9

Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts*

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This chapter looks at the particular problems of trying to secure fairness when contracts are made using one party's standard form conditions, and at the EC Council Directive on Unfair Terms in Consumer Contracts.[1] In so doing we move away from the traditional grounds for relief, which for the most part[2] involve either some improper behaviour by the party against which relief is sought (eg duress) or exploitation in terms of value for money—that the weaker party has sold property for less than its true value or the transaction is manifestly disadvantageous.[3] There are certainly many cases of the 'victimization'[4] of consumers; some sad examples are given in the Report of the Director-General of Fair Trading, *Trading Malpractices*.[5] The Director-General calls for improved powers to deal with such cases.

Problems with standard form contracts

I hope it is now accepted that the problems caused by standard form contracts are rather different to those confronted in traditional cases of victimization. They are the result of the very advantages of standard form contracts—that complex transactions can be made with a minimum of negotiation and by relatively unskilled personnel, and that supplier's

[1] Council Directive 93/13/EEC of 5 April 1993 (OJ L95, 21.4.1993, p 29).

[2] Infants' contracts are possibly an exception.

[3] See *Fry* v *Lane* (1888) 40 ChD 312 and on 'manifest disadvantage' in cases of undue influence, P Birks & Chin Nyuk Yin, ch 3 above. The meaning of unfairness is discussed in H Beale, 'Inequality of Bargaining Power' (1986) 6 Ox JLS 123; SN Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 Ox JLS 17.

[4] The word is that used by Lord Brightman in *Hart* v *O'Connor* [1985] AC 1000, at 1018.

[5] (Office of Fair Trading July 1990.) See, eg p 42.

Good Faith and Fault in Contract Law. Jack Beatson and Daniel Friedmann.

risks are reduced and standardised.[6] To restate[7] the arguments briefly, although both judges[8] and academics[9] have suggested that the frequency of harsh terms in standard form contracts is the result of 'the concentration of particular kinds of business in relatively few hands',[10] this explanation seems implausible. Standard forms and apparently harsh terms are found in industries which do not have significant market concentrations.[11] Empirical study of guarantees offered by manufacturers in the United States does not suggest a correlation between concentration and the use of exclusion clauses.[12]

Although not proven empirically, it seems more likely that harsh clauses are the result of information costs. Many customers faced with standard form contracts may not know of, or understand the meaning of, the small print and may not think it worth the time and cost to find out about it. Instead they choose products and services on the basis of things they can evaluate, such as the physical characteristics of the product and the price. In order to remain competitive in price, suppliers will tend to reduce their costs by using the small print to shift more and more risks onto the customers who, since they do not know of or understand the clauses, will not complain. So in a market which is competitive in terms of price, but where customers do not have full information about the standard terms, there will be a tendency toward harsh term—low price offerings.[13]

Even if a customer is aware of what is in the standard form and protests, it is likely to be met with a take-it-or-leave-it attitude. A supplier is unlikely to find it worth while altering its standard terms just to satisfy one customer unless that customer's business is particularly important to it—unless, in other words, the customer has bargaining power as well as bargaining sophistication.

[6] See F Kessler, 'Contracts of Adhesion—Some Thoughts About Freedom of Contract' (1943) 43 Colum L Rev 629, 631–2.

[7] See also the summaries in H Beale, 'Inequality of Bargaining Power' (1986) 6 Ox JLS 123, 131–2 and H Beale, 'Unfair Contracts in Britain and Europe' [1989] CLP 197, 199–201.

[8] eg Lord Diplock in *A Schroeder Music Publishing Co Ltd* v *Macaulay* [1974] 1 WLR 1308, at 1316.

[9] eg F Kessler, 'Contracts of Adhesion—Some Thoughts About Freedom of Contract' (1943) 43 Colum L Rev 629, 631; O Kahn-Freund, Introduction to K Renner, *The Institutions of Private Law and their Social Functions* (1949).

[10] *A Schroeder Music Publishing Co Ltd* v *Macaulay* [1974] 1 WLR 1308, at 1316, per Lord Diplock.

[11] See MJ Trebilock, 'An Economic Approach to the Doctrine of Unconscionability' in (BJ Reiter and J Swan (eds) 1980) *Studies in Contract Law* 379, 398.

[12] GL Priest 'A Theory of the Consumer Product Warranty' (1981) 90 Yale LJ 1297.

[13] See VP Goldberg, 'Institutional Change and the Quasi-Invisible Hand' (1974) 17 J Law & Econ 461, 483 *et seq*; MJ Trebilcock, 'An Economic Approach to the Doctrine of Unconscionability' in BJ Reiter and J Swan (eds), *Studies in Contract Law* (1980) 379. A very useful survey of the economic arguments is IDC Ramsay, *Rationales for Intervention in the Consumer Marketplace* (Office of Fair Trading, 1984). Other possible explanations for harsh terms are canvassed in H Beale, 'Unfair Contracts in Britain and Europe' [1989] CLP 197, 200.

Suppliers are not completely unconstrained in the terms other than the price that they offer, because these non-price terms may become the subject of competition. This may the result of a marketing decision to highlight the advantages of particular terms, eg the warranty offered on a new car or the cover provided by an insurance policy, or it may result from the fact that a percentage of customers are sufficiently knowledgeable to compare the small print offerings and to shop around to try to find terms with which they will be happier. If there are enough of these marginal sophisticated customers, it may be worthwhile for suppliers to offer better terms in the hope of capturing their business, and since it is not often going to be worthwhile to discriminate between customers so far as the standard terms offered are concerned, the result may be that better terms are offered to all.[14]

This analysis means that often it will be impossible to say that there has been 'exploitation' in the traditional sense of over-charging or buying at undervalue. Nor will there have been procedural impropriety in any of the traditional senses; rather, just a failure to explain to the customer the content and meaning of what is being signed or perhaps a refusal to negotiate over the standard terms. So what are the problems of fairness associated with standard form contracts? One of the best summaries is that of Lord Reid in the *Suisse Atlantique* case:

> In the ordinary way the customer has no time to read [the standard terms], and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.[15]

In other words the problems are what the comments to Uniform Commercial Code § 2–302 calls 'unfair surprise', and lack of choice.

Legislative controls over unfair terms in consumer contracts in English law

In England attention until now has focused on clauses which exclude or limit the liability of one party to a contract. Legislative controls date back to the Railway and Canal Traffic Act 1854, but controls over such clauses in contracts in general were introduced in the Unfair Contract Terms Act

[14] See MJ Trebilcock, 'An Economic Approach to the Doctrine of Unconscionability' in BJ Reiter and J Swan (eds), *Studies in Contract Law* (1980) 379, and A Schwartz and LL Wilde, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) 127 U Penn LR 630.

[15] *Suisse Atlantique Société d'Armement Maritime SA* v *NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, at 406.

1977 (UCTA). Despite its broad title,[16] this only affects various types of exclusion and limitation of liability clause[17] and indemnity clauses in consumer contracts.[18]

The legislation involves two types of control: some clauses are always ineffective while others may be valid but only if they satisfy the requirement of reasonableness. Thus the 1977 Act, s 2 deals with clauses which purport to exclude or restrict liability for negligence in the course of a business or arising out of the occupation of land used for the business purposes of the occupier.[19] Section 2(1) provides that any clause which purports to exclude or limit such liability for death or personal injury is of no effect. It is immaterial whether the liability arises in contract or in tort. Under s 2(2), in contrast, clauses excluding or restricting liability for other loss or damage caused by negligence in similar circumstances may be valid but only if the clause is reasonable.

Some controls are applied only to contracts for the sale or supply of goods. As against any person who deals as a consumer,[20] any attempt by the supplier to exclude or restrict liability for the goods' correspondence with description or fitness for purpose is of no effect.[21] At common law, manufacturers would normally be liable directly to a consumer in tort if negligence in the manufacture of the goods led to the consumer being injured or her property being damaged,[22] or if the manufacturer has given the consumer a contractual guarantee.[23] Section 5 of the Act prevents the manufacturer from using the terms of the guarantee to exclude or limit its liability in tort to the consumer.

Finally, any exclusion or restriction not caught by the above may fall within s 3, which applies in favour of any consumer.[24] The business may

[16] The draft Bill proposed by the Law Commission was entitled the Avoidance of Liability Bill: the new title was adopted in the Bill's passage through Parliament.

[17] See s 13, discussed by E Macdonald, 'Exclusion Clauses: the ambit of s 13(1) of the Unfair Contract Terms Act 1977' (1992) 12 LS 277.

[18] Section 4, which was also the result of an amendment in Parliament.

[19] See s 1.

[20] Section 12 defines this broadly as a sale or supply by a person acting in the course of a business to one who is not, provided that the goods are of a kind normally supplied for private use or consumption.

[21] Sections 6(2) (sales) and 7(2) (other contracts for the supply of goods). Section 6 derives from the earlier Supply of Goods (Implied Terms) Act 1973, which imposed similar but not identical controls. In non-consumer contracts (eg a sale by one business to another) such clauses may be valid if they are reasonable: ss 6(3) and 7(3).

[22] The manufacturer will then be liable under the principles established in *Donoghue* v *Stevenson* [1932] AC 562. There is no liability for a product which is defective but which has not caused any harm: *Murphy* v *Brentwood District Council* [1991] 1 AC 398.

[23] The consumer's purchase of the goods in reliance on the guarantee would normally be the consideration for the manufacturer's promise. Doubts may arise over whether the consumer relied on the guarantee and thus whether it is enforceable and the Department of Trade and Industry has canvassed making all manufacturers' guarantees of consumer goods enforceable by statute: *Consumer Guarantees: A Consultation Document* (1992).

[24] And also in favour of any party, consumer or not, who is dealing on the other party's written standard terms of business.

not exclude or restrict any liability for breach of contract[25] unless the clause is reasonable. Nor may it rely on any clause as permitting it to render a performance substantially different to that which was reasonably expected, or as justifying it in not performing, unless the clause is reasonable.[26] Thus, were a clause to purport to give a package holiday company the right to change the destination of the holiday-maker, or to cancel the holiday altogether, at its complete discretion, it would probably be invalid.

The test of whether a clause is reasonable is whether it was a fair and reasonable clause to include given the circumstances known when the contract was made.[27] The 'inclusion' test seems to mean that a clause which is very wide may be unreasonable even though the way in which the business is seeking to apply it does not seem unreasonable on the facts which have actually occurred.[28] Schedule 2 of the Act contains a non-exhaustive list of guidelines which, although they apply strictly only to decisions under ss 6(3) and 7(3),[29] the courts look at in any case:[30]

(1) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(2) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(3) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(4) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
(5) whether the goods were manufactured, processed or adapted to the special order of the customer.

Because under the Act so many clauses in consumer contracts are automatically invalid, there has been little case law on the application of the reasonableness test to consumer contracts.[31]

[25] Section 3(2)(a). [26] Section 3(2)(b). [27] Section 11(1).
[28] In contrast the Supply of Goods (Implied Terms) Act 1973, s 4, had used the test of whether it was fair and reasonable to rely on the clause.
[29] Section 11(2).
[30] *Phillips Products Ltd* v *Hyland* (Note) [1987] 1 WLR 659.
[31] Though see *Woodman* v *Photo Trade Processing Ltd* (7 May 1981, unreported), cited in RG Lawson, 'The Unfair Contract Terms Act: A Progress Report' (1981) 131 NLJ 933, 935.

The implications of unfair surprise and lack of choice

Although it was said a long time ago that the problems with standard form contracts are usually ones of unfair surprise and lack of choice, I am still not sure that we have taken on board the full implications. We are dealing not with individual victimization, but with problems of mass contracting. First, I have argued elsewhere that this should have implications for the way in which we determine in an individual case whether or not a clause is fair and reasonable under the Unfair Contract Terms Act 1977 (UCTA).[32] Secondly, it may affect the implications of individual decisions on reasonableness for the general run of standard form contracts. Thirdly, it requires us to think carefully about mechanisms for improving the standard forms on offer, especially in the consumer field. For a traditional contract lawyer, some of the devices which are needed may 'go against the grain'.

An irreducible minimum?

There is another possible problem with standard form contracts, identified years ago by the Molony Committee: they enable well organised commerce 'to deny [the consumer] what the law means him to have.'[33] Whether English contract law is solely concerned with freedom of contract in all its many guises, or whether there is a certain irreducible minimum of obligations and correlative rights, is something on which neither the law nor policy makers seem to have made up their minds. I think that liability for fraud and other intentional harm cannot be excluded under any circumstances,[34] but do we go further than this?[35] The absolute bans on certain types of exclusion clauses under the 1977 Act seem to have been justified at least by the Law Commission primarily in terms of bargaining

On reasonableness in non-consumer contracts the leading cases are *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 2 AC 803 and *Phillips Products Ltd* v *Hyland* (Note) [1987] 1 WLR 659. See also *Smith* v *Eric S Bush* [1990] 1 AC 831, a case in tort.

[32] See H Beale, 'Unfair Contracts in Britain and Europe' [1989] CLP 197, 204–11.

[33] Board of Trade, *Final Report of the Committee on Consumer Protection* (Molony Committee) (1962) Cmnd 1781 para 435. See *Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893* (1969) Law Com No 24; Scot Law Com No 12; para 68.

[34] *Pearson & Son Ltd* v *Dublin Corpn* [1907] AC 351.

[35] H Collins, 'Good Faith in European Contract Law' (1994) 14 Ox JLS 229, 246–7, has argued that the decision in *Smith* v *Eric S Bush* [1990] 1 AC 831 represents a policy of creating a 'social market'.

power[36] or the misleading nature of the term.[37] This liberal tradition is seen as surprising by many continental colleagues.

The Directive

There are a number of questions one may address in relation to the Directive on Unfair terms in Consumer Contracts. I will discuss only three.

First, what will be its impact on the law of England and Wales? Here the means of implementation must be considered. Shortage of Parliamentary time has meant that the Directive has been implemented via regulations under the European Communities Act 1972 rather than by amendment of UCTA or other legislation; full revision of the Act before the deadline of 31 December 1994 for implementation of the Directive was impossible. The Department of Trade and Industry's initial consultation paper on implementation[38] provisionally proposed Regulations for the most part simply reciting the words of the Directive, so that there would be a dual system by which clauses might be challenged either under the Act or under the Regulations. This seems clumsy and apparently attracted a good deal of adverse comment. However, it was not clear that, given the time constraints, there was a better solution. It might have been stated in the Regulations that consumers would be excluded from the future operation of those sections of UCTA which require terms in consumer contracts to be reasonable, so as to force consumers to proceed under the Regulations and thus eliminate the overlap.[39] But it would have been arguable that consumers' protection was being reduced, as it is not wholly clear that the test of fairness under the Directive gives the same protection

[36] For s 2(1) (clauses excluding liability for death or personal injury) the original proposal was to limit the ban to situations such as car parks where the customer had no effective choice. For ss 6(2) and 7(2) (clauses excluding or restricting liability for failure to correspond with description, fitness for purpose etc) the First Report on Exemption Clauses stated that the burden should fall on the retailer rather than the consumer, but also rejected a reasonableness test because it would weaken the consumer's bargaining position rather than on any a priori ground (*Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act 1893* (1969) Law Com No 24; Scot Law Com No 12; para 73).

[37] Section 5 (clauses in manufacturers' guarantees): *Exemption Clauses, Second Report* (1975) Law Com No 69; Scot Law Com No 39; para 100.

[38] *Implementation of the EC Directive on Unfair Terms in Consumer Contracts* (93/13/EEC): A Consultation Document (1993).

[39] FMB Reynolds, 'Unfair Contract Terms' (1994) 110 Law QR 1, argued that 'all the resources of s 2(2) [of the European Communities Act 1972] should be deployed' to repeal parts of UCTA in order to avoid uncertainty.

as the test of reasonableness under the Act.[40] After a second consultation paper, regulations were laid before Parliament.[41a]

This raises the second question: what is covered by UCTA and other existing UK law but not by the Directive? This may seem to be of less importance, but one of the aims of the Directive is

> . . . to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own . . .[42]

If consumers do shop abroad, what minimum protection can they be sure they will have, compared to what they would have at home? Often the position will be better than the minimum, as many Member States already offer much fuller protection that the Directive requires (and Article 8 preserves their right to do so), but this will not always be the case.

Thirdly, what are the concepts and techniques employed in the Directive, and do they add anything to the debate or possible amelioration of the problems?

Scope of the Directive

The Directive is confined to the law relating to unfair terms in contracts concluded between a seller or supplier and a consumer.[43] A consumer is defined as a natural person.[44] Thus, unlike UCTA, the Regulations will not affect contracts between businesses and it will not be possible to hold that a limited company is acting as a consumer, even if it makes a transaction which is outside its normal course of business.[45]

The Directive only requires Member States to treat as potentially unfair terms which have 'not been individually negotiated'.[46] UCTA does not contain such a restriction, but many laws do; eg the German Law of Standard Contract Terms of 9 December 1976. Printed standard terms of business are obviously within this definition, unless in fact there has been some negotiated change in them. Perhaps the phrase 'standard terms' was not used to take care of the problems of definition which occur when one party has its usual terms not in a pre-printed document but on its word-

[40] See further below, pp 242–5.

[41] *Implementation of the EC Directive on Unfair Terms in Consumer Contracts* (93/13/EEC): *A Further Consultation Document* (1994).

[41a] Unfair Terms in Consumer Contracts Regulations, SI 1994 No. 3159.

[42] Council Directive 93/13/EEC of 5 April 1993 (OJ L95, 21.4.1993, p 29), preamble para 6 (my numbering).

[43] Article 1. See r 2(1).

[44] Article 2(b).

[45] Cf. *R & B Customs Brokers Co Ltd* v *United Dominions Trust Ltd* [1988] 1 WLR 321.

[46] Article 3(1).

processor, or in a precedent contract which is in effect non-negotiable. It is clear that the question is whether the consumer has been able to have some influence:

> A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.[47]

In terms of consumer contracts, the restriction of the Directive to terms which have not been individually negotiated does not seem very significant; at a guess, almost all objectionable terms[48] are pre-formulated.

In terms of the types of consumer contract covered the Directive is significantly wider than UCTA, from which several types of contract are exempted.[49] For example, insurance contracts are within it[50] and so, it seems, are contracts for the sale of land when these are part of the seller's 'trade, business or profession'.[51] This is to be welcomed. Whether a lessor of land can be regarded as a 'supplier' is unclear.

With two exceptions, which I will deal with below, the Directive requires the law of Member States to cover any unfair terms. This is, on the face of it, a sharp contrast to UCTA which, as noted earlier, covers only clauses which in one form or another restrict or exclude liability[52] and indemnity clauses.[53] It is difficult to predict what types of clause may be vulnerable under the new Regulations. The Annex contains 'an indicative and non-exhaustive list of the terms which may be regarded as unfair'.[54] This permissive wording seems to leave it to Member States whether or not to adopt the list; in any event, the terms are not ones which are automatically to be regarded as unfair; in that sense it is only a 'grey list' not a 'black list'. Yet some idea of what terms may be caught may be gained from looking at it, or at black and grey lists contained in the legislation of other Member States.[55]

Not surprisingly, a number of the clauses in the Annex would in any event be of no effect under UCTA[56] or other legislation.[57] Some would be

[47] Article 3(2). Regulation 3(3) omits the last phrase.

[48] Other than the price itself, which cannot be reviewed anyway. See below, p 240.

[49] See Sched 1.

[50] Though see the discussion of Article 4(2) below, p 240.

[51] Article 2(c).

[52] See UCTA, s 13: in particular, clauses which would 'exclude or restrict the relevant obligation or duty' (eg 'the seller gives no undertaking of any kind that the vehicle is of merchantable quality') are covered: s 13(1).

[53] Section 4.

[54] Article 3(3); Regulations, Schedule 3.

[55] An early draft of the Directive (June 1987: XI/124/87-EN) helpfully appended lists from the legislation of Member States and from the earlier Council of Europe resolution (76)47 of 16 November 1967. This draft is reprinted in (1988) 6 Trading Law 79. A very full and helpful survey is EH Hondius, *Unfair Terms in Consumer Contracts* (1987).

[56] eg Annex para 1(a), (b), (f) and (o).

[57] On para 1 (q) see Consumer Arbitration Agreements Act 1988.

caught by common law rules, eg the rules on penalty clauses.[58] Some are perhaps unlikely to arise under English law; for example, Annex para 1(c), a clause

> making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his will alone

may be aimed at systems which normally treat offers as irrevocable.

Other clauses in the Annex could perhaps be reached by an imaginative use of UCTA. The examples in para 1(j) and (k) giving the seller or supplier the right to alter unilaterally, and without a valid reason, the terms of the contract or the characteristics of the product or service must be within s 3(2)(b)(i) of the 1977 Act.

There will definitely be some widening of the controls. We can expect, for example, considerable activity over clauses allowing sellers and suppliers to change their prices after the contract has been made. Annex para 1(l) lists clauses 'providing for the price of goods to be determined at the time of delivery'. (It should be remembered that in some systems there cannot be a valid contract of sale if the price is 'open'.[59]) It also covers clauses allowing a price increase without a right of cancellation for the consumer if the 'final price is too high'. It would not be controversial to hold such a clause unfair but decisions under the new Regulations might go further. The German Law on Standard Contracts black-lists any clause allowing an increase of price within the first four months.[60] This may give many companies pause for thought. Luxembourg law proscribes minimum consumption clauses in contracts for the supply of gas, electricity or fuels;[61] standing charges for utilities may be at risk.

Price and definition of the main subject matter

As mentioned above, there are two exceptions to the wide coverage of types of clause. Under Article 4(2) the price may not be assessed in terms of fairness in so far as it is in plain intelligible language; nor may the definition of the main subject matter of the contract. The second exception at least seems to be another tribute to the power of the insurance lobby.[62] The nineteenth paragraph of the Preamble states that

> . . . it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject

[58] eg Annex para 1(e).

[59] eg under French law. See generally D Tallon (ed), *Le détermination du prix dans les contrats, étude de droit comparée* (1989).

[60] Para 11.1.

[61] Consumer Protection Act of 25 August 1983, Art 2(17).

[62] Cf. the exemption of insurance from UCTA. Sched 1, s 1(a).

to . . . assessment since these restrictions are taken into account calculating the premium paid by the consumer.

The words inter alia, and the terms of Art 4.2 itself leave a considerable loophole in the Directive. In any competitive market, the terms on which the goods are sold or the service provided are taken into account in the price. Can it not be said that any exception clause defines the seller or supplier's obligations and thus cannot be reviewed?

There seem to be two possible answers. One is that the exception must be obvious. Thus a clearly understandable clause stating that travel insurance does not cover injury through winter sports would not be subject to review; but an obscure clause in the small print of a domestic insurance policy, excluding theft coverage when the theft occurred without forcible entry, would be reviewable.

The second argument may be that an insurance policy's exceptions define when the insurer is obliged to perform its primary obligation, ie to pay out; whereas many exemption or limitation of liability clauses define only secondary obligations, ie those which spring up only when there has been a failure to perform the primary obligations. But what of the kind of clause at one time so common in holiday contracts:

Steamers, sailing dates, rates and itineraries are subject to change without prior notice.[63]

As the Law Commission pointed out, such clauses also define the primary obligation and a special provision for them was made in UCTA.[64] It seems they are not covered by the Directive.

In terms of scope, therefore, the Directive does extend controls to more types of clause than are caught by UCTA. For the British consumer abroad, the picture is less happy. First, certain types of clause covered by UCTA are apparently outside the Directive. A second point is more serious. There is no guaranteed minimum. Section 2(1) of UCTA, for example, renders completely ineffective any clause excluding or restricting business liability for death or personal injury caused by negligence. Under the Directive there is no blacklist. Fortunately many countries' laws do prevent the exclusion of this type of liability[65]—but do they all?

Early drafts of the Directive seemed to contemplate black lists and grey lists but were less than clear.[66] The Economic and Social Committee said

[63] *Anglo-Continental Holidays Ltd* v *Typaldos Lines (London) Ltd* [1967] 2 Lloyd's Rep 61. See now the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992 No 3288 (implementing the Council Directive 90/314/EEC of 13 June 1990 (OJ L158, 23.6.1990, pp 59) which might not apply to the facts of this case.

[64] Exemption Clauses, Second Report (1975) Law Com No 69; Scot Law Com No 39; para 143; UCTA s 3(2)(b), above, p 235.

[65] eg German Law on Standard Contracts, art 11(7).

[66] eg COM (90) 322 fin -SYN 285 (OJ C 243, 28.9.1990, p 2).

that this must be clarified[67] and the next draft was quite categoric: certain terms were blacklisted, some (including exclusions of liability for death and personal injury) even if they had been negotiated individually.[68] The final text is a disappointing watering down.[69]

The test of unfairness

When we turn to the test of when a term in a consumer contract is to be treated as unfair we come to one of the conceptual problems. The test laid down in the Directive is not immediately applicable to the problems which I identified earlier. It is to be regarded as unfair

> . . . if, contrary, to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligation arising under the contract, to the detriment of the consumer.[70]

The world 'imbalance' has connotations of exploitation of the old-fashioned kind. If the arguments used earlier are correct, this would open to the seller or supplier the defence that the harsh clause resulted in a cheaper deal for the consumer, with the result that there was no overall imbalance. It was on just this ground that the French legislature rejected this test when considering what was to become the *Loi Scrivener* of 1978.[71] In addition, it seems, the Directive restricts relief to cases where there has not been good faith. To English lawyers this may have connotations of conscious misleading, or at least a reckless attitude as to whether the other party has been misled by the standard form. It does not seem to apply readily to a case where the consumer has simply not read the standard form, although the form is not misleading, still less to cases where the supplier simply indicates that it is not willing to alter the form in the consumer's favour.

In this respect, earlier drafts of the Directive again seemed more satisfactory: in the 1990 version,[72] for instance, significant imbalance and incompatibility with good faith were alternatives, rather than cumulative.

[67] 91/C159/13 (OJ C 159, 17.6.1991, p 34).

[68] COM (92) 66 final - SYN 285 (OJ C 73, 24.3.1992, p 7), Art 3.3.

[69] It seems inconsistent with the Package Travel Directive, note 63 above, which by Art 5 blacklists any exclusion of liability for personal injury, grey-listing exclusions of liability for property damage: also with Commission Proposal for a Council Directive on liability of suppliers of services (91/C12/11, COM (90) 482 final -SYN 308 (OJ C 12, 18.1.1991, p 8). Art 7, which would have prevented exclusion of liability for either type. However the draft Services Directive has now been withdrawn, COM(94) 260 of 23 June 1994.

[70] Article 3(1); r 4. The term is to be judged by the circumstances at the time the contract was concluded, Article 4(1). section 11(1) of UCTA is the same on this point.

[71] J Ghestin, *Le contrat: formation* (2nd ed 1988), para 602.

[72] COM(90) 322 fin - SYN 285 (OJ C 243, 28.9.1990, p 2).

There were also two other grounds for unfairness: that the term caused performance of the contract to be unduly detrimental to the consumer, or that it caused the performance to be significantly different to what the consumer could legitimately expect. The Economic and Social Committee wanted to add a further criterion, the 'non-transparency of a contract term'.[73] The House of Lords Select Committee on the European Communities favoured adding the test of reasonableness, although noting that this term has a different meaning in civil law jurisdictions.[74] In contrast, in the first debate of the proposal in the European Parliament, a Spanish member protested against all the grounds except good faith as being too much the British solution; only good faith was in accord with the civil law tradition. His argument was turned down so sharply by the Commission representative that it is a little surprising to see that this voice of reaction appears to have come close to winning the day.

However, it seems probable that concerns over the tests of imbalance and absence of good faith appropriate may be premised on interpretations of those phrases which are too narrow. First, we should think of imbalance not just in a narrow 'deviation from market price' sense, but in terms of balancing overall interests. Thus there may be imbalance if, by using a term, the supplier reduces the price slightly, and thereby gains a few extra sales, but at the price of placing a very large potential loss on the small number of consumers for whom the risk will materialize.[75] It has been noted that the test adopted by the Directive is close in its wording to the German Act on Standard Contract terms of 1976.[76] The so-called 'General Clause' of that Act refers to 'undue advantage to such an extent as to be incompatible with good faith'.[77] It seems that this has been interpreted as requiring the courts to look at the overall balance of advantage in the general run of cases.[78] Witz notes that the courts have frequently rejected the argument that a harsh clause is acceptable because it leads to a lower price being charged to the consumer.[79]

Secondly, it is clear that in several civilian systems 'good faith' has been

[73] Opinion on the proposal for a Council Directive on unfair terms in consumer contracts (91/C159/13) (OJ C 159, 17.6.1991, p 34), para 2.5.3.

[74] House of Lords, 6th Report (1991–92) HL 28, para 74.

[75] It may be interpreted as requiring that the consumer have certain rights irrespective of the price: H Collins, 'Good Faith in European Contract Law' (1994) 14 Ox JLS 229.

[76] eg KG Weil and F Puis, 'Le droit allemand des conditions générales d'affaires revu et corrigé par la directive communautaire relative aux clauses abusives' (1994) Rev int droit comparé 125. It should be noted that the German Act contains separate provisions on surprising clauses (§2) and prohibiting certain clauses altogether (§11) but the absence of parallels from the Directive does not necessarily mean that Art 3 of the Directive must be interpreted more narrowly.

[77] Standard Contracts Law (AGB-Gesetz) of 1976, §9.1.

[78] Witz, *Droit Privé Allemand* (1992), §457.

[79] *Ibid.*, §459.

developed very much beyond what we might immediately think of. As Bingham LJ said in the *Interfoto* case.

> In many civil law systems ... [t]his does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing.[80]

French law has used the concept of good faith in performance to avoid onerous conditions.[81] Other legal systems seem to have gone beyond the kind of disclosure requirement that Bingham LJ's words suggest. The Dutch Hoge Raad, admittedly in a case of mistake, laid down as early as 1957 a very broad requirement: the parties must let their conduct be guided by the legitimate interests of the other party.[82] This kind of approach can clearly be used to hold either a failure to draw the other's attention to a harsh clause or a refusal to negotiate to be not consistent with good faith. (The new Netherlands Civil Code, Article 6.233, uses the test of whether the contract is unreasonably onerous.) Germany also uses the good faith test extensively, both under the Law of Standard Contracts and under BGB § 242. The test does not seem to be purely a procedural one. Although the 'transparency' of the clause is a very important factor,[83] commentators have noted that the German courts tend to judge the clause by whether there was any real choice open to the customer[84] and have discussed the balance of interests in general terms, rather than in relation to the particular position of the individual consumer.[85] It seems that conceptual tools have been rewrought to meet new tasks, just as the notion of unconscionability in Anglo-American law was re-worked in *Williams* v *Walker-Thomas Furniture Co*[86] to mean terms which are unreasonably

[80] *Interfoto Picture Library Ltd* v *Stilletto Visual Programmes Ltd* [1989] QB 433, at 439.

[81] NS Wilson, 'Freedom of Contract and Adhesion Contracts' (1965) 14 ICLQ 172; and see J Ghestin, *Le Contrat: Formation* (2nd ed 1988) para 608–2.

[82] HR 15-11-1957. See ME Storme, *La bonne foi dans la formation des contracts en droit neerlandais*, Report to the Capitant Association (1992).

[83] See Reich, 'Le Principe de la transparence des clauses limitatives relatives au contenu des prestations dans le droit allemand des conditions générales des contrats' in J Ghestin (ed), *Les clauses limitatives ou exonératoires de responsabilité en Europe* (1990), 77–93.

[84] HW Micklitz, 'La loi allemande relative au régime juridique des conditions générales des contrats du 9 decembre 1976' (1989) 41 Rev int droit comparé 101, 109: JP Dawson, 'Unconscionable Coercion: The German Version' (1976) 89 Harvard L Rev 1041, 1114. Dawson states that before the Standard Contracts Law the courts were concerned with preventing unfair surprise but also with preventing one-sided contracts and ensuring 'elementary contractual justice' (pp 1110 *et seq*). See also Schmidt-Salzer, 'Droit allemand' in J Ghestin (ed), *Les clauses limitatives ou exoneratoires de responsabilité en Europe* (1990), at p 57: 'en matière de conditions générales ce qui est inattendu est aussi déraisonable: ce qui n'est pas raisonable, est légalement inattendu'.

[85] Witz, *Droit Privé Allemand* (1992) §457.

[86] 121 US App DC 315, 350 F 2d 445 (1965).

favourable to one party and an absence of meaningful choice for the other.

Certainly the Preamble to the Directive suggests a broad interpretation of the imbalance and good faith tests.[87] The sixteenth paragraph refers specifically to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer—words apparently taken directly from the guidelines on reasonableness in UCTA Schedule 2—and whether the party has taken the other's legitimate interests into account. Dean notes that when the Common Position was agreed, it was made clear that reasonableness should form part of the test of unfairness.[88] The Consultation Paper suggested that the tests of unfairness and reasonableness are likely to produce similar results in most cases, but that there is no guarantee that this will always be the case.[89]

I suspect that good faith has a double operation. First, it has a procedural aspect. It will require the supplier to consider the consumer's interests.[90] However, a clause which might be unfair if it came as a surprise may be upheld if the business took steps to bring it to the consumer's attention and to explain it. Secondly, it has a substantive content: some clauses may cause such an imbalance that they should always be treated as being contrary to good faith and therefore unfair.[91] A clause excluding liability for death or personal injury caused by negligence might be an example.

Probably, as Professor Diamond said in his evidence to the House of Lords Select Committee, imprecision is inevitable.[92] In effect a great deal of discretion is left to the court or other decision maker.[93]

[87] On use of the preambles to interpret directives see Case C-106/89 *Marleasing SA* v *La Comercial Internacional de Alimentación SA* [1990] ECR 1-4135. [1992] 1 CMLR 305 and P Duffy, 'Unfair contract terms and the draft EC directive' [1993] JBL 67.

[88] M Dean, 'Unfair Contract Terms: The European Approach' (1993) 56 MLR 581, 585, referring to the Consumer Council of 29 June 1992.

[89] *A Further Consultation Document* (note 41, above), Comment on Art 3(1).

[90] Thus the requirement of good faith does more than exclude certain types of unacceptable conduct: cf. R. Brownsword, 'Two Concepts of Good Faith' (forthcoming, JCL). I have benefited greatly from extensive discussion of good faith with Professor Brownsword. The views expressed here are not necessarily his.

[91] Article 3 does not require that the significant imbalance be caused by the absence of good faith. See also H Collins, 'Good Faith in European Contract Law' (1994) 14 Ox JLS 229, 250. On this point I have to disagree with the provisional views of Brownsword, Howells and Wilhelmsson, 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair terms in Consumer Contracts' (forthcoming), although their paper is a very interesting discussion of the various interpretations of the good faith requirement. I am very grateful to my colleague Chris Willett for useful discussions on Art 3 and for letting me see his forthcoming paper 'The Directive on Unfair Terms in Consumer Contracts'.

[92] See House of Lords, 6th Report (1991–92) HL 28, para 74.

[93] J Ghestin and Marchessaux, 'Les téchniques d'élimination des clauses abusives en

Advantages of a grey list

This element of discretion gives cause for concern simply because of the uncertainty involved for business. In the United Kingdom we have black-listed clauses only after very careful consideration, but in some ways it may be easier for business to know that a particular clause is always invalid than to know that it may or may not be invalid according to the circumstances and, dare one say it, the whim of the decision maker.[94] If the clause is absolutely banned the business knows what risks it must bear or insure against, even if they are hard to quantify; whereas with a general 'fairness' or 'reasonableness' test there will always be the fear that the clause may be struck down while a competitor's clause, perhaps worded in a slightly different way or presented to the consumer in a slightly different manner, may be upheld.

Even a grey list may go some way towards reducing the uncertainty, and it is good that the Regulations incorporate one. Grey lists should be as full as possible. When any type of term is subject to review under the new unfairness test, a grey list may be much more useful as guidance to business than a set of guidelines like UCTA, Schedule 2. Section 68A of the Australian Trade Practices Act[95] is interesting: a clause limiting the liability of a supplier of goods to a non-consumer may limit the supplier's liability to replacement of the goods, repair of the goods, or payment of the cost of replacement or of repair unless reliance on the clause is shown not to be fair and reasonable. The substance of this provision, with the burden of proof on the buyer, may be thought too weak even to protect non-consumers, but the style of the section does seem to give fuller guidance than the equivalent sections of UCTA. Could a similar approach be used in grey lists?

Schedule 3 of the Regulations incorporates just the grey list in the Annex to the Directive. I would like to have seen a much fuller list. I would also be happier if the grey-listed terms were presumptively invalid, whereas the Regulations leave the burden of proving unfairness on the consumer.[96]

Europe', in J Ghestin (ed), *Les clauses abusives dans les contrats-types en France et en Europe* (1991), p 57.

[94] Kessler thought that one of the reasons for standard form contracts was to guard against judicial irrationality: F Kessler, 'Contracts of Adhesion—Some Thoughts About Freedom of Contract' (1993) 43 Colum L Rev 629, 631–2.

[95] Inserted by Trade Practices Amendment Act (No 2) 1977.

[96] *A Further Consultation Document* (note 41, above), comment to Art 3(3).

Transparency

I do think it is a shame that the Economic and Social Committee's suggestion of transparency as additional criterion was not taken up. In the present state of knowledge I can only guess, but I suspect that the vast bulk of consumer complaints about unfair terms are really questions of unfair surprise, in other words, had the consumer known and understood the implications of the clause, it would have been acceptable. Transparency has certainly been a major concern of other systems.[97] Needless to say, the problem is not just one of ensuring that the clause is understandable; the consumer must also know that it is there. In other words, clauses should be conspicuous as well as transparent.

Disclosure is already a major technique for combating problems of consumer ignorance: see eg the requirements of regulations made under Consumer Credit Act 1974.[98] The Uniform Commercial Code's requirement that disclaimers be conspicuous[99] is well-known.

The Directive goes some way in this direction. Article 5, besides stating that the contra proferentem rule shall apply,[100] states that where written terms are used (it hard to think of any other form for terms 'which have not been individually negotiated'), these must always be drafted in plain, intelligible language. This is laudable but its status is unclear. The fact that a term is not so drafted is not in itself a ground for it being held to be unfair under Article 3. Regulation 6 simply states the requirement as a preamble to the *contra proferentem* rule. Is this a proper implementation of Article 5?

There have been cases under the Directive against discrimination[101] in which the European Court has held that Member States must introduce laws to make good in full the loss suffered by persons as the result of discrimination;[102] but Art 6 of that Directive obliged Member States to provide an effective judicial remedy. There is no equivalent in the Unfair Terms Directive. It is argued that there is a general principle of Community law that effective judicial protection must be granted at least for measures which have direct effect,[103] but it is not certain that Art 5 is sufficiently clear and precise to be of direct effect.[104]

[97] See eg Reich, 'Le principe de la transparence des clauses limitatives relatives au contenu des prestations dans le droit allemand des conditions générales des contrats', in J Ghestin (ed), *Les clauses limitatives on exonératoires de responsabilité en Europe* (1990), pp 77–93.

[98] Section 60.

[99] UCC, § 2–316(2).

[100] Except in the 'collective' proceedings under Art 7. See below p 255.

[101] Council Directive 76/207/EEC of 9 February 1976 (OJ L39, 14.2.1976, p 40).

[102] Case 14/83, *von Colson* [1984] ECR 1891: Case 79/83, *Harz* [1984] ECR 1921.

[103] See van Gerven (1994) 1 Maastricht J of European and Comparative Law 6, 11.

[104] See Wyatt & Dashwood, *European Community Law* (3rd ed 1993), p 72, citing Case 126/82, *DJ Smit* [1983] ECR 73.

There is also a principle, exemplified by the *Francovich* case,[105] that an individual may bring an action against a Member State for failure to implement a Directive which is not of direct effect. However this is conditional: the Directive should entail the grant of rights to individuals, it should be possible to identify the content of those rights from the Directive and there must be a causal link between the breach of the State's obligation and the individual's loss.[106] Even if the first two conditions could be satisfied for Art 5 of the Unfair Terms Directive, it would be hard to an individual to prove that failure to provide a sanction had caused a particular loss.

Finally, if a Member State has failed to implement a Directive, the Commission has discretion to bring an action under Art 169 of the Treaty of Rome for Failure to comply with the obligations of Arts 5 and 189 of that Treaty. However, this assumes that the Directive does impose an obligation to provide a remedy, which begs the question.

If Member States are obliged to introduce a remedy where a contract is not in the plain language required by Art 5, that remedy must be no less favourable than under national law.[107] This would mean that the clarity of the language should be taken into account in assessing fairness, as it is no doubt relevant to reasonableness under Unfair Contract Terms Act 1977, s 11.[108]

Inability to assess risk

Even a clear and comprehensible clause is not necessarily fair. First, there is the problem that the individual consumer may not be able to estimate its likely impact.[109] Take a clause stating that you travel on a fairground ride entirely at your own risk, however the accident may be caused. Such a clause is almost certain to be of no effect in England,[110] but one cannot assume that it will be void elsewhere in Europe even after 31 December 1994. The clause could not be much clearer or easier to understand. But

[105] Case C-6/90 and C-9/90 [1991] ECR 1–5357.

[106] *Ibid.*, I-5416, para 44. See van Gerven (1994) 1 Maastrict J of European and Comparative Law 6. I am grateful to my colleague Han Somsen for allowing me to see a draft paper '*Francovich* and its application to EC Environmental Law'.

[107] *Comet* v *Produktschap* Case 445/76 [1976] ECR 2043.

[108] See Sched 2(c) and *Stag Line Ltd* v *Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep 211. The DTI (*op cit* above n 41, p 18) has suggested that the court may take into account the way in which terms are drafted in considering whether they satisfy the requirement of good faith but proposes no stricter sanction.

[109] A point well made by Trebilcock, 'An Economic Approach to the Doctrine of Unconscionability' in BJ Reiter and J Swan (eds), *Studies in Contract Law* (1980) p 379.

[110] UCTA s 2(1) will apply unless the big dipper is not operated as part of a business. See above, p 234.

the average consumer will have little idea how much loss he will suffer if he is seriously injured, let alone how much risk there really is of the cars leaving the track. This alone seems to justify an absolute ban on such clauses.

Lack of choice

The other problem we identified earlier: lack of choice. The consumer may be only too well aware of the implications of the clause but be quite unable to get it changed—at least without offering a very high price for a 'special deal'[111]—because he lacks bargaining power.

In discussions with colleagues I have noticed that at this point many of us become slightly uneasy. Are we really going to strike down a clause as unreasonable simply because of lack of choice when the customer went into the deal with his eyes open? Lord Reid said that 'freedom of contract must imply some choice or room to bargain'.[112] But is that really so? Isn't freedom satisfied by there being a choice as to whether or not to contract, without having a choice as to the terms on which one contracts? Isn't it odd to expect bargaining over this when one wouldn't expect a seller to be prepared to drop below the market price?

In modern conditions, it seems implausible to expect explicit bargaining over much more than the item, the price and the delivery date. The effect of requiring a choice seems to be that every supplier must offer two sets of terms—the one that the run of market choices (however ill-informed) seems to suggest and another, perhaps complying fully with the general norms which would apply in the absence of any special clauses in the standard form. Isn't it moving from refusing effect to unreasonable terms to insisting that the terms offered be reasonable, even in accordance with the general norms?[113] Yet English law does it: in *Woodman* v *Photo Trade Processing Ltd*[114] a clause limiting a film developer's liability to replacement with a new film was held to be unreasonable, largely it seems because the developer did not offer a higher level of

[111] Cf A Schwartz, 'Seller Unequal Bargaining Power and the Judicial Process' (1974) 49 Indiana LJ 367, 370–1, who points out that customers can influence the terms offered if they devote enough resources to it. It is not unknown for suppliers on occasion to alter their standard terms to suit a customer—but it is probably rare and may be a local and unauthorized initiative.

[112] In the *Suisse Atlantique* case [1967] 1 AC 361, at 406.

[113] Also, as J Hellner, 'Consequential Loss and Exemption Clauses' (1981) 1 Ox JLS 13, 26, asked some years ago, why do we assume that the general norms are actually what is wanted by consumers? Remember that when we do have a choice, eg with extended warranties on domestic appliances, many of us prefer to take a risk and pay a lower price.

[114] Reported in RG Lawson, 'The Unfair Contract Terms Act: A Progress Report' (1981) 131 New LJ 933, 935.

service as the Code of Practice for the Photographic Industry suggested it should. If the sixteenth paragraph of the Preamble quoted earlier is to given effect, I would expect the same result to be reached under the Directive.

Transparency as a way of improving the operation of the market

Even though the Directive goes beyond requiring merely transparency, there is a second reason for disappointment that transparency was not given greater emphasis. I have argued that one cannot expect effective individual bargaining over the small print between consumers and suppliers. However, if enough consumers do raise questions about the small print, the supplier will come under pressure to offer better terms. The 'thickness of the margin', that is, the number of consumers who do ask the right questions, can be increased by the right measures.

Education is fundamental: and the value of the work of the consumer organizations and, in this country, of the Office of Fair Trading in promoting consumer awareness is tremendous. I was interested to read of a proposal in France to allow time off work for participation in consumer organizations (it was not adopted).[115] There appears to have been a steady improvement in certain types of term on offer, in particular warranties on new products, and much of this may be due to education.[116]

I am not sure how far consumer consciousness reaches to other kinds of small print, but it seems to me that if transparency is increased, so will be awareness. Elsewhere[117] I have suggested that whether a clause was conspicuous and easy to understand should be the biggest single factor in deciding whether or not it was reasonable. First, transparency will make it hard to argue that any 'surprise' on the part of the consumer was unfair. Secondly, if a clause is clear and easily understandable, and yet it is commonly used, that suggests that it may in fact represent what the active margin of consumers want—or at least that it is all they are prepared to pay for.

Here I am using a similar argument but for a different purpose. Requiring terms to be conspicuous and clear is likely to increase awareness and that, in turn, is likely to lead to the terms offered being closer to

[115] J Ghestin and Marchessaux, in J Ghestin (ed), *Les clauses abusives dans les contrats-types en France et en Europe* (1991), p 27.

[116] I very much regret the Government's rejection of the warranty proposals (broadly similar to Magnusson-Moss) contained in the Consumer Guarantees Bill: see C Willett, 'The Unacceptable Face of the Consumer Guarantees Bill' (1991) 54 MLR 552. The more recent DTI proposals (see *Consumer Guarantees: A Consultation Document* (1992)) are interesting, but much weaker in this respect.

[117] H Beale, 'Unfair Contracts in Britain and Europe' [1989] CLP 197.

what consumers want—in other words, to reducing the inefficiencies caused by the inadequacy of consumer information about what they are being offered.

Public and collective action

I do not believe that we can rely on individual actions, even the 'invisible hand' comprising the aggregate of individual consumers' decisions, to achieve all the results we want. Despite both consumer education and the Unfair Contract Terms Act, the level of complaints about unfair terms and conditions is still quite high. The Office of Fair Trading document 'Trading Malpractices' states that Trading Standards Authorities and Citizen's Advice Bureaux received 16,200 complains in 1989.[118] This was quite a small percentage (three per cent) of the total numbers of complaints: by comparison, forty-three per cent related to defective goods or substandard services and twenty-five per cent to selling techniques.[119] But 16,200 complaints is not a negligible number, and the real dissatisfaction is probably much higher, even if not all the grumbles are justified.

Individual challenges to unfair terms will always remain few because of the many obstacles to effective legal action by individual consumers. These are too well known to require documentation here.[120] So we must look to supplementation of individual private remedies by public action or collective action.[121]

Prevention is better than cure. Agreement on fair terms and conditions may be secured by the negotiation of Codes of Practice: some of those negotiated by the Office of Fair Trading refer to terms and conditions at least in general terms.[122] In Belgium the consumer organisation *Test-Achats* has negotiated a number of model contracts with suppliers' organizations.[123] Alternatively suppliers may be encouraged to submit terms for vetting or pre-validation, as in Israel since the Standard Contracts Act of 1964 came into force.

There are significant problems with these approaches. Neither Codes of

[118] (July 1990), Table 2, p 10.

[119] *Ibid.*, Table 2A, p 10.

[120] See eg AJ Duggan, 'Consumer Redress and the Legal System' in AJ Duggan and LW Darval (eds), *Consumer Protection Law and Theory* (1980) p 200; IDC Ramsay, 'Consumer redress mechanisms for poor-quality and defective products' (1981) 31 UTLJ 117.

[121] There are obvious analogies to the labour market.

[122] eg the ABTA Tour Operators Code of Conduct, s 4.4(i), provides that 'Booking conditions, if any, shall define the extent of the responsibilities as well as the limits of the liabilities of tour operators towards clients and shall be so designed that they are easily read and understood'. See now the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992 No 3288 (implementing the Council Directive 90/314/EEC of 13 June 1990 (OJ L158, 23.6.1990, p 59).

[123] See Hondius, *Unfair Terms in Consumer Contracts* (1987) p 170, and references there.

Practice nor model contracts are compulsory and in particular they are unlikely to be used by firms which are not members of the relevant trade association. One suspects it is precisely these firms which cause a lot of the problems. Negotiating model terms and conditions is very time-consuming and difficult.[124] In this country negotiation of a model 'Fair Deal contract for Home Improvements' proved impossible.[125] I understand that the Israeli experiment under the 1964 Act proved disappointing in that very few firms sought pre-validation.[126]

The other possibility is public or collective action against suppliers which use unfair terms. Here the United Kingdom seems to have lagged behind other countries to some extent.

Public action to prevent the use of unfair terms

The use of certain types of clause may be made a criminal offence. The Director-General has used his powers under the Fair Trading Act 1973, Part II, to outlaw terms in consumer contracts for sale or supply of goods which would exclude or restrict the seller's or supplier's liability for the description or fitness for purpose of the goods and therefore be of no effect under UCTA s 6(2) or s 7(2).[127] There is no similar provision for other terms which are equally of no effect under UCTA. Part of the explanation may be that procedures under this part of the Act are cumbersome and slow.[128] And criminalisation of the use of unfair terms can only be used for terms which are blacklisted.

What seems to have more potential are procedures under Fair Trading Act 1973, Part III, which gives the Director-General powers to take action against traders who persist in a course of conduct which is detrimental or unfair to consumers. He may obtain an assurance from the trader involved and, if the practice continues, obtain a court order. However, conduct which is detrimental or unfair is at present defined in terms of breaches of either the civil or the criminal law, so that it will not cover the

[124] See the personal experience of Professor Hondius reported in his *Unfair Terms in Consumer Contracts* (1987) pp 224–5.

[125] See the Annual Report of the Director-General of Fair Trading (Office of Fair Trading, 1991), p 21.

[126] See A Hecht, 'The Israel Law on Standard Contracts' (1968) 3 Israel LR 586. Possible reasons for this are discussed below, p 260.

[127] The Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976 No 1813 (as amended by SI 1978 No 127).

[128] See B Harvey and D Parry, *Law of Consumer Protection and Fair Trading* (4th ed 1992), pp 314–15. The Director-General of Fair Trading has also been able to exercise some controls via his power to refuse licences for credit business and, where trade associations recommend the use of terms, under the Restrictive Trade Practices Act 1974. See GV Davies, 'Void Terms in Consumer Contracts: Should Their Use be a Criminal Offence?' (1983) 80 Law Soc Gaz 1978; H Beale, 'Unfair Contracts in Britain and Europe' [1989] CLP 197, 210–12.

use of even blacklisted terms unless an order prohibiting their use has been made under Part II. The procedures have a number of other serious defects and the Director-General has called for major improvements.[129] These would extend his powers to deal with both 'Deceptive and misleading practices'[130] and 'Unconscionable practices'. The latter would include

> that the terms and conditions on, or subject to which, the consumer transaction was entered by the consumer are so harsh or adverse to the consumer as to be inequitable.[131]

Such a change seems desirable; as the Director-General points out, it would bring the law in the United Kingdom into line with that in, eg Australia[132] and many European countries.[133]

I am not wholly clear whether the Director-General envisages that any practice of using a clause which is unfair or unreasonable would count as unconscionable within this proposal. On the one hand, the Report cites as analogy the New South Wales Contracts Review Act of 1980.[134] This Act relies on the general test of whether a contract or term is 'unjust', and empowers the court to refuse to enforce the contract or the term.[135] The Supreme Court is then given power, on the application of the Minister or the Attorney General, to make orders against persons who have embarked on conduct likely to lead to the formation of unjust contacts.[136] This analogy suggests that the criterion for the Director-General to act is simply unfairness.[137] But earlier in his Report the Director-General refers to the problem that a criterion such as 'unfair' or 'improper' gives excessive discretion to the enforcement authorities. Instead:

> the narrower Canadian/Australian approach is to be preferred. This refers to 'unconscionable' conduct. I broad terms it can be said that unconscionable conduct will arise in a situation where a stronger party to a transaction knowingly takes wholly unfair advantage of that position to the detriment of the less powerful party. The provision would thus be aimed at conduct which grossly contravenes ordinary principles of fair dealing.[138]

[129] *Trading Malpractices* (Office of Fair Trading, July 1990).
[130] *Ibid.*, s 5. 19.
[131] *Ibid.*, s 5. 27(d).
[132] eg Trade Practices Act 1974 (as amended), s 51AB, which forbids corporations from engaging in conduct 'which is unconscionable' in connection with the supply of goods.
[133] The Swedish example is very well known; the 1971 Act to Prohibit Improper Contract Terms adopts the same control mechanisms as the 1970 Marketing Practices Act. See Hondius, *Unfair Terms in Consumer Contracts* (1987), pp 143–50 and U Bernitz, 'The Swedish Marketing Practices Act' in AC Neal (ed), *Law and the Weaker Party: An Anglo-Swedish Comparative Study* (1981), vol 1 (The Swedish Experience) pp 107–25.
[134] *Trading Malpractices* (Office of Fair Trading, July 1990), s 5. 28.
[135] Section 7.
[136] Section 10.
[137] This is approach taken in the New Zealand Law Commission's provisional proposals, see Preliminary Paper No 11, *Unfair Contracts—A discussion paper* (1990): Draft Bill s 13.
[138] *Trading Malpractices* (Office of Fair Trading, July 1990), s 5. 25.

For reasons suggested earlier, this might hamper action against firms using harsh terms as a way of keeping down costs, when there have not been significant protests from consumers: it is hard to say that the firm is acting unconscionably in the sense the Director-General refers to. Perhaps continued use of such terms after their disadvantages to consumers have been pointed to the business by the Office of Fair Trading would be unconscionable in the narrow sense!

Article 7(1) of the Directive requires Member States to:

> ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

This seems to envisage either the extension of criminal sanctions against the use of unfair terms or some kind of injunctive procedure against their use. But surprisingly the Department of Industry's initial Consultation Document stated:

> No specific implementing legislation is required for this Article. The legislation will automatically confer a right of civil action . . . In the UK the doctrine of precedent means that once a term has been judged to be unfair suppliers will know that if used again in the same context they will not be able to rely on it. It is not proposed that criminal sanctions be introduced.

With respect the argument that UK law already contains adequate and effective means to prevent the continued use of unfair terms, simply because such terms will be invalid, is untenable. We know from experience that businesses continue to use even terms which are automatically invalid under the Unfair Contract Terms Act; if they did not, it would not have been necessary for the Director-General to use his powers under Fair Trading Act 1973, Part II.[139] Presumably businesses continue to use invalid terms in the hope that the presence of the clause will deter consumers from seeking redress.

Powers under Fair Trading Act 1973, Part II, to make continued use of a clause a criminal offence do not seem appropriate to terms which are not automatically of no effect, as none are under the Directive. So at the least this argues for the broadening of the Director-General's powers under Part III in the way he has proposed, but to cover the use of any unfair term whether or not the use is unconscionable.[140] In the light of a 'strong consensus' among consultees that implementing action as regards Art 7(1) is required, the Regulations provide that the Director-General shall have a duty to consider complaints that a term is unfair, and the power

[139] See above, p 252. [140] Article 7(1).

to seek an injunction against any person using it or recommending its use.[141]

Collective action

The Directive provides in Art 7(2) that the steps to be taken by Member States to ensure that:

> . . . adequate and effective means exist to prevent the continued use of unfair contract terms . . . shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.[142]

This appears to contemplate proceedings by a consumer or other public interest group, or perhaps by a Government Department.

I have argued elsewhere that this provision is very important.[143] Thoroughgoing implementation of the Article would bring about the greatest single improvement in British law as the result of the Directive. Sadly, the method of implementation adopted leaves some doubt as to whether this will happen.

Before the Department of Trade and Industry's Consultation Document was published there were suggestions that the Director-General should be given power to seek a declaration from the High Court that a particular term is unfair.[144] The scheme would be parallel to the one used to implement the Directive on Misleading Advertising (1988).[145] But the initial Consultation Document's actual proposal was astonishing:

> In the UK the courts decide on whether a term is unfair, there are no administrative mechanisms.
>
> UK law at present contains no general provision for representative actions: only a party to the contract may sue under that contract. Thus according to a party may sue under the contract. Thus according to the national law concerned (ie that applying in the UK) this provision can have no effect.

[141] Reg 8(1). See *A Further Consultation Document* (above n 41), p 21. The DG may, instead of obtaining an injunction, accept an undertaking from the supplier or recommender.

[142] Article 7.2.

[143] H Beale, 'Unfair Contracts in Britain and Europe' [1989] CLP 197, 210.

[144] Information from Mr David Legg of the DTI, who has most helpful throughout the writing of this paper.

[145] See The Control of Misleading Advertisements Regulations 1988 (SI 1988 No 915).

This approach was rightly criticized;[146] it seemed tantamount to proposing not to implement this central element of the Directive. As a result of consultation the Department has reconsidered; but it is only the Director-General of Fair Trading who is empowered to act.[147]

Giving the Director-General power to seek an injunction against the use of an unfair term no doubt complies formally with the requirements of the Directive. I would suggest, however, that we have missed an opportunity to make a radical improvement in our law even if to do so would involve going beyond the literal requirements of the Directive. I think it is worth considering the conditions under which the type of procedure envisaged by Article 7 is likely to be really 'adequate and effective'.

(1) The mechanisms for obtaining an order prohibiting continued use of the unfair term must be speedy.
(2) There must be an effective way of publicizing decisions that particular clauses are unfair. Relying on percolation of information from the law reports is probably not enough. Under the Regulations the Director-General may arrange for dissemination of information about the operation of the Regulations to the public.[148] A public register would help, or a provision to enable clauses declared unfair to be added to the 'grey' list which I hope will form part of the Regulations to be made under the Directive.
(3) Orders made that terms are unfair should be effective not only against the individual seller or supplier but also any trade association which recommends use of the term and, preferably, other individual sellers or suppliers which use it. This is envisaged by Article 7.3.[149] Regulation 8(6) permits injunctions against 'any similar term . . . used or recommended for use by any party to the proceedings'.
(4) The order should relate not just to the use of the exact same clause in the specific circumstances of the case. The fact that the Directive is dealing with 'grey' clauses which may or may not be unfair, according to the circumstances, causes a significant difficulty in this respect. A power to enjoin the further use of an unfair term would be of little use if it could be evaded by the use of slightly different words, a different presentation or very slightly more generous terms so as to take it outside the ban without any real change in the merits. Orders would have to be made in quite general terms, with guidance as to what is and is not acceptable[149a].

[146] FMB Reynolds, 'Unfair Contract Terms' (1994) 110 Law QR 1: H Collins, 'Good Faith in European Contract Law' (1994) 14 Ox JLS 229, 244.
[147] Reg 8.
[148] *A Further Consultation Document* (note 41, above), p 21; Reg. 8(7).
[149] *Ibid.*, p 21.
[149a] Reg 8(6) refers to 'a term having like effect'.

(5) The decision and the order will have to take into account the circumstances in which the clause was used and might be used in the future, since a clause might not be unfair in all situations. To some extent this is a question of the degree of information given to the consumer, and guidance on that should not be hard to formulate. It gets harder when the court has to take into account other factors. In *Smith* v *Eric S Bush*[150] the House of Lords held that a disclaimer of responsibility by a house surveyor (who was acting for the intending mortgagee) was unreasonable *vis-à-vis* the purchaser of a modest house, but might have been reasonable for a more expensive property. The availability of insurance is also relevant.[151] So too are factors quite outside the control of the party using the term, for instance:

> ... whether the customer ... in accepting [the term] had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term.[152]

It will not be easy to formulate the guidance businesses will need. The laws of other countries permit similar challenges to 'grey listed' terms, but I do not have any information on how these problems are dealt with.[153]

(6) The decision must be made by an appropriate body. In the light of the difficulties mentioned in (4) and (5), I wonder whether the questions are not much more complex and less precise than whether an advertisement is misleading, and whether it really is appropriate for the High Court or County Court to decide them. Decisions under UCTA have not produced very clear guidance as to what is or is not reasonable.[154] The range of information needed for a full consideration would be large. There seems to be a case for single, specialised tribunal which can build up experience—in Victoria there is now a Market Court consisting of a County Court judge as president and two advisers.[155] Or would it be better to give the decision to the Director-General of Fair Trading himself, perhaps with the possibility of an appeal to a court? The power to initiate action could then be

[150] [1990] 1 AC 831.

[151] *Phillips Products Ltd* v *Hyland* [1987] 1 WLR 659n.

[152] UCTA 1977, Schedule 2, (b).

[153] I am sure there is relevant on the German experience but I am limited by my inability to read German. I am also saved a great deal of work: by 1986 there had been over 2,000 decisions on the Standard Contracts Law! See H Micklitz, 'La loi allemande relative au régime juridique des conditions générales des contrats du 9 décembre 1976' (1989) Rev int droit comparé 101.

[154] H Beale, 'Unfair Contracts in Britain and Europe' [1989] CLP 197: JN Adams and R Brownsword, 'The Unfair Contract Terms Act: A Decade of Discretion' (1988) 104 Law QR 94.

[155] Market Court Act 1978 (Vic).

given to other bodies such as the National Consumer Council or perhaps Trading Standards authorities.[156]

(7) The body capable of initiating action would probably need to be proactive in finding out what terms are being used, and will need powers accordingly. The Swedish Consumer Ombudsman has power to require copies of standard contracts and other information from traders.[157]

(8) It is desirable to decentralize initiative. If the procedure is to be effective there must be a realistic prospect of action against unfair terms. I do not mean any criticism of the Office of Fair Trading when I say that its initiatives in this regard will necessarily be constrained by the resources available to it—it may not, for example, be able to follow the example of the Israeli Ministry of Justice which reportedly has a group dedicated to reviewing contracts.[158] Under the Regulations, the Director-General has a duty to consider any complaint that a term is unfair, unless the complaint appears frivolous or vexatious; but he only has a power to bring proceedings 'if he considers it appropriate to do so'.[159] He must give reasons if he does not act, but he might legitimately give such proceedings a low priority, eg if the term is not widely used.

Other bodies which may have different priorities and maybe a different view should be permitted to act; in other words we should follow the lead of several other Member States and give consumer organisations the power to initiate action.[160] In France some 20 consumer organizations have been recognized for this purpose.[161]

(9) If organizations other than the Office of Fair Trading are to be permitted to take action, the cost of seeking a declaration must be low, or the threat of high bills for costs if they lose will deter them.[162] The

[156] Trading Standards authorities might not feel that this watchdog role would be appropriate for them.

[157] Act Prohibiting Improper Contract Terms, 1971, s 3a(1).

[158] See J Ghestin and Marchessaux, *Les téchniques d'élimination des clauses abusives en Europe*, in J Ghestin (ed), *Les clauses abusives dans les contrats-types en France et en Europe* (1991) p 37.

[159] *A Further Consultation Document* (note 41, above); r 8(2).

[160] eg France, Law of 5 January 1988; German Law on Standard Contracts of 1976, s 13; Luxembourg Consumer Protection Act, art 5: Portuguese Law 446/85 of 25 October 1985. Art 25: Israeli Standard Contracts Act 1982, s 16.

[161] J Calais-Auloy, *Les clauses abusives en droit français*, in J Ghestin (ed), *Les clauses abusives dans les contrats-types en France et en Europe* (1991), pp 113–22, 121.

[162] Though HW Micklitz, 'La loi allemande relative au régime juridique des conditions générales des contrats du 9 décembre 1976' (1989) 41 Rev int de droit comparé 101, 118, seems to suggest that liability for the loser's costs has not proved a deterrent to action by consumer organizations in Germany.

Victorian Market Court permits legal representation but does not award costs.[163]

Assurances and undertakings

Under the Fair Trading Act 1973, Part III, the procedure is for the Director-General first to attempt to get an assurance from the trader as to its future conduct. Under the Regulations, the Director-General may have regard to any undertakings given to him.[164] Germany has a similar procedure, but at the behest of the consumer organizations empowered to act under the Law on Standard Contracts. They can obtain a written assurance from the business and take proceedings if the assurance is broken. This has proved extremely important and effective.[165] The actions of the consumer organizations have had a significant influence at least where markets are dominated by a small number of large firms using broadly similar conditions; not surprisingly the impact on more fragmented markets has been less.[166] If, as suggested, consumer organizations were to be empowered to bring proceedings, it would be desirable to enable them to seek assurances as an alternative.

Pre-validation?

If the tribunal or administrative authority empowered to act in accordance with Art 7 is to set out the conditions under which terms are fair and unfair, as I have suggested would be very desirable, is that not tantamount to pre-validation? One doubts that any subsequent court faced with the same clause in an individual case would readily dissent from the tribunal's view. It is arguable that it should be prevented from doing so except in a case in which the circumstances were radically different from those contemplated by the tribunal. If we are coming this close to pre-validation, why not permit the seller or supplier to initiate action?

The innovative pre-validation procedure of the Israeli Standard Contacts Act 1964 did not produce many applications. One commentator

[163] See AJ Duggan, 'Consumer Redress and the Legal System' in AJ Duggan & LW Darvall (eds), *Consumer Protection Law and Theory* (1980) pp 200, 221.

[164] Reg 8(3).

[165] See HW Micklitz, 'La loi allemande relative au régime juridique des conditions générales des contrats du 9 décembre 1976' (1989) 41 Rev int de droit comparé 101, 118: Hondius, *Unfair Terms in Consumer Contracts* (1987), p 184.

[166] HW Micklitz, 'La loi allemande relative au régime juridique des conditions générales des contrats du 9 décembre 1976' (1989) 41 Rev int droit comparé 101, 121.

suggests that firms feared retroactive invalidation,[167] but in 1987 Hondius reported much greater success with the 1982 Standard Contacts Law—in 4 years some eighty contracts were submitted for approval.[168] Perhaps part of the reason is that the new law contains not just the carrot of pre-validation but also a stick: there are procedures for the Attorney General, the Commissioner of Consumer Protection and any approved customer's organization to seek annulment of disadvantageous conditions.[169] There was no equivalent in the 1964 law. The courts may also be taking a more severe attitude.[170]

The Law Commission considered pre-validation in its pre-UCTA report. It rejected the idea, partly because of the difficulties of pre-validating terms which may or may not be reasonable according to the circumstances.[171] I accept those difficulties but I think they will have to be faced anyway under the procedures required by the Directive. It may be necessary to validate terms under prescribed conditions of use, just as I think it will be necessary to proscribe terms under certain conditions. The House of Lords Select Committee suggested that pre-validation should be looked at again;[172] I respectfully agree.

Conclusion

I have argued that there is still need for clearer recognition that, with standard form contracts, we are not usually dealing with traditional forms of exploitation or unconscionable behaviour, but with unfair surprise, lack of choice and (perhaps) derogation from obligations which we think should be irreducible. This should be reflected in the questions we ask. The terms of general test of fairness used in the Directive must be read in this light.

We must also face up to the phenomenon of mass contracting, under which individual negotiation is unlikely but where the run of consumer preferences may influence the market for terms. We need to take this into account in assessing what is fair or reasonable. We also need to take positive steps, based on this analysis, to improve the way in which the market operates, for instance by encouraging transparency of contracts.

[167] A Hecht, 'The Israel Law on Standard Contracts' (1968) 3 Israel LR 586.

[168] Hondius, *Unfair Terms in Consumer Contracts* (1987) p 209. See also Deutch (1987) 7 Tel Aviv Univ Stud in Law 160. The Israeli Ministry of Justice has confirmed that the number of applications has increased (information from Professor Nili Cohen).

[169] Article 16(a).

[170] Eg *Israeli Football Players' Association* v *Israeli Football Association*, 825/88, 45 PD(5) 109. I am grateful to Professor Nili Cohen for this suggestion.

[171] Exemption Clauses, Second Report (1975) Law Com No 69; Scot Law Com No 39; paras 101–8.

[172] 6th Report (1991–92) HL 28, s 86.

Enabling collective by consumer organizations as envisaged by the Directive seems to have great potential.

In substantive terms the requirements of the Directive are rather disappointing. They are wider in scope than UCTA, but offer poor protection to the 'shopper abroad', particularly in the absence of a black list. Article 7, which requires Member States to ensure that there are adequate and effective means to prevent the continued use of unfair terms, does offer a significant step forward, but it would have been better if the Government had been persuaded to provide for proceedings against the use of unfair terms to be brought by consumer organizations and to be heard by a specialist tribunal.