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No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts

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Abstract: Judicial intervention into B2B contracts should be construed as part of state infrastructure to improve business efficiency and thereby that of the market itself. The main purpose of unfair contract terms regulation should be to discharge a business from reading, analysing, or even negotiating the bulk of contract terms presented to them by other businesses. This enables businesses to prepare standard terms in advance, particularly those underlying high-volume transactions. Their customers can rest assured that such contracts would need to pass a judicial fairness test before being enforced and can therefore accept the bulk of all terms presented to them in blissful ignorance of the terms' content. However, those terms which an efficient market economy would expect businesses to read carefully and, if necessary, negotiate need not be subjected to this judicial unfairness test. Such terms exempted from the fairness test are, if transparent, those that determine the price and the main subject matter of the contract, those that any aggrieved business had actually itself supplied, and moreover, all terms in a contract of such a high value for which reasonable parties would seek legal advice and painstakingly negotiate every word. There is also no need for a judicial fairness test for those terms that have, in fact, been negotiated in detail by the parties, since the main function of the test is to compensate for the lack of negotiations. In order to free the parties in the most efficient way possible from negotiating, or even reading, all other terms, the following judicially applied unfairness test should apply. The further removed a particular non-negotiated term is from what reasonable and honest parties would have agreed in individual negotiations, the more likely it is that the individual term is unfair.

Résumé: L'immixtion du juge dans les contrats entre professionnels doit être considérée comme faisant partie de l'ensemble du cadre étatique visant à améliorer l'efficacité des entreprises et du marché lui-même. L'objectif principal du contrôle des clauses abusives est de dispenser le professionnel de la lecture, de l'analyse ou de la négociation de la majeure partie de ces clauses proposées par un autre professionnel. Ceci permet à l'entreprise de rédiger des contrats d'adhésion au préalable. Leurs partenaires commerciaux peuvent aussi accepter la majeure partie des clauses qui leur sont présentées sans avoir pris le soin d'analyser celles-ci en détail sachant que, le cas échéant, le juge en assurera un contrôle a posteriori. Il n'est toutefois pas nécessaire de soumettre au contrôle du juge les clauses pour lesquelles une économie de marché efficace suppose une lecture attentive, voire une négociation complète. De telles clauses, si elles sont claires et compréhensibles, sont celles qui déterminent le prix et

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l'objet principal du contrat, celles proposées par l'entreprise demanderesse, ainsi que celles d'un contrat qui implique des enjeux financiers importants, contrat pour lequel les parties feraient raisonnablement appel à un conseiller juridique et négocieraient prudemment chaque mot. Le recours au juge n'est pas non plus justifié pour les clauses qui ont été négociées en détail par les parties, la fonction principale du contrôle judiciaire étant de compenser l'absence de négociations. Afin de dispenser les parties de la négociation ou même de la lecture des autres clauses, le contrôle du juge s'opère selon la règle suivante : plus une clause particulière est éloignée de ce dont les parties ont convenu lors de négociations de bonne foi, plus il est probable qu'elle soit abusive.

Zusammenfassung: Die richterliche Kontrolle von Verträgen zwischen Unternehmen sollte als Teil einer staatlichen Infrastruktur mit dem Ziel der Effizienzsteigerung unternehmerischen Handelns und damit des Marktes begriffen werden. Hauptzweck der richterlichen Kontrolle ist es, die Unternehmen davon zu entlasten, große Teile der Klauselwerke ihrer Geschäftspartner lesen, analysieren oder gar über einzelne Klauseln verhandeln zu müssen. Gleichzeitig soll den Unternehmen die einseitige Gestaltung ihrer Vertragsmuster insbesondere für Massengeschäfte ermöglicht werden. Wenn die Kunden auf eine wirksame richterliche Kontrolle dieser Vertragsmuster vertrauen, können sie große Teile des Vertragsinhalts hinnehmen, ohne sich um deren Inhalt zu kümmern. Jedoch sollten diejenigen Vertragsbestimmungen, deren sorgfältige Lektüre und nötigenfalls Aushandlung in einer effizienten Wirtschaftsordnung von den Unternehmen erwartet werden kann, von der richterlichen Fairnesskontrolle ausgenommen sein. Kontrollfrei in diesem Sinne sind – soweit sie dem Transparenzgebot genügen – Klauseln, die den Preis und den Hauptgegenstand des Vertrages bestimmen, ferner diejenigen Klauseln, die eine Partei selbst in den Vertrag eingeführt hat, und außerdem alle Bestimmungen in Verträgen mit einem so hohen Gegenstandswert, dass vernünftige Parteien mit Sicherheit juristischen Rat einholen und erforderlichenfalls jedes Wort im einzelnen verhandeln würden. Es bedarf auch dann keiner richterlichen Fairnesskontrolle, wenn die Vertragsparteien tatsächlich ernsthaft über einzelne Vertragsbestimmungen verhandelt haben, denn die (Haupt-) Funktion dieser Kontrolle bestand ja gerade darin, das unterblieben Aushandeln zu kompensieren. Damit die Parteien bei allen anderen Vertragsklauseln wirkungsvoll davon entlastet werden, diese lesen oder gar über sie verhandeln zu müssen, sollte im Prozess eine richterliche Fairnesskontrolle stattfinden, deren Kern der folgende Test ist. Je weiter eine konkrete, nicht im einzelnen ausgehandelte Klausel von dem abweicht, was vernünftige und anständige Unternehmer in gründlichen Verhandlungen vereinbart hätten, desto naheliegender ist es, dass diese Klausel unfair ist.

1. Introduction

This article explains why the Common European Sales Law (CESL)[1] provides that terms in a B2B contract should be subjected to a specific judicial unfairness test applicable uniquely to 'non-negotiated terms'. It also explains why certain

1 Commission proposal published as COM(2011) 635 final of 11 Oct. 2011.

contract terms, in particular those on the price, the main subject matter, and individually negotiated terms, should not be subjected to this test.

The notion of 'non-negotiated terms' used here includes standard terms but is slightly broader.[2] It is a great ongoing discussion on whether the distinction between non-negotiated and individually negotiated terms should apply irrespective of whether the terms are part of a consumer contract or a contract between businesses. This article nevertheless restricts itself to contracts between businesses because it is at least conceivable that specific consumer protection issues may blur the theoretically much more interesting question of why all businesses, perhaps even the very biggest ones, need judicial protection against non-negotiated unfair contract terms.

Readers will have noticed that the title of this article is inspired by thoughts of economists on the interaction between uncertainty on the quality of goods or services in the market and the strategies of market participants to address this uncertainty.[3] Goods and services are usually accompanied by boilerplate terms supplied by the seller or service provider.[4] Although even scrupulous customers usually do not fully read these boilerplate contracts, they know from their experience that their content may be rather important and less or more unfavourable for them. They also know that the individual terms used by businesses may vary substantially. Customers are hence confronted with significant uncertainty in knowing whether the boilerplate terms accompanying goods and services are good or bad for them. By contrast, the supplier of boilerplate terms whose legal advisors formulated them (or who adopted terms recommended by his trade association) is usually in a position to know rather well what sort of terms he is offering. This is a classical case of an asymmetry of available information and one where the customer is conscious of this asymmetry. The situation is rather similar to the famous example of used cars, where potential buyers are aware that the seller knows much better whether the car is a good one or a 'lemon' (as the bad ones are fondly termed in the United States). The core insight drawn from the lemon case was that the only way to prevent market failure and a race to the bottom may be state intervention. In the example of used cars, it would, however, be nonsense to claim that the sale of 'lemons' should be prohibited and fought by public authorities. This article explains why in the example of unfair boilerplate terms (which one could also call 'lemons') this is

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2 For a basic definition, see Art. 7 CESL: 'A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content'; as to the reasons for using this notion (and not 'standard terms'), see s. 7.4 below.

3 Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', 84. *The Quarterly Journal of Economics* 1970, p 488 ff.

4 Conditions of purchase and the issue of 'battle of forms' are ignored here, not on substantive grounds but for purposes of simplification.

exactly what should be done in a liberal market-oriented economy by the state. This includes entitling and obliging the courts to apply a specific fairness test to non-negotiated terms and to refuse to enforce non-negotiated terms if they are (too) unfair – whereas individually negotiated terms should not be subjected to this fairness test (but perhaps to other, much less stricter tests of their fairness).

These thoughts have been provoked by the discussions in the European Commission's Expert Group on European Contract Law[5] that prepared the proposal for a CESL.[6] Although many examples are taken from the CESL, the ideas should also be applicable to national laws. The following lines seek to sketch out – with a rather broad brush – some of the various underlying ideas of judicial unfair term controls for B2B contracts. The following questions are dealt with:

- What is the *raison d'être* of judicial intervention in contract terms?
- Which terms should, and should not, be subjected to a judicial fairness test – and in particular, why should a (rather strict) fairness test only apply to non-negotiated terms and not to individually negotiated ones?
- What is the correct yardstick for this unfairness test?

2. Judicial Unfairness Tests in Contract Law

At least as a reminder, it may be helpful to point out that unfairness tests are usually not the one and only instrument to which judges may have recourse when intervening into contracts. Rather the opposite is true. A fully developed law of contract has many toeholds where judges can lock in. The CESL may serve as an example. Unfair contract terms might already fail to pass the incorporation test because of lack of consent,[7] surprise,[8] lack of awareness[9] of (standard) terms, or

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5 I owe specific thanks to Hugh Beale who was one of the most engaged participants in these discussions. As to the work of the Expert Group, see SCHULTE-NÖLKE, 'Vor- und Entstehungsgeschichte des Vorschlags für ein Gemeinsames Europäisches Kaufrecht', in Schulte-Nölke/Zoll/Jansen/Schulze (eds.), *Der Entwurf für ein optionales europäisches Kaufrecht* (2012), p 1 ff.; STAUDENMAYER, *Introduction, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* (Beck'sche Textausgaben, 2012), p VII ff.

6 The Commission Expert Group on European Contract Law elaborated a feasibility study for a future instrument in European contract law, 3 May 2011 (available at <http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf>), on which the Proposal for a Common European Sales Law (in particular, the articles on unfair terms) is largely based.

7 Articles 30–39 CESL.

8 An article on surprising terms is lacking in CESL but was part of the Expert Group's Feasibility Study and has been dropped later; as to surprising terms in CESL, see LOOS, *Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law*, in this issue of ERPL.

9 Article 70 CESL.

lack of transparency.[10] It could also be part of the pre-contractual duties of a party to inform the other party of the existence of certain terms with the consequence that an infringement of this duty may result in the unenforceability of these terms.[11] Irrespective of the existence of a duty to inform, false or misleading statements as to the actual content of terms given by the supplier of such terms may lead to the avoidability of the contract or to the unenforceability of the terms in question under doctrines such as mistake or misrepresentation.[12] Very harsh terms can, even if incorporated, be thrown out under doctrines such as illegality, duress, undue influence, usury, terms *contra bonos mores*, unconscionability,[13] or (if the legal system has one) a general good faith clause.[14] Even if contract terms pass all of these tests, they might nevertheless be unenforceable if they conflict with mandatory provisions of statutory contract law.[15]

This article does not attempt to deal with all of these doctrines on the formation and validity of contracts. The focus lies on specific provisions introducing a judicial unfair terms test for non-negotiated terms or standard terms, such as Articles 79 *et seq.* CESL, sections 305 *et seq.* of the German Civil Code (BGB), or Articles 6:231 *et seq.* of the Dutch Civil Code (BW). Specific regimes for judicial unfairness tests, which are applicable alongside the other mentioned doctrines of contract law, seem to exist in most, if not in all, European contract law systems. However, the three examples of the CESL and German and Dutch laws have in common that they apply both to B2C and to B2B contracts and that the legislative frameworks are rather comprehensive in comparison to other legal systems.[16] The question dealt with in this article can now be defined more precisely: What is the *raison d'être* for judicial unfair terms tests such as Articles 79 *et seq.* CESL (and the corresponding tests in the BGB and the BW)?

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10 *Cf.* Art. 82 CESL that is, however, only applicable to B2C contracts.

11 Article 23 CESL.

12 Article 48 CESL.

13 Articles 50 (Treats) and 51 CESL (Unfair Exploitation); there are no (explicit) rules on illegality, duress, undue influence, usury, terms *contra bonos mores* or unconscionability in CESL.

14 Article 2 CESL (Good faith and fair dealing).

15 Mandatory provisions exist, however, only rarely for B2B contracts; as to an example, *cf.* Art. 170 CESL (Unfair Contract Terms relating to interest for late payment).

16 As to an overview on European legal systems, see, e.g., Bar & Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Full Edition*, vol. 1 (2009), p 643 ff.; Beale, Fauvarque-Cosson, Rutgers, Tallon & Vogenauer, *Contract Law* (2nd edn, 2010), p 757 ff.; on the advantages of the unfairness test in CESL for SMEs in comparison to English law, see Beale, 'A Common European Sales Law (CESL) for Business-to-Business Contracts', in *The Making of European Private Law: Why, How, What, Who*, ed. Moccia (2012), p 65 ff.

3. Main Features of the Judicial Unfair Terms Test in the CESL for B2B Cases

Before looking at their underlying philosophies, it may be useful to shortly recall the main characteristics of the judicial unfair terms tests in question. Again, the CESL may serve as an example.[17] Its provisions on unfair terms can perhaps be grouped into provisions on incorporation and transparency, on the one hand, and provisions on what one could call a substantive fairness test, on the other hand.

3.1. Incorporation and Transparency

At least for B2B cases, the provisions on incorporation and transparency in the CESL clearly aim at facilitating the incorporation of enforceable boilerplate terms into contracts. The provisions are applicable to:

- terms supplied by one party;
- terms which have not been individually negotiated.

Such terms become part of a contract if:

- the other party was aware of them or if the supplier of the terms took reasonable steps to draw the other party's attention to them before or when the contract was concluded.

By *argumentum e contrario*, one can conclude from some further provisions exclusively applicable to B2C contracts that:

- a mere reference to the terms in a contract document may suffice, and
- that there may even be no duty of transparency in the sense that the terms be drafted and communicated in plain intelligible language.[18]

The sheer existence of these provisions on incorporation and transparency of non-negotiated terms proves that the CESL clearly upholds the use of non-negotiated terms. The same is true for many national legal systems.

3.2. Substantive Unfairness Test

The substantive fairness test for those terms that have been incorporated is whether a term 'grossly' deviates from good commercial practice, contrary to good faith and fair dealing (Art. 86).

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17 For an overview on the unfair contract terms provisions in CESL, see PFEIFFER, 'Unfaire Vertragsbestimmungen', 19. *European Review of Private Law* 2011, p 835 ff.

18 The lack of any duty of transparency in CESL for terms in a B2B contract may be a drafting error; as to the opposite view, see MAZEAUD & SAUPHANOR-BROUILLAUD, in *Common European Sales Law*, ed. Schulze (2012), Art. 86, n. 5.

Perhaps the most characteristic feature of the substantive unfairness test is its exclusions. The following four exclusions are provided for:

(1) contract terms that reflect the (default) rules of the CESL (Art. 80(1) CESL);
(2) terms that define the main subject matter of the contract or relate to the appropriateness of the price to be paid (Art. 80(2) CESL);
(3) terms supplied by the party invoking the unfairness (Art. 79(1) CESL);
(4) individually negotiated terms (Art. 86(1)(a) CESL).

Both the exclusions from the substantive fairness test and the formulation of this test (in particular the word 'grossly') express a certain reluctance against judicial intervention in contract terms that is too far-reaching. The exclusions from the fairness test are particularly significant. The thesis of this article is that these exclusions, in particular numbers (3) and (4), reveal the main *raison d'être* for the existence of the fairness test, at least for B2B contracts.

Before looking closer at the characteristic exclusions of (3) and (4), the other two should be briefly explained. Number (1) is an exception for contract terms, which simply reflect the default rules of the CESL applicable to the contract in question. If such terms were not excluded from the fairness test, judges would be obliged to assess the fairness of provisions that do not originate from the contract parties themselves but those enacted by the legislature. It is a rather obvious consequence of the division of powers between the legislature and the judiciary that – at least for simple rules of contract law – the judges are bound to the decisions adopted in the form of legislation.

The main reason for exception number (2), i.e., terms that define the main subject matter of the contract or relate to the appropriateness of the price, is also rather evident. Judges are usually not entrusted with exercising public price control. In market economies, the determination of price is, as a rule, only left to the market. Leaving aside extreme cases such as unfair exploitation, there is no general regulation of price by the state and more than ever not by the courts.[19]

Whereas it was rather simple to explain these two exceptions, the remaining two (terms supplied by the party invoking the unfairness and individually negotiated terms) are more difficult to explain. This requires a broader perspective on the European discussion of reasons for judicial intervention into contracts.

19 On a further reason why terms on price and main subject matter should not be subject to a fairness test, see below s. 7.2.

4. Judicial Intervention and Freedom of Contract

Often judicial unfairness tests of contract terms are seen as a limitation of the principle of freedom of contract. However, simple confrontations such as 'freedom of contract versus paternalism' or (for those who wish more judicial intervention) 'freedom of contract versus fairness' are more polemical terms than legal arguments. In order to avoid over-simplification, one could perhaps accept as a starting point that various answers to the question of the *raison d'être* of judicial intervention into contracts can be given. These individual answers can, however, hardly claim to be exclusive since the existence of judicial intervention into contracts may reflect various ideological underpinnings of contract law theories or even various models of the relationship between state and society.[20]

The concept of freedom of contract was developed particularly in the 19th century where, already beginning in the 18th, the state increasingly abstained from regulating the 'private' relations of its citizens and allowed them greater autonomy by way of contract. The relationship between lord and serf was transformed into a contractual relation under a contract of lease or the relationship between master and apprentice was no longer determined by guild laws but by a contract of apprenticeship. The state's abstinence from regulating the private relations of its citizens became one of the cornerstones of a liberal model of society and economy and is still very important in modern legal thinking.

The corollary to the general abstinence of the state was an individual right of parties to draw upon the state's coercive power to enforce their contract when the other party did not perform its contractual obligations. Judicial intervention into contracts does not interfere with freedom of contract in general. On condition of not infringing public law rules, the parties remain free to agree in a contract what they want as long as they do not rely on the state's coercive power by going to court. A judicial fairness test is part of the state's assessment (usually by the courts) on whether to enforce a 'private' contract. Judicial intervention into contracts is therefore not so much about freedom of contract or not. It is more about the extent to which the state (usually by the courts) ratifies the contents of a contract by enforcing its terms. Freedom of contract and the possibility to enforce contracts by the state also include the possibility of enforcing contracts that appear to be rather unfair. Nevertheless, there might be some limits in so far as the state is not bound to enforce very unfair contracts. This is rather clear for extreme cases such as unfair exploitation. The real question still to answer is the extent to which the state also enforces unfair contracts or, in other words, the extent to which citizens may have a right for the state not to use its power to enforce contracts that appear too unfair. The

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20 Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies', XIV. *Juridica* 2008, pp 51-52.

principle of freedom of contract is not part of the answer, it is much more part of the question.

At least in some continental legal systems, the issue of freedom of contract is seen as a constitutionally protected fundamental right. Judicial intervention into contract terms can be considered as a restriction of the fundamental right of freedom of contract. However, contracts have at least two parties that both have a fundamental right to freedom of contract. Therefore, the constitutional right of freedom of contract is not simply a one-way street. When applying the fundamental right of freedom of contract, judges must balance the right of the one party against the same right of the other. As a result, one cannot say that any judicial intervention into contract terms is a restriction of the principle of freedom of contract. At least as far as German constitutional law is concerned, a wholly *laissez-faire* judicial approach may actually infringe the principle of freedom of contract. The German Constitutional Court has held, for instance, that if one of the parties has such power as to be able to determine the content of the contract unilaterally, it is a task of the law (i.e., the court) to take action to safeguard the fundamental rights of the parties involved to avoid the notion of contract as an expression of autonomy being subverted into one of heteronomy.[21] The fundamental right of freedom of contract may thus operate in both directions. Sometimes it may oblige the judge not to intervene into a contract, and sometimes the judge may even be obliged to intervene in favour of one party.

5. Various Fairness Ideologies of Judicial Intervention

To the extent that 'fairness' is considered as a motive for judicial intervention into contracts, it is necessary to bear in mind that fairness can have rather different meanings. Fairness is synonymous with justice.[22] Without delving into the philosophical discussions on the difference between *justicia commutativa* and *justicia distributiva*, it may suffice for the purposes of this article to distinguish between procedural, commutative, and distributive fairness.[23]

Judicial intervention into contracts aims at procedural fairness if it helps to ensure an informed decision of the parties. Examples are the requirement of consent, any specific rule on incorporation of standard terms, their disclosure, or pre-contractual information duties relating to the terms of the contract. This sort of judicial intervention can be considered as the least invasive fairness test. Politically, they clearly belong to liberal and market-oriented thinking.

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21 German Federal Constitutional Court, 26 Jul. 2005, 1 BvR 80/95.

22 *Cf.* Rawls, *A Theory of Justice* (1971), p 3 ff.: 'Justice as Fairness'.

23 As to such distinctions, see Wilhelmsson, XIV. *Juridica* 2008, pp 51–52.; on the evolution of 'contractual justice', see Zweigert & Kötz, *Introduction to Comparative Law* (3rd edn, 1998), p 331.

Commutative fairness aims at ensuring a balance between what the parties have promised to perform for one another. One example may be a ban on (at least harsh) exclusion clauses where a party that does not properly perform its obligations under a contract seeks to exclude its liability for breach of contract. Such clauses are frequently subjected to judicial intervention. If one were to label this kind of intervention politically, one could still describe the philosophical underpinnings as liberal. In particular, the ideology that a market failure may need correction by the state helps justify this kind of intervention still as part of a market oriented (ordo-)liberal policy.

Distributive (or social) justice is usually considered to go beyond a purely liberal policy approach. Distributive justice seeks to enhance the position of weaker groups of market participants, usually at the expense of stronger ones. It may be surprising that judicial intervention into contract terms may have such aims. A recent example could be clauses that stipulate high bank charges for unauthorized overdrafts.[24] Such a practice may be seen as a kind of cross-subsidization where economically weaker clients of banks (i.e., those who more frequently use unauthorized overdrafts) subsidize the bank charges of stronger clients who (as long as they do not use unauthorized overdrafts) get free or at least cheaper bank charges for their accounts.[25] If judges were to interfere in such a pricing policy generalized within the banking sector for the purpose of helping weaker market participants, one could consider this as distributive justice. Politically, this would probably no longer be labelled as just liberal but as a more interventionist policy that one could call welfarist or (in particular if one opposes it) paternalist.

Already this rather sketchy analysis of possible meanings of fairness should make clear that judicial intervention into contracts may have rather different reasons that may, in part, vary and, in part, overlap. In particular, the aim of ensuring contractual fairness sounds good but often blurs rather than clarifies the mix of motive in a concrete case. Furthermore, fairness can justify very different outcomes. From a more classical, liberal perspective, where judicial intervention mainly secures procedural fairness (i.e., informed consent), contract clauses that pass this test may be seen – in substantive terms – as very unfair and may nevertheless be enforced by the courts since the parties knew (or at least were in the position to realize) what they signed up to.

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24 See, for example, the famous case *Office of Fair Trading (OFT) v. Abbey National plc* [2009] UKSC 6 (25 Nov. 2009), [2010] 1 All ER 667, where the UK Supreme Court held that such charges could not be assessed for fairness by the courts, because UK law precludes any assessment of the 'core terms' of a contract and because overdraft fees relate to a bank's remuneration.

25 For a general view on cross-subsidization in contract law, see QUILLEN, 'Contract Remedies and Cross-Subsidization', 61. *Southern California Law Review* 1988, p 1125 ff.

The picture widens much more when the effects of judicial intervention into contracts on the market in general are also taken into consideration. Ensuring fairness of contracts through judicial intervention can have the aim of increasing general economic wealth by improving the functioning of the market.

It is not to be expected that a certain legal system clearly follows just one of these aims and clearly opposes all the others. It is more likely that any existing legal system is based on a mix of such purposes that nevertheless could allow for an analysis of which of these purposes is preponderant and which merely subsidiary targets or perhaps even insignificant.

6. Reasons for Judicial Intervention into Contracts under Articles 79 *et seq.* CESL

The foregoing lines drew a picture of a rather multi-layered web of possible aims for judicial intervention into contracts. In order to answer the question more precisely, it may be useful to focus the perspective on the reasons for judicial intervention in non-negotiated contract terms. This could help to explain the *raison d'être* of unfairness tests such as codified in Articles 79 *et seq.* CESL, sections 305 *et seq.* BGB, or Article 6:231 *et seq.* BW. At the same time, the question of why such unfairness controls only apply to non-negotiated contract terms may find an answer.

If one were to try to summarize the result of several decades of discussion, at least in those countries where specific unfairness controls of non-negotiated (or standard) contract terms are in place, one could perhaps group the sets of reasons brought forward for judicial intervention into contract terms into two main categories that both have two subcategories.[26]

The two main categories are either the protection of individual contract parties ('the other party') or the protection of 'the market' (or even other general values such as ethical conduct among citizens).[27] The first group, where the purpose is seen as protection of individual contract parties, has two subgroups where (a) the main aim is the protection of 'weaker' contract parties (whereby weakness can have very different reasons such as merely a weaker bargaining

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26 Summaries, e.g., by HESSELINK, 'Unfair Terms in Contracts between Businesses', in *Towards a European Contract Law*, eds Stuyck & Schulze (2011), p 131 ff.; LEUSCHNER, 'AGB-Kontrolle im unternehmerischen Verkehr – Zu den Grundlagen einer Reformdebatte', *Juristenzeitung* 2010, p 875 ff.; HELLWEGE, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (2010), p 540 ff.; SCHÄFER & LEYENS, 'Judicial Control of Standard Terms and European Private Law', in *Economic Analysis of the DCFR*, eds Larouche & Chirico (2010), p 97 ff.; monographs, e.g., AXER, *Rechtfertigung und Reichweite der AGB-Kontrolle im unternehmerischen Geschäftsverkehr* (2012); BECKER, *Die gebotene Grenze zwischen AGB und Individualvereinbarungen im unternehmerischen Geschäftsverkehr* (2010).

27 The question of whether contract law should also aim at improving ethical standards, or whether the state ought not to pursue any moral agenda, can be left aside for the purposes of this article.

position, less experience, or even intellectual or social inferiority). The reason why individual contract parties may need protection against non-negotiated contract terms can also be seen as (b) much more focused on the specific situation of the conclusion of the contract, in particular in a situational disadvantage due to the pre-formulation of contract terms by one party of the contract.

The other group of reasons why judges should be entitled to intervene in non-negotiated contract terms, the protection of 'the market', can perhaps also be divided into two subgroups. The first (a) starts from the assumption that there is market failure wherever there is ordinarily no competition of terms and further assumes that judges should correct this market failure for the sake of bettering market conditions in general. The other subgroup (b) starts from the assumption that non-negotiated contract terms, in particular standard terms, have desired effects for market efficiency and reduction of transaction costs in particular when parties are disburdened from individually negotiating the details of their contracts. Judicial control over such terms is necessary for ensuring a minimum of substantive fairness of terms drafted by one side and thereby allows the other party to accept without reading. In this perspective, the interplay of the general condoning of unilateral contract drafting and judicial monitoring facilitates the conclusion of tailor-made contracts and thereby increases market efficiency.

In a nutshell, these groups of possible reasons for a judicial unfairness test such as Articles 79 *et seq.* CSEL could be presented as follows:

(1) Protection of an individual contract party ('the other party'):
  (a) Protection of the weaker party.
  (b) Protection of the other party due to informational asymmetry upon conclusion of the contract.
(2) Protection of 'the market':
  (a) Judicial correction of market failure.
  (b) Enabling acceptance of (certain) contract terms without reading and negotiating.

Most authors assume that judicial unfairness tests both protect individual contract parties and the market in general.[28] Some assume that the protection of individual contract parties should be preponderant.[29] Others see the main or even

28 KÖTZ, *European Contract Law*, vol. I (1997), p 137 ff.; BEALE, 'Unfair Contracts in Britain and Europe', 42. *Current Legal Problems* 1989, p (199) 204; English and Scottish Law Commissions, *Unfair Terms in Contracts: A Joint Discussion Paper*, 3 Jul. 2002 (The Law Commission Consultation Paper No. 166; The Scottish Law Commission Discussion Paper No. 119, available at <http://www.lawcom.gov.uk/unfair_terms.htm>), p 2.1 ff.

29 At least for B2C contracts, *cf.* HESSELINK, 'Common Frame of Reference & Social Justice', *European Contract Law Review* 2008, p (248) 262; HONDIUS, *Unfair Terms in Consumer*

the exclusive reason in protecting the market and not individual contract parties.[30] The core message that provoked this article is that – despite the many different political and academic positions one could take within this spectrum – one of these possible aims for a judicial unfairness test should be beyond dispute. This is point (2)(b). An efficient legal system should allow all parties, including businesses, to accept certain parts of pre-formulated contracts presented to them without even bothering with their content. Those pre-formulated terms that an efficient legal system does not want the parties to read and negotiate should be subjected to a judicial fairness test.

A slightly closer look at the groups of possible reasons for judicial intervention into non-negotiated terms could help to explain why most of these reasons are rather open for discussion, whereas it is fairly beyond doubt that parties should not be expected to read or even to negotiate all boilerplate terms they are confronted with.

6.1. Protection of an Individual Contract Party ('the Other Party')

6.1.1. Protection of the Weaker Party

The problem with the idea that judicial intervention into non-negotiated contract terms aims at the protection of the weaker parties (e.g., SMEs) is that it cannot explain why weaker parties should not be protected against individually negotiated terms.[31] Non-negotiated terms are usually not the most important part of a contract. The main subject matter of the contract, the price (which are not subjected to judicial intervention), and also individually negotiated contract terms are usually much more important for the rights and obligations under a contract than the non-negotiated terms (i.e., traditionally the small print). Be it because of their weaker bargaining position, their lack of experience in this sort of contract, or because of a precarious financial situation, if weaker parties need protection by the courts against parties with whom they conclude a contract, one wonders why this protection should be limited to relatively accidental matters such as the small print. Even more radical, one could wonder why – in a B2B context – parties who conclude unfavourable contracts in a weak bargaining position, because of their lack of experience or precarious financial situation should need any protection.

Contracts (1987), p 237; HOWELLS & WILHELMSSON, *EC Consumer Law* (1997), pp 88–89; WEATHERILL, *EU Consumer Law and Policy* (2005), p 115 ff.

30 'On the Unfair Terms in Consumer Contracts Directive Antoniolli', in *Europäische Rechtsangleichung und nationale Privatrechte*, eds Schulte-Nölke & Schulze (1999), p 137 ff.; RÖSLER, *Europäisches Konsumentenvertragsrecht* (2004), p 191–192; SCHILLING, 'Inequality of Bargaining Power versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms', 33. *European Law Review* 2008, p 336 ff.

31 HESSELINK, in: eds Stuyck & Schulze, *Towards a European Contract Law*, p (131) 133.

This may sometimes be the case, e.g., in favour of SMEs or under antitrust laws. Nevertheless, the general purpose of markets should be that businesses that cannot stand rough market conditions are squeezed out and replaced by others. It is not very plausible that the main purpose of a judicial fairness test (just) for some of the non-negotiated terms could be to protect weaker businesses in the market.[32] This may be, if at all, an – often desired – side effect. If rules that allow judicial intervention into contract terms had the direct aim of protecting weaker parties, they would have to be applicable to all terms irrespective of whether they are core terms or whether they have been individually negotiated or not. Examples of rules that may have the function of protecting weaker parties are the doctrines of unconscionability or of contract terms that are *contra bonos mores*.

6.1.2. Situational Disadvantage Due to Pre-formulation

More plausible are thoughts that justify the specific unfairness controls of non-negotiated terms by the situation of the formation of such contracts. One party is confronted with pre-formulated, often lengthy contract terms. The party who formulated these terms is often the more experienced player in the field. This party has usually invested some time and effort in formulating the terms and is familiar with their content. The other party is indeed at a sort of situational disadvantage. This disadvantage is not insurmountable. The effort of reading and analysing the terms, often also of seeking judicial advice, would, however, at least delay the intended conclusion and increase the costs. The contract party, and this is also true in a B2B context, is confronted with a real dilemma. Should it really read the full beauty of pages of pre-formulated terms supplied by the other party and attempt to overcome the situational disadvantage by analysing the terms and opening negotiations about it? The answer to this question depends very much on the type of contract. However, it is a well-established fact that hardly anyone, irrespective of whether in a business or private context, reads all small prints.[33]

The situation is rather independent from the actual bargaining position. Even if the CEO of a global player wishes to hire a car at the airport, he or she is usually not in a position to change even one printed letter of the smallest print of the rental car company's standard terms. Moreover, the salesperson at the counter is usually not entitled even to negotiate the standard terms. In such a situation, it is very reasonable and not lazy or careless not to negotiate but simply accept the small print.

It may be worth reflecting a little bit further whether such situational disadvantages really justify judicial intervention into contracts. Our CEO could

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32 Eidenmueller, Faust, Grigoleit, Jansen, Wagner & Zimmermann, 'Towards a Revision of the Consumer-Acquis', 48. *C.M.L. Rev (Common Market Law Review)* 2011, p (1077) 1087.

33 For consumers, see Ben-Shahar, 'The Myth of the Opportunity to Read in Contract Law', *European Review of Contract Law* 2009, p 1 ff.

ask his or her legal department to individually negotiate with all major car rental company framework contracts that contain much better terms than their standard contracts. However, is it really in the interest of car rental companies to negotiate individual framework contracts with say 50 or 100 global players and then set up a system that allows every sales person to immediately identify that for this customer an individual framework contract is applicable at perhaps 10,000 different points of sale? The car rental company would lose the advantage of having standardized contracts that, except for some parameters such as the specific car, duration of hire, price, insurance, etc., can be used for every transaction. One could even consider a legal system that incentivizes CEOs of big companies to negotiate individual framework contracts that such suppliers as car rental companies as being rather inefficient.

Moreover, there are certainly businesses that do not have enough bargaining power to make any car rental company negotiate an individual framework contract with them. Such businesses could only try to escape harsh terms on their own by analysing the terms and conditions of all major car rental companies and finding out which of them offers the most acceptable terms. This analysis would have to be repeated whenever one of the car rental companies changes its standard terms. A legal system that requires smaller businesses to carefully compare not only price and other main subject matters of contracts but also the individual standard terms could also be considered as rather inefficient.

There is at least some plausibility in concluding that rules on judicial intervention into boilerplate terms have the purpose of allowing parties to accept such terms without reading them.

6.2. Protection of 'the Market' as Purpose for Judicial Intervention in Non-negotiated Terms

From the foregoing, it should follow that the reasons for judicial intervention in non-negotiated terms are probably not limited to the protection of individual contract parties but include the protection, or at least the improvement of, market conditions. It is – if not the only – at least a very important function of unfairness tests for non-negotiated terms to allow for the development of standardized tailor-made contracts for many rather specific types of business and thereby to increase market efficiency. The previously discussed situational disadvantage due to the pre-formulation of contract terms is not just a problem of individual contract parties. It is a general problem of many markets where goods and services are only offered under lengthy pre-formulated terms and conditions. This is, moreover, not to be considered as a misguided development[34] but rather

34 As to the opposite view, see RADIN, *Boilerplate, the Fine Print, Vanishing Rights and the Rule of Law* (2013).

quite the opposite. Standard terms allow many business sectors to tailor their contracts to the specific conditions of their business model. In other words, it is not a problem *per se* that contract parties are confronted with boilerplate terms in so many market sectors. It would, however, be a problem if contract parties were not willing to accept these terms and were to start negotiating instead. Judicial intervention into non-negotiated terms should be construed as part of the state's infrastructure that allows for tailoring contracts for, in particular, mass transactions and that disburdens parties who are confronted with such contract terms from reading, analysing, and negotiating them. To this extent, it is correct that judicial intervention compensates market failure resulting from the lack of competition in the market of terms. The existence of unfairness controls of non-negotiated contract terms is part of the state's infrastructure allowing for parties to accept boilerplate without reading and thereby increases efficiency of contracting, in particular, in mass markets.

7. The Correct Scope of Judicial Unfairness Controls

7.1. Terms that Parties Are Not Expected to Read and Negotiate

If judicial unfairness controls of non-negotiated terms clearly aim at allowing for the standardization of contracts (whereas the protection of individual contract parties may be simply a side effect), the answer to the question of which kind of term should be subjected to such control must be general and not individual. Terms subjected to judicial control must be those where parties – under normal circumstances – rationally behave when not reading them. In other words, those terms that an efficient legal system does not want the parties to read or negotiate should be subjected to judicial intervention. On the basis of this insight, the relation between rule and exception should also become clear. All terms should be subjected to a judicial fairness test except those that an efficient legal system expects contract parties to bother with.

7.2. Exceptions for Price and Subject Matter

Those terms that ought not to be subjected to the fairness test therefore include the price and also the description of the main subject matter of the contract. Even if standardized, as is very often the case in mass contracts, parties are expected to read at least those parts of their contract that determine the main subject matter and the price. This may be different where in particular exceptions or disclaimers or additional charges are not obvious and somewhat hidden. Therefore, this exception should only be applicable to clear and transparent terms on price and main subject matter.

7.3. Exception for Terms Supplied by the Other Party and for Individually Negotiated Terms

Besides price and main subject matter of the contract, there is no need for judicial intervention, at least in B2B contracts, for terms that have been supplied by the party invoking the unfairness of the terms or that have been individually negotiated between the parties.[35] In both cases, there is no situational disadvantage that needs to be corrected by judicial intervention. Of course, such exceptions from the judicial fairness test might cause problems for the courts to establish the facts, i.e., to answer the question of who supplied the terms or whether they have been individually negotiated. These difficulties, however, can be solved rather easily by rules on the burden of proof. Such a rule could read, for instance, that a party that supplied the terms bears the burden of proof that these terms actually have been individually negotiated.[36] A more radical solution could even be to place the burden of proof that a term has not been supplied by the other party always on the (first) party, i.e., the party against whom the other party seeks protection under the specific unfairness test for non-negotiated terms.[37]

7.4. Why Not Simply a Test Limited to Standard Terms?

The national laws vary with respect to whether only standard terms,[38] any pre-formulated term unilaterally supplied by one party,[39] non-negotiated terms,[40] or all terms[41] should be subjected to a judicial fairness test. If the main reason for the existence of judicial control of contract terms is to avoid parties reading and negotiating those pre-formulated contract terms reasonable parties should not bother with, there is no need to test terms individually negotiated between the parties (since they actually already bothered with them). Therefore, the correct scope of the judicial test must be pre-formulated terms supplied by one party and not individually negotiated with the other.

The classical notion of standard terms, i.e., terms that have been drafted for several uses, is too narrow for this purpose. For an individual party, it makes no difference whether (unfair) terms that have been pre-formulated and supplied by the other party have been drafted for several uses or just for this one. Moreover, it may be rather difficult if not impossible for a party to discern whether terms presented to it have been drafted for several uses or just for this

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35 Strongly for the exclusion of individually negotiated terms, EIDENMUELLER *et al.*, 48. *C.M.L. Rev* 2011, p (1077) 1093.

36 *Cf.* Art. 7(3) CESL that contains such a rule.

37 Article 7(5) CESL (which, however, only applies to B2C contracts) could be read in this sense.

38 For example, German law for B2B contracts, *cf.* s. 305 BGB; for Austrian law, *cf.* s. 879(3) ABGB.

39 For German law, *cf.* s. 310(3), No. 3 BGB (applicable only to B2C contracts).

40 *Cf.* for Portuguese law, Art. 1(2) Standard Terms Act.

41 *Cf.* for Denmark, Sweden, and Finland, Art. 36(1) of the Nordic contract laws.

case. The notion of standard terms, although still frequently used in legislation and discussion, requires establishing whether the terms have been drafted in advance for several uses. This was rather easy at the time when contracts were concluded by making use of printed forms provided by one party that merely required filling in some gaps. Since word processing – and all the more so with the advent of Internet order forms – may produce texts from which pre-formulated parts and those filled in when making the individual contract cannot be optically distinguished, it may be difficult to prove that a certain contract term has been formulated for several uses. The notion of non-individually negotiated terms[42] avoids such difficulties. Therefore, both practical issues of efficient litigation and the underlying philosophy of the unfairness test should lead to the more modern notion of non-negotiated terms within the meaning of pre-formulated terms supplied by one party and not individually negotiated by the parties. The unfairness tests of German and Dutch laws do not conform to this notion since they both require terms to have been drafted for a number of uses for the applicability of the unfairness test to B2B contracts.[43] The CESL is more modern in this respect since its fairness test is also applicable to terms that have been drafted for only one use as long as the terms have not been individually negotiated.[44]

7.5. Exception for Big Contracts (but Not Generally for Big Business)

In particular for B2B contracts, a further exception from the judicial fairness test could be considered. Terms in contracts for which reasonable parties would certainly seek legal advice should also be excluded. Where the cost of advice and also the negotiation of individual terms are small relative to the value of the transaction, a contentious businessman should consider this cost as a necessary investment. Such an exception is lacking in the CESL and German law. In Dutch law, Article 6:235(1) BW excludes certain companies (e.g., those which publish their annual financial statements or have more than 50 employees) from the protection against standard terms under Article 6:233 BW. Such businesses can only invoke the general rules of reasonableness and equity in the BW. The exclusion of (mainly large) companies from the unfairness test in Dutch law is, however, also applicable to the small transactions of those companies and thereby sets an incentive to negotiate terms presented to them where the value in question is rather low. The introduction of a threshold for the inapplicability of the non-negotiated terms fairness test, such as transactions above a certain value,

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42 For a possible definition, see Art. 7 CESL.

43 For German law, see s. 305 BGB that requires terms drafted for a 'multitude of contracts' (whereby the minimum for a 'multitude' is just three times); for Dutch law, see Art. 6:231(a) BW, which reads 'general conditions' that have been drawn up for 'a number of' agreements.

44 Articles 79 and 86 CESL.

could be more efficient.[45] The English and Scottish Law Commissions suggested a limit of GBP 500,000.[46] It is of course up for discussion what the suitable amount should be,[47] but it is at least rather plausible that for transactions with a value of more than, say, EUR 5 million, perhaps even less, the parties should be expected to seek legal advice and to carefully deal with all terms of a contract.[48]

8. Yardstick for the Fairness Test of Non-negotiated Terms

The insights into (at least) the main reason for the existence of the judicial fairness test for non-negotiated terms also allow for some orientation on the yardstick for this fairness test. This can – again – be seen with more clarity regarding the exceptions, i.e., those terms that should not be subjected to a fairness test, in particular for individually negotiated terms. One of the very basic assumptions of contract law is that the parties know best what is good for them (or at least better than a judge) and that therefore any freely negotiated consensus should not be subjected to judicial control. In other words, the result of open-ended individual negotiations between parties of equal bargaining power is presumed to be fair for the individual purposes of these parties. It can easily be argued that this presumption is legitimate for individually negotiated terms. In Germany, legal scholarship presumes that the parties' agreement is correctly enshrined in the contract under the doctrine of the so-called guarantee of the contract's correctness (*Richtigkeitsgewähr des Vertrages*). The reason why judges, except in very extreme cases, may not intervene in core matters of contracts such as the appropriateness of the price or individually negotiated terms is that one can doubt whether judicially amended contracts are 'better' than individually negotiated ones. This presumptive or safeguarding function of individual negotiation is, by definition, not present in the case of non-negotiated terms. Judicial fairness tests have the function of replacing the fairness indicator of free and open-ended negotiations.

This should help to develop a benchmark for the judicial fairness test. The question should be what would reasonable and honest parties of similar bargaining power have agreed if they had carefully negotiated the issue.

It would be, however, much too simple merely to replace the non-negotiated term in question by such a benchmark developed by a court. It is

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45 Against a fixed value, see Eidenmueller *et al.*, 48. *C.M.L. Rev* 2011, p (1077) 1092–1093.

46 English and Scottish Law Commissions, *Unfair Terms in Contracts: Joint Report*, February 2005 (http://www.lawcom.gov.uk/docs/lc292.pdf), p 5.24 and 5.54.

47 Schäfer & Leyens, in: eds Larouche & Chirico, *Economic Analysis of the DCFR* (2010), p (97) 115 suggest that the limit should be significantly higher.

48 On other factors that may mitigate adverse effects of boilerplate contracts for high value transactions, see Ben Shahar & White, 'Boilerplate and Economics Power in Auto Production Contracts', 104. *Michigan Law Review* 2006, p 953 ff.

by far not granted that any deviation from the benchmark makes a term unfair. The answer must be found in a movable system that can be expressed by 'the more the worse' formula. The further removed the concrete non-negotiated term in question is from what reasonable and honest parties would have agreed following individual negotiation, the more unfair the individual term is presumed to be.

A full picture can only be found by looking at possible reasons that may justify the deviation. The test could perhaps be expressed by the following formula: the greater the distance to the benchmark and the weaker the reasons for the deviation from it, the more the term is suspected of being unfair. The adjective 'grossly' in Article 86(1)(b) CESL could be understood in this sense. At least in theory, this measure for assessing the fairness or unfairness of an individual term is crystal clear. Since life and, in particular, cases in court are often more complex, many questions nevertheless remain open in practice. Finding the benchmark may need much more reflection than simply allowing the judges to consider as a fair term what they personally think is fair. Usage and practices in certain sectors must have their say, whereby this does not exclude that even frequent practices may be considered unfair by the court. In cases where the legislature has provided a default rule in the absence of express agreement, the judge might consider this rule as representing 'the hypothetical bargain' and use it as a benchmark.[49] It is also very difficult to determine the extent to which the assessment can be carried out by looking at one individual isolated term in a contract. A potentially unfair term may, at least in part, be balanced by other terms that are rather favourable for the party seeking protection. Moreover, courts would need to adopt a position regarding the argument that the price reflects the harshness of the term. There are good reasons why courts could come to the result that this argument is not admissible at all, i.e., that even a very low price does not justify harsh non-negotiated terms. Otherwise, courts would indirectly be forced to assess the appropriateness of prices.

It is also difficult to decide on the extent to which individual circumstances of the conclusion or the execution of the contract may influence the assessment of the fairness of a term. For example, can a party defend its very harsh non-negotiated terms by establishing that it made enormous efforts to explain to the other party the meaning of these terms? Or, does it make a difference whether a contract party that seeks protection against a non-negotiated exclusion clause had itself behaved very badly when executing the contract and committed, for example, an intentional fundamental breach?

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49 See, however, HESSELINK, in: eds Stuyck & Schulze, *Towards a European Contract Law*, p (131) 139 ff., who calls this approach 'paternalist'.

Whether these questions would be uniformly answered according to the different national courts or laws or whether there would be deviations may depend on many factors, not at least the political views and values underlying the legal system in question.

9. Conclusions

Various answers to the question of the *raison d'être* of judicial intervention into contracts can be given. The extent of judicial intervention into contract terms may reflect different ideological backgrounds of contract law theories or even models of the role of the state in the economy. This article hints at a point that may nevertheless turn out as a communality despite the many variants of judicial unfairness tests and the differing opinions on its purposes. An efficient legal system should allow all contract parties including businesses to accept most parts of boilerplate contracts presented to them without bothering with their content. In order to allow parties to accept boilerplate terms without reading them, such terms should instead be subjected to a judicial fairness test. Consequently, the judicial fairness test has the purpose of disburdening the parties from reading and negotiating the terms and thereby reduces costs and increases market efficiency. Judges who declare lemon-like terms invalid and refuse to enforce them contribute to driving them out of the market and help solving the lemon problem. Hence, judicial intervention into contract terms should be construed as part of the state's infrastructure that allows for tailoring contracts for, in particular, mass transactions and that disburdens parties who are confronted with such contract terms from reading, analysing, and negotiating most of their content.

In contrast, those contract terms that an efficient legal system expects contract parties to carefully read and negotiate may be excluded from the judicial fairness test. These are – if transparent – terms on the price and main subject matter of the contract, terms that have been supplied by the party itself, and terms dealing with transactions of a value where reasonable parties would certainly seek legal advice and individually negotiate every dot and iota of the contract. If – at least in a B2B contract – parties have seriously negotiated individual terms, a judicial fairness test that has the (main) function of disburdening parties from doing so needs not be applied to these individually negotiated terms. This explains why the judicial unfairness test for B2B contracts in the CESL is solely and uniquely applicable to non-negotiated terms and not to individually negotiated terms.

The limitation of the test to non-negotiated terms may also give orientation for developing a yardstick in assessing the fairness of a term. The further removed the concrete non-negotiated term in question is from what reasonable and honest parties would have agreed in individual negotiations, the more likely it is that the individual term is unfair.

The existence of a fairness test for non-negotiated terms does not prevent a legal system from also putting individually negotiated terms under scrutiny – but the yardstick for assessing the fairness of terms that have been individually negotiated between businesses should be very different, creating much more room for the freedom of contract.