads the terms he will probably make the deal even if he does not like all of the terms included.

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[24] See supra p. 45.

[25] See supra p. 119. The writer also noted a lack of effect with regard to the theory of an articulate notice and the Plain English Movement. See supra pp. 132.

The notice requirement, which is very important in the "ticket cases", is of less importance in signed contracts with the exception of the argument used in the case of Tilden Rent-A-Car Co. v. Clendenning[26]. In this case it was found that the normally binding effect of a signature was not present if the user of a standard form contract had no reason to believe (whether he actually did believe it or not) that the term in question was assented to by the consumer. But as stated earlier[27], the writer does not think that the Tilden Rent-A-Car case changes the general understanding that a signature to a standard form contract represents the consumer's consent and makes the contract binding.

The AGB-statute does not distinguish between "ticket cases" and signed contracts; there is no rule which is comparable to that of L'Estrange v. F. Graucob Ltd., that a signature to a contract has the effect of consent, regardless of whether the document has been read or not. The German law however has some rules in its Civil Code BGB to alert the contracting parties to a special danger of some types of contracts, including contracts which are in a standard form. For example, the conclusion of a contract concerning a land deal needs to be assisted by a notary public.[28]

The writer thinks that the distinction made by the common law between "ticket cases" and signed contracts does not help to deal with the problems of standard form contracts. The consumer's consent to a contract by way of signing the document is given more importance than his consent in a "ticket case". The writer agrees with this distinction insofar as it emphasizes the significance and value of a signature; however, it does not take into account

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[26] (1978), 18 O.R. (2d) 601, 4 B.L.R. 50, 83 D.L.R. (3d) 400 (C.A

[27] See supra p. 118.

[28] See supra p. 33 footnote 24.

that the consumer is not expected to read what he is signing and assenting to. In many cases the consumer will be held to the statement given by his signature even though no "true" consent (with the opportunity to get to know the contract terms prior to the signature) was given.

The facts of the Tilden Rent-A-Car case are comparable to the German case dealing with a car rental[29]. In both cases the defendants signed a standard form contract for the rental of a car. Each contract included exclusion clauses which dealt with the liability for damage caused by the defendant's action. The Tilden Rent-A-Car case, as mentioned earlier, was decided on the basis that the signature to the contract could have no effect because a sufficient notice of an unusual exclusion clause was not given to the defendant. The judgement in the German case did not concern itself with the defendant's signature to the contract. Given a sufficient claim, it could have scrutinized the contract term with regard to § 11 No. 7 AGBG (liability for gross negligence); but it based its decision on § 9 I AGBG and ruled that the content of the clause was unreasonable and therefore invalid.

The writer admits that the comparison remains superficial, since the facts of both cases are similar in some respects but very different in others. However, the comparison shows that the common law uses the notice requirement and the incorporation of a term into the contract to solve its problem, whereas the German law relies on a test of the content of the clause in question. Nevertheless both cases came to the conclusion that the clause at hand was invalid and unenforceable, although through a different process of reasoning.

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[29] See supra pp. 65-67.

(a) Test of incorporation in view of surprising clauses

§ 3 of the AGB-statute includes a rule about surprising clauses which do not become part of a standard form contract. The statute acknowledges with this regulation that standard contract terms are not individually bargained for and that the consent of the consumer does not have the same "quality" as in an "ordinary" contract. It is strictly prohibited to use this rule to perform a test of content. As noted earlier[30], the clause does not have a long term effect, because the surprising effect deteriorates after a continued usage. This is much like the re-drafting[31] that appears in common law and which can eventually lead to "clear" clauses which cannot be construed differently.

The common law does not use a special rule to judge surprising clauses, but it uses the general notice requirement to address the possibly surprising nature of standard terms. In the "ticket cases" for example, standard terms have to be brought to the consumer's attention by a notice which may even have to be "printed in red ink with a red hand pointing to it"[32]. In the case of Kowalewich v. Airwest Airlines Ltd.[33] the court decided that conditions printed on the back of a flight ticket were not part of the contract because they were not brought to the consumer's attention. The court also held that a clause limiting the airline's liability was not worded clearly enough to exclude its liability for the damage of the consumer's luggage. At no point in its judgement does the court test the

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30 See supra pp. 46, 47.

31 See supra pp. 109, 110.

32 See supra p. 4. A link between the notice requirement and the surprising character of an exclusion clause can also be seen in the Tilden Rent-A-Car case - Tilden Rent-A-Car Co. v. Clendenning (1978) 83 D. L. R. (3d) 400 (C. A.). The court stated that the user of a standard form contract had to take reasonable measures to draw the attention of the other party to stringent and onerous (and possibly surprising) terms.

33 [1978] 2 W. W. R. 60 (B. C. S. C.).

fairness of the content of the contract clauses in question. The opposite is true with regard to the German case involving a test of the flight tickets used by *Lufthansa.* Several clauses printed on the back of the flight ticket were held to be invalid because their content contravened regulations listed in the catalogues of § 11 and § 10 AGBG. The court did not rely on the rule about surprising clauses, even though it could be said that a consumer (without any special notice) may have been surprised by the numerous clauses printed on the reverse of a flight ticket. The German courts consider that consumers in general should expect numerous clauses printed on the back of a flight ticket. The consumer might be surprised by the content of some of the clauses, but content is not to be taken into account when making the judgement of a "surprise clause". Instead of asking whether the consumer had been notified of some "onerous" terms of the standard form contract, the German court tested the content of the clauses and asked whether they really were onerous to the consumer. To emphasize its judgement, the court did not allow the airline to continue the usage of their supply of tickets. The previously printed tickets would at least have to include a notice alerting the consumer to the invalid clauses.

(b) Interpretation of ambiguous clauses

The meaning of a term used in a standard form contract has to be questioned if this term is ambiguous or not clear, to use the terminology of the AGB-statute in its rule of non-clarity (§ 5 AGBG). This rule is comparable to the *contra proferentem* rule used in common law[34] and the writer thinks that the two

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[34] W. Schlochtermeyer, Das Recht der Allgemeinen Geschäftsbedingungen in Kanada supra n. 4 at 72; H. R. Hahlo, " Unfair Contract Terms in Civil Law Systems" (1979-80) 4 Can. Bus. L. J. 428 at 436.

rules come close to being identical. The rule of non-clarity states that standard terms are to be construed against the user, just like the *contra proferentem* rule which asks for an interpretation *contra proferentem* (meaning against the person who brings the terms forward) if there are doubts with regard to the true construction of the contract. The case of Cathcart Inspection Services Ltd. v. Purolator Courier Ltd.[35] emphasizes that any ambiguity in an exclusionary clause has to be construed against the party relying on the clause. The cases of Alex Duff Realty Ltd. v. Eaglecrest Holdings Ltd.[36] and Rody v. Re/Max Moncton Inc.[37] further illustrate the use of the *contra proferentem* rule in common law. In both cases the dispute centred around the meaning of a term included into a standard form contract and in both cases the ambiguous term was interpreted *contra proferentem*. Unfortunately a comparable German case to illustrate the rule of non-clarity and its closeness to the *contra proferentem* rule could not be found. But it should be noted that the rule of non-clarity (like the rule concerning surprising clauses in § 3 AGBG) does not allow a court to perform a test of content with regard to the clause at hand. It only clarifies the content of the clause in question.

Both rules can only be applied after a "normal" interpretation has taken place. In the case of Delaney v. Cascade River Holidays Ltd.[38] the majority of the judges held that the exclusion clause of the contract was clear enough and therefore excluded the liability of one of the contracting parties. The rule of

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[35] (1981) 128 D. L. R. (3d) 227 (Ont. H.C.).
[36] (1983) 44 A.R. (C.A.) 67.
[37] (1986) 72 N. B. R. (2d) 430.
[38] (1983) 44 B. C. L. R. 24, 24 C. C. L. T. 6 (B. C. C. A.).

contra proferentem could not be employed because there was a reasonable certainty to the proper meaning of the exclusion clause.

(c) Fate of an invalid term

According to the AGB-statute, contract terms which are found to be unfair are declared invalid (§ 6 AGBG).[39] There is normally no influence of this declaration on the contract as a whole. In the common law, the decisions often do not state clearly whether it is just the term which was not incorporated, or the contract as a whole, which is not enforceable. But this practice does not create uncertainty because it is the norm that only the term in question is invalid and the user is left with his common law duty.[40] Some common law cases, for example the Suisse Atlantique case[41], also discuss if the contract party agreed to the possibly unfair term when it affirmed the contract.

2. INTERPRETATION OF TERMS SUSPECTED TO BE UNFAIR

A standard form contract term suspected of unfairness is subject to the rules of interpretation. The process of interpretation, just like the test of incorporation, is not supposed to deal with the fairness of certain contract terms, but to determine the parties' intentions. Both systems have to deal with the question of what the parties intended by a certain term when it was included by one party and "consented" to by the other. The interpretation of the parties' intentions usually takes place with a dispute already in progress. And, the

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[39] See supra pp. 49-52 for a detailed description.

[40] See, for example, Olley v. Marlborough Ct. Ltd. [1949] 1 K.B. 532, [1949] 1 All E.R. 127 (C.A.).

[41] Suisse Atlantique Societé d' Armement Maritime S. A. v. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, [1966] 2 All E. R. 61 (H. L.).

situation in dispute might not even have been considered by the parties. Each system takes a different approach to the task of interpretation of standard form contracts.

(a) Interpretation and fundamental breach approach used in common law compared to the interpretation practised according to German law

The rule of construction or the interpretation approach is the major technique used in common law to deal with unfairness in standard form contracts. The AGB-statute does not exclude or limit an interpretation of the standard contract terms, even though tests of content of a suspected unfair clause are the heart of the statute[42]. Both systems start their analysis of a contract term by determining its literal meaning. If the term is ambiguous, it has to be construed according to the intentions of the contracting parties. The rule of *contra proferentem* (the rule of non-clarity according to the AGB-statute[43]) and the rule of strict construction are used in both systems and the writer cannot detect any significant differences. But German contract law puts less emphasis on the importance of a literal interpretation. Where common law seems to be preoccupied with finding the "true" construction of a term, the general German contract rule (§ 133 BGB) states that the wording used is not the all-important factor; important are the real intentions (*der wirkliche Wille*) of the parties. This general rule also applies to a standard form contract; rules in the AGB-statute concerning interpretation are seen as special rules of interpretation which do not change the general rule. But the AGB-statute does not emphasize the

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[42] The rules regulating the incorporation of standard terms into the contract have lost some of their importance due to the importance the test of the content of the clauses has gained. See supra p. 52.

[43] See supra pp. 47-49.

construction or interpretation of contract terms. According to German law a judge, just like a common law judge, cannot re-write the contract for the parties. The practice in German law prior to the enactment of the AGB-statute does however show that German judges seemed to be more willing to declare unfair clauses to be invalid. Lacking the special statute, they used the general concepts of fairness, contained in the regulations of § 242 and § 138 of the Civil Code BGB[44]. They further approached the interpretation of the Civil Code BGB in the light of the Constitution, using its concept of Germany being a social welfare state (*Sozialstaatsgedanke*) to achieve a fair and just result. Common law judges may have become more willing to declare unfair clauses unenforceable, but they rarely admit it explicitly. Forté remarks that there "is some evidence to suggest that judges are no longer always prepared to wait for legislative reform but are prepared to describe bargains as unconscionable and deal with them on that basis."[45] Finding a fair and just solution to a case might have been the intention behind the theory of fundamental breach which rules that a contract party who commits a fundamental breach of the contract cannot rely, for example, on an advantageous exclusion clause.

The above comparison of the approach taken by both systems towards the interpretation of standard form contracts can be illustrated by a comparison of cases. The cases of Drake and Drake v. Bekins Moving and Storage Co. and Levison and Another v. Patent Steam Carpet Cleaning Co. dealt with carpets lost by the cleaning companies. Both cases focused on the interpretation of a

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[44] H. Cartwright, "The Law of obligations in England and Germany" (1964) 18 I.C.L.Q. 1316 at 1341-1343 describing the attempts in Germany (prior to the AGB-statute) to exclude liability in standard form contracts with the help of § 138 and § 242 of the Civil Code BGB; also H. R. Hahlo, "Unfair Contract Terms in Civil Law Systems" supra n. 34 at 434-436.

[45] A. D. Forté, "Unfair Contract Terms" [1985] Lloyd's Maritime and Commercial L. Q. 482 at 486.

dry-cleaning contract and the allocation of risks intended by the contracting parties. The main issue of the cases was the exclusion of the company's liability.[46] In both cases it was held that the cleaner's liability for loss, as opposed to his liability for negligent damage to an item, could not be excluded. The decision in Drake and Drake was based on a fundamental breach of the contract being present; alternatively it was also based on a strict construction of the clause in question. The Patent Steam Carpet Cleaning case was decided on the basis of a fundamental breach of contract which could not exclude the cleaner's liability for the loss of the carpet.

In two German cases[47], focusing on the interpretation of a dry-cleaning contract as well as the allocation of risks intended by the contracting parties, it was held that the clauses in question were invalid. In one case (which had to be decided according to the law prior to the enactment of the AGB-statute) it was decided that liability for damage to valuable items can be limited if additional insurance is recommended to the consumer. In the second case the court held that the cleaner's liability for a lost item cannot be limited, because the loss of items is a typical risk of the dry-cleaning business. The decision was based on the general principle of § 9 of the AGB-statute which states that standard terms are invalid if they are unreasonably disadvantageous to the consumer and in contravention of the principle of good faith.

The comparison of cases in both systems which deal with dry-cleaning contracts shows again that each system may take a different approach to solve a comparable problem, but nevertheless reach the same result.

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[46] See supra pp. 84-88.
[47] See supra pp. 68-70.

However, the same result is not reached in the following comparison between the Photo Production case[48] and the German case dealing with a contract to rent space in a freezer warehouse[49]. The respective courts decided each case on the basis of a different allocation of risks, suggesting a different attitude towards deliberate actions of the employees of a contracting party. In the common law case it was decided that the liability of the user of a standard form contract for a deliberate action of his employee can be excluded. The crucial question which had to be answered was whether the exemption clause covered deliberate actions, without expressly using the term "deliberate". The court decided that the intention of one party to exclude its liability for deliberate action of its employees had been made sufficiently clear to the other, making the exclusion clause a valid one. The writer has noted earlier in a detailed description of the case[50] that it will never be easy and predictable to assess what is "sufficiently clear", as the opposing trial and appeal court decisions demonstrate.

The German court held a clause to be invalid which excluded the defendant's responsibility with regard to intentional and grossly negligent actions of his employees. If the defendant wanted to exclude his liability, he could only do so in an individually bargained for contract with the customer. The defendant could not unilaterally limit his responsibility for damages as he intended with the clause in question. The court could not base its decision on § 11 No. 7 AGBG (the catalogue including the "most dangerous clauses"), which does **not** allow a contracting party to exclude its liability for damages

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[48] See supra pp. 79-84.
[49] See supra pp. 63, 64.
[50] See supra pp. 82, 83.

caused by deliberate actions of its employees. The regulation of § 11 AGBG did not apply because merchants were involved in the contract[51], but § 9 II No.2 AGBG was used which states that a term is assumed to be unfair if it limits essential rights or duties arising from the nature of the contract and jeopardizes the achievement of the purpose of the contract. It should be noted that § 11 No. 7 of the AGB-statute replaces the rule of general contract law[52] which **allows** a contracting party to exclude its liability for damages caused by deliberate actions of employees.

The writer thinks that the theory of fundamental breach has to be seen as a special application of the rule of interpretation. When using the theory of fundamental breach the court has to ask whether the breach of contract in question can be seen as a fundamental one. By answering this question the court interprets the intentions of the parties when concluding the contract; did the part of the contract now breached by one contract party form a fundamental part of the agreement as a whole?

The writer also thinks that the fundamental breach theory is on the border line to a test of content. It is no longer an interpretation of terms, a determination of the intentions of the parties, which is performed. When the judge states that it could not have been the intention of the parties to include an unfair term, he is really deciding that the term is not fair. The writer thinks that even in light of the Photo Production case this is still true. The Photo Production case dismissed the understanding of the theory of fundamental breach as a rule

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[51] If the plaintiff who rented the warehouse had been a consumer, the regulation of § 11 No.7 AGBG would have applied. Unfortunately, the writer could not find a German case providing a constellation of facts which was similar enough to a common law case.

[52] The rule is expressed in § 278, 2 in connection with § 276 II of the Civil Code BGB.

of law and emphasized its character of a rule of construction. Even in case of a fundamental breach of a standard form contract, an interpretation of its terms remained necessary. The writer acknowledges that a distinction between an interpretation of what the parties wanted to achieve and a judgement of the content of a contract term is indeed a very difficult one to make. Where is the borderline? What is still an attempt of the judge to determine the parties intentions? When does a substitution of the parties' intentions by the judge's own understanding of a fair and just content of the contract start?

There is no equivalent to the theory of fundamental breach in the AGB-statute, but a parallel can be seen in § 9 II No. 2 of the statute. According to this regulation, a clause is unfair if it limits essential rights or duties arising from the nature of the contract and jeopardizes the achievement of the purpose of the contract. In other words, a clause which limits rights or duties in a fundamental way may be ruled invalid. The regulation of § 9 II No. 2 AGBG is a "rule of law", as far as this term can be used with regard to a regulation of the AGB-statute. The AGB-statute has to be obeyed by the courts as substantive law, but this does not prohibit some interpretation by the courts (comparable to the common law rule of construction) concerning terms like "unreasonable disadvantage" in § 9 AGBG.

(b) Technique of inequality of bargaining power and unconscionability in common law compared to the AGB-statute

The German legislators expressed in the proposal for the AGB-statute that the statute was enacted as a response to an inequality of bargaining power,

which especially presented an intellectual disadvantage to the consumer.[53] Inequality of bargaining power is, by the definition used in the AGB-statute[54], a main element of every standard form consumer contract. As a reaction to this inequality, the legislators reinforced the incorporation requirement, banned the use of surprising clauses and included a rule of non-clarity into the AGB-statute.[55]

The theory of inequality of bargaining power is used by common law judges, but, as noted earlier[56], there is no firm shape to the concept. The writer finds it especially difficult to determine when an inequality is to be present because no guide-lines exist to aid the "definition" of an inequality of bargaining power. However, the writer does not share doubts which question (as stated earlier[57]) whether it is legitimate for a judge (a non-elected, non-representative institution) to make a wide reaching decision such as whether an inequality of bargaining power is present.

The principle of unconscionability[58] which declares a standard form contract unenforceable if the assent of one party was obtained in an unconscionable way can be compared to the general rule in § 9 of the AGB-statute. The latter states that standard terms are invalid if they are unreasonably disadvantageous to the consumer and are in contravention of the principle of good faith (§ 9 I AGBG). But the rule of § 9 AGBG also contains a

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[53] Gesetzentwurf der Bundesregierung dated Aug. 6, 1975 in Bundestags-Drucksache 7/3919 at 13.
[54] See supra pp. 32-34.
[55] See supra pp. 47-49.
[56] See supra pp. 123-125.
[57] See supra pp. 124, 125.
[58] See supra pp. 125-131.

more detailed description (in § 9 II No. 1 and No. 2 AGBG) of what is considered to be unreasonable. Unlike the principle of unconscionability the general rule of § 9 of the AGB-statute provides at least some guidance to the courts to determine whether or not a standard form contract term is enforceable. The writer admits that the rule of § 9 AGBG is still formulated in a general way, but it has to be kept in mind that § 9 AGBG only applies if the detailed catalogues of unfair terms listed in § 11 and § 10 AGBG do not apply.

(c) The Plain English Movement compared to the AGB-statute

The AGB-statute does not include an equivalent to the Plain English Movement. But precise wording of contract terms will always be advantageous to the user of a standard form contract. Contract terms which are written in a plain and simple language will not be as vulnerable to an interpretation as "surprising" or not being in line with the respective rules of the Civil Code BGB.

3. OPENLY ADMITTED VERSUS COVERT TEST OF THE CONTENT OF A CONTRACT TERM

Within the three step-approach mentioned earlier to deal with unfair terms in standard form contracts, an openly admitted test of content is the only one which evaluates the fairness of a standard term. The rules dealing with the test of content of suspected unfair clauses are the heart of the German statute. This is a very distinct and important difference from the common law, where the major technique used is the rule of construction or the interpretation approach. The common law does not openly express that it performs a test of content. It emphasizes that a contract cannot be re-written by the court, an effect that a test of content would have when it would subsequently declare a term unenforceable due to its unfair content. The German law has an openly

admitted test of content in place. The catalogues provided in the AGB-statute to assist the judgement of fairness and the general rule of § 9 AGBG have been explained in detail in a previous chapter.[59] At this point the writer would like to add that German courts practiced an openly admitted test of content long before the enactment of the AGB-statute.[60] The *Reichsgericht*, the predecessor of the *Bundesgerichtshof*, which is the highest German court in civil matters, already used such a test of the content of a standard contract term. The *Reichsgericht* did however require that an abuse of a monopoly-like situation by the user of the standard form contract was present. The dogmatic basis for the decisions was § 138 of the Civil Code BGB, which states that a legal transaction which is *contra bonos mores* (*gute Sitten)* is void. The *Bundesgerichtshof* continued basically along the line of decisions given by the *Reichsgericht*, but it increasingly did not require a monopoly-like situation to be present. The basis of its decisions also changed from § 138 to § 242 or § 315 of the Civil Code BGB (containing principles of *Treu und Glauben*[61]). A further change occurred as the court started to use the concept from the Constitution that Germany is a social welfare state[62] to allow judges to intervene, in case of abuse, into the content of a contract which was drawn up according to the principle of freedom of contract, which allows the contracting parties to determine the content of their agreement. A significant change was made by the enactment of the AGB-statute in 1977. Compared to the court decisions

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[59] See supra pp. 53-63.

[60] A. von Mehren, "A General View of Contract" VII International Encyclopedia of Comparative Law at 70, 71 with further details to the history of a test of content in German law.

[61] H. Cartwright, "The Law of obligations in England and Germany" supra n. 44 notes at 1330: "It is impossible adequately to render this phrase into English. Literally, it means approximately 'faithfulness and trust'. It implies more than mere honesty and includes a sense of fair play and proper consideration for others.".

[62] Art. 20 I of the German Constitution.

prior to the AGB-statute it did not bring drastic changes, but it did give a constitutionally solid basis to the "fairness test" practiced by the courts along with new procedural rules, which acknowledged the special character of standard form contracts. Prior to the enactment of the AGB-statute the fairness of a term in a standard form contract could still have been tested while answering the questions of incorporation of the term into the contract or the interpretation of its content (characterized earlier as steps one and two). Today, covert testing of fairness of standard form contracts is neither necessary nor allowed.

Compared to the development in German law, the writer thinks that common law today still deals with the problem of unfairness in standard form contracts on the level of steps one and two, incorporation of a term and its interpretation. This approach of the common law has appropriately been described as the use of covert tools. The writer fully agrees with Waddams[63] when he succinctly notes the disadvantages of the use of covert tools:

> If unfairness is the criterion for judicial intervention, let the courts apply it **openly**. Only by openly recognizing the true reason for judicial intervention can the legal system expect to evolve a satisfactory set of legal rules. In the presence of the true principle, even though it may be a vague one, the courts can evolve sensible guidelines to increase the predictability of its application; if the true principle remains unstated, the guidelines can never be openly developed.[64]

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[63] S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" (1971) 49 Can. Bar Rev. 578 at 599.

[64] Emphasis added; D. Tiplady, "The Judicial Control of Contractual Unfairness" (1983) 46 M. L. Rev. 601 at 606 notes that "[w]hat is needed is proper articulation of the reasons for decision within existing techniques, rather than casting these aside as artificial and outmoded methodology.".

Before a final judgement favouring an openly admitted test of content over the use of covert tools can be made, several questions have to be answered. It has already been discussed[65] that the predictability of the law could be in jeopardy, if judges are allowed to rule that contract clauses are unenforceable because of their content. The freedom of contract of the parties, which includes their right to determine the content of their agreement, could be unduly limited. The writer agrees that an openly admitted test of content causes some unpredictability, because the user of a standard form contract will never know if all the terms used will stand up to a judgement of fairness. But the amount of unpredictability has to be balanced with the amount of fairness of the individual contract. The writer thinks that some unpredictability in the law is not too high a price to pay for fairness in the individual case. A term in a standard form contract may be unenforceable due to its uncertainty. No party to a contract can rely on it being enforced in exactly the way this party thought it would be. Some unpredictability will always be present even if no "test of fairness" is performed. But the writer especially thinks that a covert test of content creates unpredictability, as the real reasons of a decision are not voiced. This makes it difficult for the parties to understand or perhaps appeal a decision and it does not help in predicting the outcome of a similar future case. The user can further not satisfactorily remedy the problem by re-drafting his contract if the court does not state that the true reason for its decision of unenforceability lies in the unfair content of a standard term.

Another question to be answered is whether the test of content provided in the AGB-statute is one which should be adopted by common law. The test,

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[65] See supra pp. 130, 131.

described in detail at an earlier point[66], consists of two catalogues of clauses serving as guide-lines to assist the judgement of fairness of the contract term in question. Forté disagrees with the provision of guide-lines because "... no list could ever be complete, and ... criteria which were listed might assume a disproportionately high measure of importance and items omitted might be disregarded as being irrelevant ..."[67]. The writer agrees with Forté's concerns, which apply to every guide-line. But the writer does not agree with Forté's conclusion that guide-lines[68] should therefore not be provided. Guide-lines, as their name suggests, can provide guidance in view of the very difficult decision of what makes a standard contract term unfair. They are never to be understood as being complete. Not even a statutory regulation can ever be complete; there will always be a real life situation which should be, but in fact is not, covered by the wording of the statute. The guide-lines provided in the AGB-statute give the judge a range of possibilities from clauses that are to be judged invalid without any evaluation, to clauses which leave room for the judge to evaluate their fairness in the case at hand. If none of the guide-lines covers the standard form term in question, the judge can resort to the general test of fairness and reasonableness provided in § 9 of the AGB-statute. The writer thinks that Forté's concerns should not discourage an adoption by the common law of the openly admitted test of content provided in the AGB-statute.

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[66] See supra p. 53 and pp. 54-70.

[67] A. D. Forté, "Unfair Contract Terms: Evaluating an EEC Perspective" supra n. 45 at 490 cites the Law Comission and the Scottish Law Commission, neither of which were particularly anxious to include a list of guidelines into the British Unfair Contract Terms Act 1977.

[68] Idem at 490, 491 goes even further when he states that a definition of unfairness should not be attempted.

If the common law adopts an open test of content, there has been debate over whether such a change should be carried out by judicial innovation or by legislation.[69]

Waddams[70] thinks an intervention should be left to the courts. He argues that legislation could hardly offer detailed rules to guide courts over so wide an area and he doubts that there is a theoretical advantage a legislative statement would have over a judicial one. On the other hand Waddams admits that the judicial evolution is a haphazard and unpredictable process, and that it is perhaps better to initiate legislative reform.

Reiter[71] also thinks that an intervention should be judicial. He points out and the writer agrees with the following assessment:

> ... [it has] been argued that ... the task of controlling contract power must be a political one and that it is therefore delegated inappropriately to judicial administration. ... these views are dramatic overstatements of the dimensions of the problem. ... it is important to recognize that the reconciliation of competing social values as they arise in the context of individual case litigation is an inevitable concomitant of judicial decision-making in any field. ... it must not be overlooked that a decision that courts should enforce contracts as written, ignoring concerns for fairness and reasonableness is, as

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69 It is yet another question if a solution to the problem of unfairness in standard form consumer contracts can be found by resorting to an administrative solution. For example, it could be regulated that prior vetting is necessary with regard to these contracts. This system was adopted in Israel and did not prove to be very successful. See with regard to the Israeli approach, for example: K. F. Berg, "The Israeli Standard Contracts Law 1964" (1979) 28 I.C.L.Q. 560; The German legislators did not adopt an administrative solution. As the focus of this thesis is the comparison between the German law and common law approach, the writer does not think it to be justified to discuss the wide area of administrative versus legislative and judicial solutions to the problem of standard form contracts. Dealing with the administrative solution are, for example: S. Deutch, Unfair Contracts (1977) at 243-250; A. D. M. Forté, "Unfair Contract Terms" supra n. 45 at 491-495.

70 S. M. Waddams, "Contracts - Exemption Clauses - Unconscionability - Consumer Protection" supra n. 63 at 598.

71 J. Swan and B. J. Reiter, Contracts (2nd ed. 1982) at 6-279 and 6-282, 283.

much as the contrary view, a decision of policy that is subjective, debatable, political and disputable at the margins.[72]

In opposition to Waddams and Reiter, Belobaba[73] thinks that an intervention should be legislative, not judicial. Belobaba states that in the consumer context (as opposed to the commercial context) "piece-meal judicial initiatives"[74] are not responding to the problem of standard form contracts and the "problems posed by the consumer market demand more than the common law can institutionally deliver"[75]. Belobaba suggests that a "problem-specific regulatory response [is needed] which can be geared to a particular abuse in a particular market."[76] Belobaba's preference for a legislative response to the problem of standard form consumer contracts may be influenced by his evaluation of the common law. According to Belobaba "[t]he common law is in decline. The transition to a purely legislative legal system seems inevitable."[77]

The writer thinks that an intervention into the common law with regard to the treatment of standard form consumer contracts could be judicial and/or legislative. The writer agrees with Waddams that a legislative reform might be speedier. Since the adoption of the Photo Production case by the Supreme Court of Canada which states that the theory of fundamental breach is only a rule of construction[78], the writer does not see much movement towards a judicial re-evaluation of the problem of standard form contracts. As stated

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[72] Idem at 6-282, 283.

[73] E. P. Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention" Study # 12, in J. Swan and B. J. Reiter, Contracts (2nd ed. 1982) at 6-374, 375, 376 and 6-379, 380.

[74] Idem at 6-367.

[75] Idem at 6-369.

[76] Idem at 6-372.

[77] Idem at 6-374.

[78] See supra pp. 79-84.

earlier[79], the case of Gafco Ent. Ltd. v. Schofield especially illustrates that the Photo Production ruling is taken seriously by Canadian courts. But in this decision or any other decision involving a standard form contract the writer cannot detect a new or different approach towards the problem of unfairness, especially not towards an openly admitted test of content. However, the writer disagrees with Waddams' statement that legislation cannot offer detailed rules to guide courts over the wide area of standard form contracts. The AGB-statute shows the opposite, even though it has to be kept in mind that the statute based its guide-lines on the judicial practice prior to the enactment of the statute. Based on the experience with the AGB-statute, the writer favours a speedier legislative intervention. But the writer doubts that this is, as Belobaba states, the only intervention possible because the common law is in decline. If more attention of the judiciary could be drawn to the problem of standard form consumer contracts, judicial guide-lines might be developed. Such a practice would pay tribute to the special character of the common law and would render the enactment of a statute unnecessary. Given the handling of the problem of standard form consumer contracts in common law so far, the writer does not see any new developments in the near future.

E. COMPARISON OF PROCEDURAL TREATMENT GIVEN TO STANDARD FORM CONSUMER CONTRACTS

A comparison would not be complete without a brief look at the procedural treatment given to standard form contracts in both systems. The scope of this

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[79] See supra p. 104.

thesis does not allow an in-depth description of the numerous differences in the general law of civil procedure, which would be necessary for a complete comparison of the procedural treatment of standard form contracts.

The writer could not detect any special procedural treatment given to standard form contracts in common law. On the other hand, the AGB-statute includes some procedural rules, which have been described and evaluated earlier[80]. The writer thinks that from those rules only the regulation of § 13 AGBG, which gives a right of discontinuance and revocation especially to consumer protection agencies, might be considered for an adoption by common law. The Unfair Trade Practices Act[81], for example, already bears some resemblance with the procedures incorporated in the AGB-statute, especially in allowing a consumer protection agency to start an action. Due to the significant differences in the law of civil procedure an adoption of any German rule of procedure would have to be restricted to the intent expressed in the specific rule. An adoption of § 13 AGBG would have to focus on its intent which is to fix the consumer's reluctance to take court action[82]. A detailed comparison would have to look into the consumer's opportunity in common law to bring his or her case to a small claims court[83], a faster and probably less expensive method of dealing with a dispute concerning a standard form contract than any procedure available according to German law. Yet another issue would be a "class action"[84] which is possible in common law and which

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[80] See supra pp. 70-75.

[81] Unfair Trade Practices Act (R. S. A. 1980, c. U-3).

[82] See regarding the consumer's reluctance to take court action: supra pp. 16-18.

[83] See for example: M. E. McIntyre, Consumers and the small claims court (1979).

[84] See, for example: M. Moriarity, Consumers' class action (1970); H. S. Tur, "Litigation and the Consumer Interest: The Class Action and Beyond" (1982) 2 Legal Studies 135 at 154-160.

might eliminate any need for the adoption of a regulation comparable to § 13 of the AGB-statute.

F. A GOLDEN SOLUTION

In both systems the problem of unfairness in standard form consumer contracts is embedded into contract theory. This means that it is understood that both parties consent to the contract, or as the common law puts it, there is a meeting of the minds. It is further understood that the consumer consents to the standard form brought to his attention or presented to him for signature, even though it is not expected that he reads all the terms included in the standard form. The main element of the contract theory in both systems is the thesis that the interests of the contracting parties are balanced if and because an individual bargaining takes place.

The writer thinks that the contract theory, understood as just described, can only justify the validity and enforceability of standard form consumer contracts if it is accepted and stated that the theory describes an **ideal**. The writer thinks that standard form consumer contracts can really not be brought into harmony with the contract theory, even though both systems try to achieve just this. How can there be a "meeting of minds" if the consumer's consent is expected to be given without reading the complete content of the contract? How can there be a balance of interests achieved through a bargaining process if there is an inequality of bargaining power between the contracting parties?

One solution would be to give up the above "ideal" contract theory and abolish the inequality of economic power between the contracting parties. But this would also mean giving up the economic system of free enterprise and

substituting a different system. This effect was addressed by the German legislators when they stated that the AGB-statute was not to interfere with the system of free enterprise nor change anything with regard to the principle of freedom of contract.[85]

The writer thinks that it is a more realistic solution to continue to see standard form consumer contracts embedded into contract law and the traditional contract theory. It should however be admitted that the traditional contract theory is an ideal which can only be used as a guide-line with regard to standard form consumer contracts. The reality of an inequality of bargaining and economic power between the parties of such a contract has to be acknowledged.

Every solution should also acknowledge that the traditional contract theory does not work. It is based on an individual bargaining process of give and take and this very process is eliminated in standard form contracts. These contracts have become more like statutory regulations than contracts. They do not fit into the "normal" concept of contract law and they justify the special treatment given to them in the AGB-statute.

The central feature of these contracts is that the consumer is in an "underprivileged" position. A fine and difficult balance has to be found between too much protection for the consumer and too much protection for the user. The former "degrades" the consumer. The latter severely disadvantages him

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[85] Gesetzentwurf der Bundesregierung in Bundestags-Drucksache 7/3919 at 13; also against a change from a capitalist economic society which relies on the traditional contract theory: G. Gluck, "Standard Form Contracts: The Contract Theory Reconsidered" (1979) 28 I.C.L.Q. 72 at 90.

since he is the only one who has to pay the price for the fundamentally "good" institution of standard form contracts[86].

A balance between the freedom of contract and individual contractual justice has to be found and it should be left to the individual judge to decide the cases according to his perception of justice. In addition to a certain amount of discretion for the judge, guide-lines (judicial or statutory) should be developed in order to help the judge with the decision in the individual case. Besides fairness of the contract and individual justice to the consumer who was confronted with an unfair contract term, predictability of the law will also be achieved, even though the latter will be a slow process.

Every solution to the dilemma of standard form consumer contracts should be construed from the point of view of the consumer. His consent to the integration of standard terms should be important in order not to "degrade" the consumer's position. The consumer should not be put into the same category as minors who have only a limited possibility of legal activities.[87] The focus of any solution should be on the consumer, not the user of a standard form contract. It is the user who abuses the freedom of contract which cannot be exercised by just one party to the contract. But the limitations laid upon the user with regard to the fairness of standard forms should not be too strict. His freedom of contract also needs to be protected and too many restrictions will in

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[86] See supra p. 21 with the statement that standard form contracts are not evil *per se*.

[87] K. H. Neumayer, "Standard Form Contracts - Contracts of Adhesion" International Encyclopedia of Comparative Law vol VII ch. 12 (in the process of being published) at 147, 148.

the end affect the consumer who will have to pay higher product or service prices. Even an adverse effect on the economy as a whole is possible.[88]

The writer thinks that there is **no golden solution**. As with any legal decision, a balance between opposing principles has to be found. More on one side always means less on the other side and it is always a question of where to put the emphasis and where to draw the line.

G. Conclusion

Comparing all the techniques used in both systems it can be said that they are surprisingly similar. The major difference can be seen in the openly admitted test of content included into the German AGB-statute and an often covertly performed test of content in common law. The writer considers an openly admitted test of content to be the better approach to the problem of unfairness in standard form consumer contracts. The solution to a problem which requires such a difficult balance of interests between the contracting parties should not be reached by using covert tools. The writer thinks that there is a need in the common law to adopt the AGB-statute approach. The AGB-statute cannot be simply transformed into an Alberta statute to supplement common law. Such a statute would have to account for the differences in common law as compared to the German law. But a statute to supplement common law should include guide-lines like the two catalogues in the AGB-statute as well as a general principle of a test of fairness like the regulation of

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[88] F. Graf von Westphalen, "Schattenseiten des Verbraucherschutzes" (1981) 1/2 Der Betrieb DB 61 at 71 remarking the draw-backs of consumer protection especially with regard to small businesses.

§ 9 AGBG. The writer does not think that this would harm the common law system or force it to give up its distinct differences from the German civil law system. The common law may not even have to resort to a special statute. The common law judges could change their approach to unfairness in standard form contracts and create guide-lines as well as a general principle of fairness. Such a process took place in Germany and led to the enactment of the AGB-statute. The writer thinks that the first and very important step in the right direction would be if the common law judges would openly and honestly admit that they are not only interpreting standard form contracts but also evaluating their content with regard to its fairness. However, the writer does not think that the common law judges will change their approach to unfairness in standard form consumer contracts in the near future. The problems of standard form contracts are no longer a focus of discussion[89] in the law of contracts and the writer thinks that the problem of unfairness in these contracts will not be dealt with extensively in the near future.[90]

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[89] See supra p. 8.

[90] J. R. Peden, The Law of Unjust Contracts including Contracts Review Act 1980 (NSW) 1982 at 24 characterizes the [Australian] search for a solution as an "perennial issue".

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APPENDIX

The appendix is a translation of the **Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen**, the German statute enacted in 1977 to govern Standard Form Contracts. It was reprinted in the hardcopy versions of the thesis with permission of the publisher of the translation.

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The version of this thesis microfilmed by the National Library of Canada in Ottawa does not contain the above Appendix. A copy of the translation by Gres/ Gerber is easily available at the University of Alberta Law Library.

It must be noted that the author of this thesis does not agree with all of the translated wordings, and has made note of a few of them in the body of the thesis.