The Common European Sales Law in Context

Interactions with English and German Law

Edited by
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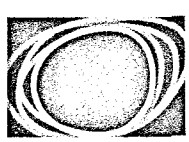

Arts & Humanities Research Council

Deutsche Forschungsgemeinschaft

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Control of Standard Contract Terms

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I. Introduction

This chapter will analyse possible interactions with regards to the control of standard contract terms between the academic DCFR and the proposed CESL, on the one hand, and English and German law, on the other hand. In doing so, we will distinguish four different forms of interaction. Before we are able to identify and discuss these forms of interaction it is necessary, however, to give a short historical and comparative account of controlling standard contract terms.

1. Controlling standard contract terms in historical and comparative perspective

The use of standard contract terms is not a modern phenomenon.[1] Throughout the ages, one or even both contracting parties have had reason to resort to standard terms.[2] One party might want to modify the non-mandatory rules to his advantage. Since Roman law times, the rules on damages have been one such example. Alternatively, there might be gaps in the non-mandatory rules pertaining to a specific contract, or there might not even be any rules at all. If the parties want to enter into such a contract they will have to draw up detailed contract terms. With maritime insurance contracts, this practice dates from as far back as the Middle Ages. If one party offers standardized services then he will not want to negotiate these contract terms for each contract anew, since such individual negotiations would be far from cost efficient.[3] Instead, this party will want to offer his standardized services on the basis of standard contract terms.

By way of illustration of their usefulness across history, we find examples of standard contract terms in the Digest.[4] However, whilst the use of standard terms might not be a modern phenomenon, their ubiquity certainly is, and their use increased exponentially during the course of the 19th century.[5] This development has proved challenging for every European legal system. The party who draws up standard contract terms will prefer to safeguard his own interests rather than trying to balance out the opposing

[1] This is, however, alleged in DCFR Principle 10.

[2] P Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (Tübingen: Mohr Siebeck 2010) 1–4.

[3] On the reasons for using standard terms see P Hellwege, 'Standard Contract Terms' in J Basedow, K Hopt, R Zimmermann, and A Stier (eds), *Max Planck Encyclopedia of European Private Law* (Oxford: OUP 2012) 1588.

[4] See Labeo D 19.2.60.6; Ulpian D 4.9.7 pr.

[5] Hellwege (n 2) 2.

interests of both parties. And the other party may find himself bound to standard terms of which he was not aware at the time of the conclusion of the contract, or which are unclear or unfair. These complaints point to three distinct problem areas. The first relates to whether standard terms are incorporated into the contract, the second to their interpretation, and the third to the control of their fairness. However, the other party will rarely raise objections in the course of the negotiations. In most cases, he will do so only after the conclusion of the contract and once the first party tries to enforce the terms.

When standard contract terms became a mass phenomenon during the 19th century, lawyers across Europe woke up to the associated problems. It became essential for European legal systems to find means of controlling standard terms. Their responses have differed widely. Most legal systems started out with sectoral solutions, for example in insurance law and transport law.[6] For the rest, attempts were made to adapt the general principles of contract law. Throughout the course of the 20th century, many legal systems developed means of control which apply to all standard contract terms in the hope of establishing general rather than merely sectoral solutions. Polish law took the lead by codifying general requirements for the incorporation of standard terms in Art 71 § 1 Kodeks zobowiązań (Code of the Law of Obligations) of 1933, followed by Italian law under Art 1341 Codice Civile of 1942. Some legal systems have focused on one of the above-named problem areas. For example, they have stressed the importance of an interpretation *contra proferentem* with the consequence that this interpretation has also been utilized (and one might say that it has sometimes been misapplied) to mitigate unfair terms.[7]

Many of the differences which emerged in the 20th century are still visible today.[8] Some legal systems have special statutory provisions for the incorporation of standard terms into the contract. Others apply the general principles of contract law.[9] For some legal systems, a fairness control was first introduced with the implementation of the Unfair Contract Terms Directive.[10] In other legal systems, fairness controls have a long-standing history. Some have developed an administrative fairness control.[11] In addition, in other legal systems, judicial control over standard terms emerged and was approved by the legislator.[12] Finally, in some European legal systems a fairness control in collective proceedings was introduced early on.[13]

[6] eg Art 423(1) *Allgemeines Deutsches Handelsgesetzbuch* (General German Commercial Code) of 1861 declared void terms in transport contracts of railway companies which excluded their liability. The German legislator thereby reacted to the practice of railway companies of excluding their liability via standard terms; see Hellwege (n 2) 157–72.

[7] In general see HKK/Vogenauer §§ 305–10 (III) para 32.

[8] On these differences see N Jansen, 'Klauselkontrolle im europäischen Privatrecht' ZEuP 18 (2010) 69, 70–1.

[9] The first is true for German, Italian, Spanish, Portuguese, Polish, Estonian and Lithuanian law, the second is true for English, Scots, French and partially Austrian law, see Hellwege (n 2) 351–69.

[10] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 ('Unfair Contract Terms Directive'). This is true, eg, with Italian and French law; see Hellwege (n 2) 531–7.

[11] This is the case for the Scandinavian legal systems, see M Ebers, 'Unfair Contract Terms Directive (93/13)' in H Schulte-Nölke, C Twigg-Flesner, and M Ebers (eds), *EC Consumer Law Compendium* (Munich: Sellier 2008) 208, 252–6.

[12] This is the case for Germany, see Hellwege (n 2) 146–57, 287–323.

[13] See J Devenney and T Pfeiffer 'Control of Standard Terms and Collective Proceedings' ch 20 of this volume.

However, the differences are not just on a technical level; they go much deeper. Thus far, no agreement has been reached as to the policy considerations underlying the different means of controlling standard terms.[14] These differences manifest themselves in different scopes of application. In the preceding paragraphs the concept of standard terms has been used. The DCFR, for example, defines standard terms as 'terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties'.[15] However, the concept of standard terms is not of the same importance in all European legal systems. In Germany, equivalents were first used in the 19th century. For example, in 1808, Benecke, author of the standard treatise on maritime insurance contracts in the first half of the 19th century, called standard terms in maritime insurance contracts 'permanent terms' (*beständige Bedingungen*)[16]. Yet, such terminology was used in the 19th century not as a legal term of art but simply to describe factual phenomena. In the 20th century, a special set of rules emerged in reaction to the specific problems resulting from the use of standard terms. This development culminated in the Act on Standard Terms of Business (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*), or AGBG, in 1976. The German equivalent to the concept of standard terms (*Allgemeine Geschäftsbedingungen*, AGB) had been transformed into a legal concept defining the scope of application of this body of law.[17]

Other legal systems have, of course, developed special terminology, too. In France, for example, Saleilles coined the term *contrat d'adhésion* in 1901.[18] However, it has never been turned into a legal concept defining the scope of application of a special set of rules as in Germany. Likewise, in England, whilst the widespread use of standard terms might have generated the need for some form of substantive legal control, the legal framework for this control is not constructed around the notion of 'standard terms'.

Other legal systems have developed different legal concepts to determine the scope of application for control. The Unfair Contract Terms Directive, for example, applies to terms not individually negotiated—that is, terms which have been drafted in advance and the substance of which the other party has not been able to influence.[19] This concept is different from that of standard terms as it does not require the term to be drafted for several transactions. It is self-evident that standard terms are the prime example of terms not individually negotiated.[20] Still, the scope of application of the

[14] On these differences see Jansen (n 8) 83–90.

[15] DCFR Definitions, 80. We find an identical definition in Art 2(17) FS, and a very similar definition in Art 2(d) Reg-CESL which only replaces the word 'formulated' with the word 'drafted'.

[16] W Benecke, *System des Assekuranz- und Bodmereiwesens, vol III* (Hamburg: Conrad Müller 1808) 32.

[17] Hellwege (n 2) 333–4.

[18] R Saleilles, *De la Déclaration de volonté. Contribution à l'étude de l'acte juridique dans le Code civil allemand (Art 116 à 144)* (2nd edn, Paris: Librairie générale de droit et de jurisprudence 1929) Art 133 para 89.

[19] Art 3(2) Unfair Contract Terms Directive.

[20] This is recognized by Art 3(2) Unfair Contract Terms Directive.

Unfair Contract Terms Directive is wider than that of the German Act of 1976 in its original version. Finally, some legal systems have introduced a fairness control for all contract terms, and not only for standardized or not individually negotiated terms.[21] These differences point to different policy considerations that underlie the fairness control and, more fundamentally, to different approaches to freedom of contract.

Since the Unfair Contract Terms Directive is a minimum harmonization directive,[22] these differences have persisted after its implementation. Furthermore, the Directive does not contain any rules on the incorporation of standard terms or terms not individually negotiated into the contract.[23] It is restricted to unfair contract terms in consumer contracts and hence does not apply to business-to-business (B2B) transactions. Consequently, both technical differences and differences in the policy considerations that underpin the mechanisms of control have not been minimized by that directive. Its harmonizing effects have been limited. We will see no changes with the implementation of the Consumer Rights Directive (CRD) even though it follows, in principle, the concept of maximum harmonization (Art 4), because it does not contain any provisions on the control of unfair contract terms. Thus, the status quo from which the drafters of the Draft Common Frame of Reference (DCFR) and, building upon the DCFR, the drafters of the Feasibility Study (FS) and of the proposed Common European Sales Law (CESL), had to start was comprised of many disparate sources. And due to the limited scope of the Unfair Contract Terms Directive, the drafters of all of these instruments were not able to simply base their work on the *acquis communautaire*. It was necessary to look beyond it.

2. Four forms of interaction

This contribution will analyse the possible interaction with regards to the control of standard contract terms between, on one side, the academic DCFR and a possible future optional instrument and, on the other, English and German law. In doing so, we will not, however, restrict ourselves to the DCFR and the proposed CESL (which is likely to serve as the basis for a future optional instrument). Instead, we will also have to consider the FS since there are dramatic differences between the various texts. Such a broader view is necessary, as, for example, we do not know whether the proposed CESL will be amended before its enactment and whether the drafters might refer back to earlier texts. However, we will restrict ourselves to two of the three identified problem areas: the incorporation of standard terms and their fairness control.[24] We will distinguish the following four different forms of interaction.

[21] This is true for French law in contracts with consumers and with non-business parties and for the Scandinavian legal systems, see Ebers (n 11) 205.

[22] Art 8 Unfair Contract Terms Directive.

[23] See K Riesenhuber, *Europäisches Vertragsrecht* (2nd edn, Berlin: de Gruyter 2006) para 618.

[24] On the interpretation of standard terms and not individually negotiated terms see G McMeel and HC Grigoleit, 'Interpretation of Contracts', ch 10 of this volume; on the battle of the forms see C Harvey and M Schillig, 'Conclusion of Contract', ch 8 of this volume.

(a) Understanding the DCFR, the FS, and the proposed CESL

One possible function of both the DCFR and a future optional instrument is that they might help courts to interpret their national laws in light of what may be said to be a European solution to a given legal problem. This kind of interaction is one aspect of the so-called 'toolbox' which we will discuss below.[25] Conversely, there is the risk that a lawyer will approach both instruments with his nationally coined preconceptions. Even if all instruments call for autonomous interpretation,[26] it is permissible to argue that such an interpretation may sometimes be inspired by an understanding established under one or more national laws. However, once a national lawyer approaches these instruments without consciously realizing that he is doing so from a purely national perspective there will be an unwanted interaction between these instruments and national law. Our historical and comparative observations suggest that there is the risk that such an unwanted interaction will occur as we have pointed to great differences both in a technical sense and in the policy considerations underlying the different forms of control.[27] To point out possible candidates of this first form of interaction will strengthen the autonomous interpretation of these instruments.

We have already faced one instance of such interaction. The title of the present chapter is 'control of standard contract terms' which, at first glance, might seem an appropriately neutral title and thereby uncontroversial. Yet, we have already noted that the concept of 'standard terms' is not of the same importance in every legal system.[28] In the DCFR, the notion is only of secondary importance. Article II.-9:103 DCFR addresses the problem of when terms not individually negotiated may be invoked against the other party. Thus, Art II.-9:103 DCFR does not solely concern the control of standard terms. And Chapter 9, Section 4 of Book II of the DCFR is entitled 'unfair terms'. It deals with unfair terms in standard terms and in terms not individually negotiated. Again, Arts II.-9:401–410 DCFR go beyond controlling standard terms. The same is true for the FS and the proposed CESL. The concept of standard terms is of importance only for the application of Art 38 FS and Art 39 CESL on the 'battle of the forms'. In addition, Art 87 FS contains a provision on surprising standard contract terms. To reduce all of these provisions to the control of standard terms thus means to approach the instruments with a notion which is of fundamental importance for German law but for the instruments themselves is of minor importance as a legal concept. The reason why we have held onto the chosen albeit somewhat problematic title of our chapter is that there is, as yet, no generally accepted legal concept which allows us to discuss the problems of incorporation and fairness control.[29]

When discussing this form of interaction we will primarily focus on the DCFR—as its full edition may have a lasting impact on the development of a future European

[25] See pp 429, 438–9 and 462–3 of this volume.

[26] See Art I.-1:102(1) DCFR, Art 1(1) FS, Art 4(1) FS 2nd, and Art 4(1) CESL. See also S Vogenauer, 'Drafting and Interpretation of a European Contract Law Instrument', ch 3 of this volume.

[27] See pp 423–6 of this volume.

[28] See pp 425–6 of this volume.

[29] See also the discussion in F Möslein, 'Kontrolle vorformulierter Vertragsklauseln', in M Schmidt-Kessel (ed), *Ein einheitliches Kaufrecht? Eine Analyse des Vorschlags der Kommission* (Munich: Sellier 2012) 255, 255–6.

private law—and on the proposed CESL, as it is most likely that its text will be turned into an optional instrument. However, we will discuss the FS, too, where it contains provisions which are found in neither the DCFR nor the CESL.

(b) The limited scope of application of the proposed CESL as compared to the DCFR

Once an optional instrument such as the proposed CESL has been introduced, it may be chosen as the law governing the contract.[30] It is argued that such an option is essential for the realization of the European single market.[31] Today, small and medium-sized traders refrain from offering their services in other Member States because they do not want to be exposed to unfamiliar law.[32] An optional instrument allows traders to avoid being exposed to foreign law.

We may see two further forms of interaction once an optional instrument is introduced. First, problems may result from the limited scope of application of the optional instrument.[33] The proposed CESL only includes elements of the first three books of the DCFR and of Book 4 in relation to sales and services contracts. Yet, terms of business may go beyond the areas covered by these sources, as is the case with retention of title clauses. Retention of title clauses affect the passing of property and, thus, belong to the law of property. If the law of property is outside the scope of the optional instrument, the question needs to be addressed whether standard terms which cover questions relating to the law of obligations and the law of property are to be exposed to a control both under the optional instrument and under the applicable national law.

When discussing this form of interaction we will focus on the CESL compared to the DCFR, and omit the FS, as little would be gained from including the FS in this discussion.

(c) Comparing the standards of protection

Secondly, the standard of control in the optional instrument and national law needs to be compared. The choice of law will not be made by both parties on an equal footing but only by the stronger party.[34] In B2C transactions, this will be the business. The two extreme positions are that the stronger party will either not offer to contract under the optional instrument at all, or it may want to offer its services and goods only under

[30] See Art 8 Reg-CESL.

[31] Green Paper on Policy Options for progress towards a European Contract Law for Consumers and Businesses, 1 July 2010, COM(2010) 348 final, 2, 9, 10.

[32] Commission (n 31) 2.

[33] On the different options Commission (n 31) 11–13; Max Planck Institute for Comparative and International Private Law, 'Policy Options for Progress Towards a European Contract Law' RabelsZ 75 (2011) 371, 426–31.

[34] On the following problems see Max Planck Institute (n 33) 412–16; W Doralt, 'Rote Karte oder grünes Licht für den Blue Button?' AcP 211 (2011) 1, 13–18; R Sefton-Green, 'Choice, Certainty and Diversity' (2011) 7 ERCL 134, 141–8.

the optional instrument. The choice of law will be set out in a standard term[35] and it will depend on a number of factors. If opting for the CESL is the only practical way to market goods or services outside the stronger party's home jurisdiction, he will do so. If the optional instrument can also be chosen in internal transactions,[36] the choice will depend on which law serves the interests of the stronger party better. For example, if in B2C transactions the standard of control in national law is stricter than in the optional instrument we might find that the latter will replace the former in practice altogether. With this third form of interaction we will only focus on the proposed CESL.

(d) The DCFR, the FS, and the proposed CESL as toolboxes

The fourth form of interaction links to the so-called toolbox. The term toolbox refers to two distinct concepts. First, there is the idea of an 'official toolbox': 'the Commission could adopt an act [...] on European Contract Law to be used as a reference tool by the Commission to ensure the coherence and quality of legislation'. Alternatively, the toolbox 'could be the object of an interinstitutional agreement between the Commission, Parliament and Council'.[37] This form of toolbox would probably not lead to an immediate interaction with national law. Furthermore, it is unclear whether the Commission is still pursuing the idea of an official toolbox.[38] However, the notion of a toolbox is also used in a second sense. It is said that the DCFR and an optional instrument may be a source of inspiration for national legislators. Furthermore, it is alleged that they might help courts to interpret their national laws in the light of what may be said to be a European solution.[39] This second form of the toolbox is what we will focus on and therefore we will discuss whether the instruments are likely to initiate this form of interaction both in England and Germany. With this form of interaction we will primarily focus on the DCFR and the proposed CESL, but we will also discuss the FS where it introduces novel ideas, as it may inspire the national laws, too.

We will discuss these four forms of interaction separately for the incorporation of not individually negotiated contract terms (part II) and for the fairness control (part III).

[35] Even if Recital 22 Reg-CESL demands that it should 'not be possible to offer the use of the Common European Sales Law [...] as an element of the trader's standard terms and conditions' and even if Art 8(2) Reg-CESL requires in 'relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract' this explicit and separate agreement will, in practice, always fall under the definition of a standard contract term of Art 2(d) Reg-CESL. See C Harvey and M Schillig, 'Conclusion of Contract', ch 8 of this volume, p 250.

[36] See Art 13 Reg-CESL.

[37] Commission (n 31) 8. On this use of the term toolbox see Max Planck Institute (n 32) 379–81.

[38] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, 10.

[39] Commission (n 31) 8; DCFR Introduction 4; H Schulte-Nölke, 'Arbeiten an einem europäischen Vertragsrecht' NJW 2009, 2161, 2165; MW Hesselink, 'The Common Frame of Reference as a Source of European Private Law' (2009) 83 Tulane Law Review 919, 944–7; Lord Mance, 'The Common Frame of Reference' ZEuP 18 (2010) 457, 462.

II. Incorporation of not individually negotiated terms

In the DCFR, we find the requirements that need to be met in order for one party to invoke terms not individually negotiated against the other party in Art II.-9:103(1). The other party must have been aware of the terms. If he was not, the first party must have taken 'reasonable steps to draw the other party's attention to them, before or when the contract was concluded'. Article II.-9:103(3) DCFR clarifies that 'terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document'. Turning to the subsequent texts, we find equivalents to Art II.-9:103(1) and (3) DCFR in Art 86 FS and Art 70 CESL. The FS is striking for two reasons. First, it adds a rule which was unknown to the DCFR and which has subsequently been dropped again, and that is Art 87 on surprising standard terms. Secondly, there is a dramatic change in the legal consequences of non-compliance with the named requirements. Whereas with Art II.-9:103(1) DCFR and Art 70 CESL the supplier of terms not individually negotiated needs to meet these requirements in order to invoke them against the other party, Art 86(1) FS provides that contract terms not individually negotiated will be considered unfair if they have not been drawn to the other party's attention.

1. Understanding the DCFR, the FS, and the proposed CESL

(a) Can Art II.-9:103 DCFR, Art 86 FS, and Art 70 CESL be characterized as rules on the incorporation of not individually negotiated terms?

A German lawyer will take it as self-evident that Art II.-9:103 DCFR and Art 70 CESL address the problem of when not individually negotiated terms are incorporated into the contract. He will thus understand these provisions to modify the rules on the formation of contract. After all, that is the effect of § 305(2) BGB as well.[40] We find the rules on the formation of contracts in §§ 145–156 BGB. Since the 1930s, the courts have applied these rules very favourably for the supplier of standard terms.[41] If, for example, the use of standard terms was customary in a certain branch of trade, the supplier did not need to draw the other party's attention to them and he did not need to take active steps to allow the other party to inform himself of their content.[42] It was up to the other party to inform himself of their existence and their content. This was hardly in line with §§ 145–156 BGB, and in B2C contracts this was seen to be unsatisfactory. The legislator reacted in the AGBG in 1976 by introducing special requirements for the incorporation of standard terms. Today we find these requirements in § 305(2) BGB under the title of 'The incorporation of standard terms into the contract': (i) The supplier of such terms needs to draw the other party's attention to their existence, (ii) he needs to give the other party the opportunity to get acquainted with their content and (iii) the other party needs to consent to their incorporation.

[40] Bundesministerium der Justiz (ed), *Entwurf eines Gesetzes zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)* (1975) 28.

[41] On the following see the detailed analysis by Hellwege (n 2) 224–72.

[42] See eg RG 14 February 1931, Hanseatische Rechts- und Gerichtszeitschrift (B) 1931, 463.

From the English perspective, at first glance it also appears that Art II.-9:103 DCFR and Art 70 CESL address the issue of the incorporation of terms. The text of both provisions appears rather familiar to English common law eyes and seems to follow the established case law for incorporation. English rules on incorporation can be neatly summarized by the dictum of Denning LJ in *Olley v Marlborough Court Hotel*[43] where, in expounding whether an exclusion clause had been incorporated into the contract between the hotel and guest, Denning LJ stated that '[t]he best way of proving [whether the clause formed part of the contract] is by a written document signed by the party to be bound. Another way is by handing him before or at the time of the contract a written notice specifying its terms and making it clear to him that the contract is on those terms. A prominent notice which is plain for him to see when he makes the contract or an express oral stipulation would, no doubt, have the same effect. But nothing short of one of these three ways will suffice'. From an English perspective, the only oddities found within the DCFR and the proposed CESL rules are (i) that the rules on incorporation in the DCFR and in the proposed CESL only apply to terms not negotiated individually, whereas in England they apply equally to all terms regardless of whether they have been individually negotiated or not and (ii) that the DCFR and the proposed CESL do not distinguish between documents which have been signed and those which are supplemented by the contents of a notice or ancillary document.

Thus, one would assume that in line with both German and English law, Art II.-9:103 DCFR and Art 70 CESL may be characterized as rules on the incorporation of terms not individually negotiated. Yet caution is advised. First, we do not find any requirement in either Art II.-9:103 DCFR or Art 70 CESL that the other party must have agreed to the incorporation of the contract terms not individually negotiated. On a literal reading, all the supplier has to do is take reasonable steps to draw the other party's attention to these terms. Both English and German lawyers would assume that both provisions take an objective approach to *agreement* and that it can be assumed that the other party has agreed to the incorporation once the supplier has taken the reasonable steps. However, this is not what these provisions state. Both Art II.-9:103 DCFR and Art 70 CESL take a purely objective approach and, as a consequence, even the express dissent of the other party seems to be irrelevant.

Secondly, the legal consequences of Art II.-9:103 DCFR and Art 70 CESL do not fit an analysis that the provisions formulate requirements for the incorporation of contract terms.[44] The legal consequences would need to follow an all-or-nothing approach. The terms are either incorporated into the contract or they are not. This is, indeed, the approach of § 305(2) BGB. Yet Art II.-9:103 DCFR and Art 70 CESL both state that the terms cannot be 'invoked against the other party' if the supplier of the terms did not meet the requirements of that Article. Thus, the other party may choose whether he wants the terms to be effective or not. From the German perspective, incorporation of standard contract terms is a problem of contract formation. If one party does not accept an offer the contract is not formed and he cannot treat the contract as if he accepted it. If the requirements of Art II.-9:103 DCFR and Art 70 CESL are not met,

[43] *Olley v Marlborough Court Hotel* [1949] 1 KB 532, CA.
[44] Hellwege (n 2) 593–5.

then any terms not individually negotiated will not become part of the contract, and one would assume that the other party cannot treat these terms as if they are incorporated. The same is true from the English perspective. Incorporation rules evidence agreement between the parties. The parties have either reached agreement or they have not.

However, the Comments to the DCFR are revealing, and it seems as if the authors did not see any issue arising from the characterization of Art II.-9:103 DCFR. They believe that Art II.-9:103 DCFR supplements the rules on the formation of contract and at the same time argue that the consent of the other party is indeed necessary:

> The Article is not phrased as a comprehensive rule on the incorporation of non-negotiated terms into a contract. Instead, it is intended to supplement the rules governing the formation of contracts. It is applicable in addition to these general rules. Thus, the consent of both parties, as defined in II.-4:101 [...] and II.-4:103 [...], is necessary to include non-negotiated terms into a contract in all cases. Consequently, the provisions on the formation of contracts [...] apply in addition to this Article.[45]

Thus, our first argument against understanding Art II.-9:103 DCFR as a rule on incorporation does not seem to be valid. Yet the texts of Art II.-9:103 DCFR and subsequently of Art 70 CESL should have been clearer about their relationship with the chapters on formation and they should have expressly referred to the requirement of consent.

Notwithstanding these observations, our second objection remains valid: 'Terms which have been duly brought to the attention of a party *will become part of the contract*. If a party has not taken appropriate steps to bring the terms to the other party's attention the contract is treated as having been made without the terms, *if the other party wishes this result.*'[46]

The authors of the Comments to Art II.-9:103 DCFR understand it to be a rule on the incorporation into the contract of terms not individually negotiated. One can assume the same for Art 70 CESL. Yet, the legal consequences of the non-observance of the requirements of both provisions do not fit this understanding. We can solve this contradiction in two ways. One could argue that, regardless of their legal consequences, both provisions are rules on incorporation. Following this contention, one should interpret them to follow an all-or-nothing approach. Alternatively, one could argue that the question of whether or not individually negotiated terms become part of the contract is left to Chapter 4 of Book II of the DCFR and Chapter 3 CESL. Only if one comes to the conclusion that they are part of the contract do we look to the requirements of Art II.-9:103 DCFR and Art 70 CESL. With this second approach, these Articles do not contain further requirements for the terms to become part of the contract. They only formulate additional requirements for when terms which *are* part of the contract can be invoked against the other party.

[45] DCFR Art II.-9:103 Comment A.
[46] DCFR Art II.-9:103 Comment G (emphasis added).

Turning to the FS, we find that it has moved away from an incorporation analysis altogether. Article 86 FS formulates the exact requirements of Art II.-9:103(1) and (3) DCFR and of the subsequent Art 70 CESL. Yet, the legal consequences of non-compliance are different:

> Terms supplied by one party and not individually negotiated *are unfair* for the purpose of this Section if the other party was not aware of them, or if the party supplying the terms did not take reasonable steps to draw the other party's attention to them, before or when the contract was concluded (emphasis added).

In Art 86 FS, the requirements for the incorporation of not individually negotiated terms have been turned into factors which have to be taken into account for assessing the fairness of such terms. Only if these terms form part of the contract may their fairness be assessed under Art 86 FS.

We may conclude that German and English lawyers would indeed approach Art 86 FS with nationally formed preconceptions if they assumed that it addressed the problem of incorporation. In relation to Art II.-9:103 DCFR and Art 70 CESL, understanding these provisions as regulating incorporation is not only possible[47] but it is the most likely approach to be taken by both German and English lawyers. Furthermore, it is the approach favoured by the authors of the Comments to Art II.-9:103 DCFR, even though the legal consequences attached to them do not support this understanding.

(b) Substantiating the requirements on incorporation

If the other party is not aware of the terms not individually negotiated, both Art II.-9:103(1) DCFR and Art 70(1) CESL require the first party to take 'reasonable steps to draw the other party's attention to them, before or when the contract was concluded'. But what are such reasonable steps?

An English lawyer will assume that he can apply the English case law, chiefly because the formulation of Art II.-9:103(1) DCFR and Art 70(1) CESL are highly redolent of the English case law on incorporation. However, whilst there are indeed considerable parallels between the DCFR and the proposed CESL on the one hand and the common law approach on the other hand, caution is advised if the common lawyer is not to be wrong-footed when he approaches the DCFR and the proposed CESL.

As mentioned above, English common law rules on incorporation distinguish between whether the contractual document has been signed by the recipient of the terms or not. Signature is taken to signify that the party has assented to be bound by the terms of the signed document. This is commonly referred to as the rule in *L'Estrange v*

[47] See also T Pfeiffer, 'Non-Negotiated Terms', in R Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, Munich: Sellier 2009) 183, 184, 186–7; Schulze/Kieninger Art 70 para 16; W Ernst, 'Das AGB-Recht des Gemeinsamen Europäischen Kaufrechts' in O Remien, S Herrler, and P Limmer (eds), *Gemeinsames Europäisches Kaufrecht für die EU?* (Munich: CH Beck 2012) 93, 97; Möslein (n 29) 263, 274; C Wendehorst, 'Regelungen über den Vertragsinhalt (Teil III CESL-Entwurf)' in C Wendehorst and B Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts. Zum Verordnungsentwurf der Europäischen Kommission vom 11.10.2011* (Vienna: Manz 2012) 87, 95–6.

Graucob after the decision of that name.[48] The party was bound to the terms of the exemption clause, even though it was in 'regrettably small print', printed on brown paper, and in an unexpected place. In contrast, in those situations where the document has not been signed, the party seeking to rely on the terms will need to show that they have given the other party *reasonable notice* of the terms at, or before, the time of contracting in a document having contractual effect.[49] Determination of whether such reasonable notice has been given relates to the steps taken to give notice and just how 'onerous' or 'unusual' the terms are.[50]

Whilst this latter notion of reasonable notice resonates with the reasonable steps requirement in both Art II.-9:103(1) DCFR and Art 70(1) CESL, care should be taken before assuming that they are identical. One stark difference is that these latter provisions do not distinguish between signed and unsigned documents and therefore signed documents would still need to be subject to the reasonable steps test. Of course, and as the Comments to the DCFR underline,[51] if the document has been signed by the parties then it is likely that the other party will be deemed to have fulfilled the requirements for reasonable steps. Nevertheless, it does end the English rule of conclusiveness of signature, whether that be for the incorporation of terms in either commercial or consumer contracts.

Just as significant is the rule that a term is not sufficiently brought to the other party's attention by a mere reference to it in a contract document, even if that party signs the document. This applies to both B2B and B2C contracts under Art II.-9:103(3)(b) DCFR but only to B2C contracts under Art 70(2) CESL. This is a decisive departure from English law and is likely to be lamented for the loss of certainty that accompanies a loosening of the signature rules. Despite these differences, however, the DCFR and the proposed CESL do seem to be familiar territory for the English lawyer and it will be assumed that the established case law on incorporation by reasonable notice can be applied to the reasonable steps test of both instruments.

Equally, a German lawyer will most probably be convinced that he can apply Art II.-9:103(1) DCFR and Art 70(1) CESL along the lines of § 305(2) BGB. Accordingly, he would require (i) that the supplier of the terms not individually negotiated refer the other party to such terms either explicitly or at least by clearly visible notice at the place where the contract is concluded, (ii) that he gives the other party the possibility that he will inform himself of the content of the terms, and (iii) that the other party agrees to their incorporation.

There are signs that under Art II.-9:103(1) DCFR and Art 70(1) CESL, the supplier of the terms indeed needs to refer the other party to the terms and needs to give him the opportunity to get acquainted with their content. First, Art II.-9:103(3)(b) DCFR and Art 70(2) CESL make clear that a mere reference to the terms is not sufficient in every case. Secondly, the Comments to Art II.-9:103 DCFR discuss that the supplier needs to

[48] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, CA.
[49] *Chapelton v Barry Urban District Council* [1940] 1 KB 532, CA.
[50] *Parker v The South Eastern Railway Company* (1877) 2 CP 416, CA; *Thornton v Shoe Lane Parking* [1971] 2 QB 163, CA.
[51] DCFR Art II.-9:103 Comment D.

give the other party an opportunity to take notice of the content of the terms.[52] And thirdly, the notes to Art II.-9:103 DCFR call § 305(2) BGB a 'similar rule'.[53] Nevertheless, a German lawyer would fall victim to his preconceptions if he simply interpreted Art II.-9:103(1) DCFR and Art 70(1) CESL in the light of § 305(2) BGB. First, neither provision is restricted to B2C transactions; both apply equally to B2B contracts. In contrast, § 305(2) BGB does not apply to B2B contracts (§ 310(1)(1) BGB). Its requirements may be interpreted strictly in order to protect consumers. As a consequence of their extension to B2B transactions, Art II.-9:103(1) DCFR and Art 70(1) CESL need to be interpreted in a more flexible way than § 305(2) BGB.[54]

Secondly, according to § 305c(1) BGB, surprising terms will not become part of the contract unless the supplier has referred the other party to them. In contrast, the DCFR and the proposed CESL are missing such an explicit rule. In order to achieve similar results, they would once more need to be applied in a fashion that is far more flexible than § 305(2) BGB.[55] Finally, § 305(2) BGB explicitly requires the other party to consent to the incorporation. The authors of the Comments do not, as we saw, understand Art II.-9:103 DCFR to contain the requirement of consent; instead they argue that this requirement follows from the application of Arts II.-4:101 and II.-4:103. By logical extension, we can conclude in a similar fashion for Art 70 CESL and the requirements for the conclusion of a contract under Arts 30–39 CESL.

Reflecting on the nature of Art II.-9:103 DCFR and Art 70 CESL, we can conclude that a German lawyer cannot simply apply the requirements of incorporation found within these provisions along the lines of § 305(2) BGB. As far as the English lawyer is concerned, whilst caution would need to be exercised, it seems that the broad body of established case law would be of assistance in understanding the DCFR's and the proposed CESL's approach to incorporation.

Let us briefly reflect on Art 86 FS. Even though the provision has been dropped again in the FS 2nd, it takes such a novel approach that it is worth considering here. Article 86 FS does not address the question of when a term forms part of the contract. But how then do we determine whether terms are incorporated into the contract? It is most natural to apply the general rules of contract formation and thus Arts 29–39 FS. This leads to the question of what the requirements are under Arts 29–39 FS for the incorporation of terms not individually negotiated. In approaching this problem, an English lawyer would clearly not be tempted to apply the English case law on the incorporation of terms. Equally, a German lawyer will most probably be convinced that he cannot substantiate Arts 29–39 FS along the lines of § 305(2) BGB. A German lawyer will argue that something less is required under Arts 29–39 FS than under § 305(2)

[52] DCFR Art II.-9:103 Comments A and D.

[53] DCFR Art II.-9:103 Note 3.

[54] See also Wendehorst (n 47) 95.

[55] See T Wilhelmsson, 'Standard Form Conditions' in A Hartkamp, M Hesselink, E Hondius, C Joustra, E du Perron, and M Veldman (eds), *Towards a European Civil Code* (3rd edn, Nijmegen: Ars Aequi Libri 2004) 431, 438 who argues in a similar direction for Art 2:104(1) PECL. See also Ernst (n 47) 98; P Hellwege, 'Allgemeines Vertragsrecht und "Rechtsgeschäfts"-lehre im Draft Common Frame of Reference (DCFR)' AcP 211 (2011) 665, 682.

BGB. After all, § 305(2) BGB is *lex specialis* to §§ 145–156 BGB and is thought to go beyond the requirements found within these provisions.

However, comparative law suggests that all European legal systems acknowledge similar requirements in order for terms not individually negotiated to become part of a contract, regardless of whether they are, as in English law, derived from the general principles of contract law or whether they are, as in German law, codified in a special statutory provision:[56] (1) the supplier of such terms needs to draw the other party's attention to their existence, (2) he needs to give the other party the opportunity to get acquainted with their content, and (3) the other party needs to consent to their incorporation. However, there are differences in the way these requirements are presented and there are considerable differences in their application. For example, European legal systems differ both as to what steps the supplier needs to take to draw the other party's attention to the existence of the contract as well as to the steps the supplier needs to take to give the other party the opportunity to get acquainted with their content. We believe that the said three requirements would have been as valid under Arts 29–39 FS as under German and English law. As a consequence, both an English and a German lawyer could have been inspired by their national laws when interpreting Arts 29–39 FS. Nevertheless, it could not have been predicted which approach courts would have adopted under Arts 29–39 FS when applying these three requirements. Furthermore, the courts would have had to face problems of coordination between Arts 29–39 and Art 86 FS.

2. The proposed CESL as an optional instrument

(a) The limited scope of application of the proposed CESL as compared to the DCFR

The proposed CESL only deals with the first three books of the DCFR and some parts of Book 4, principally the part on sales. However, terms of sales may reach into other legal areas. Many, if not most, German and English standard terms relating to sale contracts contain retention of title clauses. They state that the delivered goods will remain the property of the seller until the price has been paid. The DCFR deals with this type of clause in Book IX. It calls it a 'retention of ownership device' and it is a form of proprietary security in movable assets. The proposed CESL does not include Book IX of the DCFR, raising the important question of how to assess whether such a term is part of the contract.

There are two possibilities. One could hold that the question of the incorporation of the retention of title clause is dealt with by national law. It could be said that as the optional instrument does not cover retention of title clauses it is not applicable to them at all. It would then be necessary to split the terms. For those terms which are covered by the optional instrument, Art 70 CESL would apply. And, for those terms which are beyond the scope of the optional instrument, as is the case with retention of title

[56] See the comparative analysis in Hellwege (n 2) 347–93.

clauses, the German lawyer would apply §§ 145–156 and § 305(2) BGB and the English lawyer would look to the body of case law that deals with incorporation.

With this solution to our problem, the goal of the optional instrument—to enhance the functioning of the internal market—is at risk. Small and medium-sized business will still refrain from offering their goods and services in other Member States, as they run the risk that at least parts of their terms will be exposed to foreign law. Even worse, they have to consider two different 'foreign' regimes: that of the optional instrument and that of any applicable national law.

As a consequence, one should opt for the second possible solution: because the optional instrument applies to and addresses the problem of the incorporation of terms that have not been individually negotiated, one should apply only the requirements of the optional instrument.

(b) Comparing the standards of protection

The choice for the optional instrument as the applicable law will not be made by both parties to the contract on an equal footing.[57] In practice, the choice will rest on the stronger party only—in B2C contracts, on the business. The two extreme positions are that the stronger party will either not offer to contract under the optional instrument at all, or he may want to offer his services and goods only under the optional instrument. Since the provisions on the scope and application were only added by the Commission at a late stage, it had previously been unclear in which situations parties would be able to choose the optional instrument, and this is likely to remain controversial.[58] Will the final CESL be an option only in cross-border transactions or also in internal transactions? Do the parties have the choice only in B2C contracts; does the choice operate in B2B contracts only if one party is a small or medium-sized enterprise; or does the choice operate in all other transactions, including 'non-business to non-business' contracts (NB2NB)? Will it be restricted to electronic distance sales contracts? According to the proposed Regulation designed to give effect to the CESL (Reg-CESL), the instrument will only apply in cross-border contracts,[59] though Member States may choose to extend the instrument's application to domestic contracts.[60] And, whilst the instrument may apply both to B2C as well as to B2B transactions, in the latter category it may be used only where one of the parties is a small or medium-sized enterprise.[61] Once again, however, Member States may choose to extend the availability of the instrument to *all* traders, regardless of the status of one party as a small or medium-sized enterprise.[62] Uncertain is the case of a transaction between a business as seller and a person as buyer who is neither a consumer nor a business within the meaning of Art 2(e)–(f) of the proposed Reg-CESL. The case is encompassed by Art 7 of the proposed Reg-CESL, but it is ignored in the proposed

[57] See the references in n 34.

[58] See Max Planck Institute (n 33) 420–6; Doralt (n 34) 18–20; S Augenhofer, 'A European Civil Law—for Whom and What Should it Include?' (2011) 7 ERCL 195, 201–18.

[59] Art 4(1) Reg-CESL. [60] Art 13(a) Reg-CESL. [61] Art 7 Reg-CESL.

[62] Art 13(b) Reg-CESL. It is unclear whether this option is open to Member States only in purely internal or also in cross-border cases.

CESL.[63] Its general applicability extends to sales contracts, contracts for the supply of digital content, and related service contracts.[64]

(1) The optional instrument in cross-border transactions

The choice of the supplier of terms not individually negotiated is dependent on a number of factors. If opting for the proposed CESL is the only practical way to market goods or services outside the stronger party's home jurisdiction, he will offer his goods and services under the optional instrument only. Another factor of fundamental importance in the cross-border context will be language issues. However, it is an open question whether under the optional instrument the supplier of terms will be required to translate his terms into the language of the other party.[65]

(2) The optional instrument in internal transactions

If a Member State decides to make the instrument available in domestic transactions, the choice of a supplier of terms not individually negotiated to use the optional instrument for such transactions will primarily depend on which law better serves his interests. We have already seen how the requirements of incorporation under Art 70 CESL differ from their application under national law. For example, there may turn out to be differences as to what constitute reasonable steps that the supplier needs to take to draw the other party's attention to the existence of the terms. It is quite possible that, for example, under English law, the conclusiveness of the customer's signature, even in a B2C contract, might be one factor that sways the trader's decision to choose national law rather than the European instrument. Yet at this stage it is uncertain how Art 70 CESL will be interpreted.[66] It may be assumed, however, that the rules on incorporation will not be a dominant factor in choosing or not choosing the optional instrument, at least in B2C transactions. This is because in order to opt in to the proposed CESL, the trader must be sure to acquire the consumer's consent through 'an explicit statement which is separate from the statement indicating the agreement to conclude a contract'.[67] The requirements for incorporating standard terms are unlikely to be an extra hurdle for the trader.

3. The DCFR, the FS, and the proposed CESL as toolboxes

We will now turn to the last form of interaction. It links to the function of the DCFR, the FS, and the proposed CESL as toolboxes. They are suggested to be sources of

[63] See in detail P Hellwege, 'Die Geltungsbereiche des UN-Kaufrechts und des Gemeinsamen Europäischen Kaufrechts im Vergleich' Internationales Handelsrecht 2012, 180, 183–4, and P Hellwege, 'UN-Kaufrecht oder Gemeinsames Europäisches Kaufrecht?' Internationales Handelsrecht 2012, 221, 226–9.

[64] Art 5 Reg-CESL.

[65] The answer will depend on the interpretation of Art 70 CESL. In the consumer context the rules on PCIDs and on the duty of transparency under Art 82 CESL will be of importance, too. On the duty of transparency see K Steensgaard and C Twigg-Flesner, 'Pre-contractual Duties' ch 7 of this volume. On the language problem in general see G Howells, B Marten, and W Wurmnest, 'Language of Information, Contract, and Communication' ch 6 of this volume.

[66] See also Wendehorst (n 47) 95 who criticises the uncertainty of Art 70 CESL.

[67] Art 8 Reg-CESL.

inspiration for national legislators and to help courts interpreting their national laws in the light of what may be said to be a European solution.[68]

For Art II.-9:103 DCFR and Art 70 CESL the answer is clearly in the negative. Whilst they should be interpreted to address the question of incorporation, the legal consequences do not support such an understanding. As such, both provisions contain an unresolved inconsistency and are not fit to be models for national legislators.[69]

We have seen that the FS lacks provisions on the incorporation of not individually negotiated terms as they are codified in § 305(2) BGB. The incorporation of such terms is instead assessed according to formation of contract rules. An English lawyer might argue that the context is odd. He would be used to discussing the question of incorporation in the context of assessing the content of the contract. However, from a purely dogmatic point of view this change seems to be of minor importance. In contrast, from a German point of view this may be looked upon as a step backwards. But if comparative law suggests that the results which are achieved in Germany on the basis of § 305(2) BGB may also be reached through an application of the general rules on contract formation then there is nothing wrong with the approach taken by the FS.[70]

III. Fairness control

Fairness controls are found in Chapter 9, Section 4 of Book II of the DCFR and in Chapter 8 CESL. Both the DCFR and the proposed CESL only deal with the familiar content control. As mentioned above, Arts 77–88 FS go further than this. In addition to a content control there are provisions on terms which are unfair *because of the way the other party's agreement was obtained* (Arts 86–87). Such a form of fairness control has no predecessor, and it is alien to both German and English law. Furthermore, it has already been dropped in the FS 2nd and it has not been adopted for the proposed CESL.

1. Terms which are unfair because of the way the other party's agreement was obtained

Even though Art 86 FS has not made its way into the proposed CESL we will briefly discuss it. We would like to forcefully make the point that it was rightly dropped and that it should not be a model for any future text. Article 86(1) FS reads as follows:

> Terms supplied by one party and not individually negotiated are unfair for the purpose of this Section if the other party was not aware of them, or if the party supplying the terms did not take reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

[68] On the different views as to the notion of a toolbox see p 429 of this volume.

[69] For further criticism see Wendehorst (n 47) 95.

[70] See also the analysis on German law by Hellwege (n 2) 394–437. Hellwege argues that the requirements of incorporation which we find in § 305(2) BGB can also be deduced from the German general principles on contract formation.

Article 86 FS is part of the fairness control. The question as to whether terms not individually negotiated are incorporated into the contract is left to Arts 29–39 FS on contract formation. Thus, the principal problem when substantiating the requirements of both provisions concerns their coordination. This problem of coordination points to a fundamental problem of Art 86(1) FS. It conflates the rules on incorporation and the rules on fairness control. The DCFR has, as the Comments to Art II.-9:103 DCFR make clear, refrained from merging both mechanisms of control: 'It should be noted that the rules on non-negotiated terms clearly distinguish between the incorporation of such terms into the contract [...] and their fairness'.[71] In line with these Comments, Art 86 FS should not be concerned with whether it is fair for the supplier to invoke the term. Instead, it should deal with whether the other party truly consented to the incorporation of the term. For this reason, we strongly suggest that Art 86 FS should not inspire English or German law.

2. Content control

In the DCFR, content control is set out in Arts II.-9:401–410. Its main characteristic is that it introduces three definitions of unfairness. Article II.-9:403 DCFR applies to contracts between businesses and consumers, Art II.-9:404 DCFR to contracts between non-business parties, and Art II.-9:405 to contracts between businesses. Neither the FS nor the proposed CESL include a definition of unfairness in contracts between non-business parties.

(a) Understanding the DCFR, the FS, and the proposed CESL

(1) The meaning of unfairness in contracts between a business and a consumer

According to Art II.-9:403 DCFR, a contract term not individually negotiated is unfair in B2C contracts 'if it significantly disadvantages the consumer, contrary to good faith and fair dealing'. The fairness test of Art 81 FS is formulated identically. Article 3 of the Unfair Contract Terms Directive, however, is phrased differently. A 'contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. It is to be welcomed that Art II.-9:403 DCFR and Art 81 FS speak of a significant disadvantage and not, as Art 3 of the Unfair Contract Terms Directive does, of a significant imbalance: 'The term "significant imbalance" has been replaced by the phrase "significantly disadvantages" in order to avoid the possible misunderstanding that the price-performance ratio of the contract could be a measure to determine fairness'.[72] There is no change in substance, however. For no obvious reason, Art 84 FS 2nd and Art 83 CESL have returned to the phrasing of the Directive and speak, accordingly, of a 'significant imbalance'.

[71] DCFR Art II.-9:103 Comment G. [72] DCFR Art II.-9:403 Comment B.

Although Art II.-9:403 DCFR, Art 81 FS and, apart from the minor differences in the wording, Art 83 CESL are in agreement as to the meaning of unfairness, there is still one important difference in the scope of the fairness control. With both Art II.-9:403 DCFR and Art 83 CESL, only those terms which have not been individually negotiated are subjected to the fairness control. These are defined as terms which are supplied by one party whose content the other party has not been able to influence.[73] However, the Comments to Art II.-9:403 DCFR state that it was a controversial question as to whether the fairness control in B2C contracts should extend to all terms.[74] This discussion is reflected by the fact that in Art II.-9:403 DCFR, there are square brackets around the phrase 'which has not been individually negotiated' indicating the wish of one drafting group (the Study Group on a European Civil Code) to extend the unfairness test.[75] In the FS, it became clear that the Expert Group favoured extending the fairness control in B2C contracts beyond terms not individually negotiated. Yet it did not go as far as exposing all individually negotiated terms to content control. The term needed to have been supplied by the business. Article 81(2) FS clarifies:

> For this purpose a term is supplied by the business if a version of it was included in terms originally supplied by the business, even if it has subsequently been the subject of negotiations with the consumer.

This extension was explicitly identified as a matter needing further discussion during the consultation period.[76] Perhaps in light of the feedback received on this issue, Art 84 FS 2nd and then Art 83 CESL have returned to a more restrictive approach, subjecting to a review of fairness only those terms supplied by the business which have not been individually negotiated.

Article II.-9:403 DCFR, Art 81 FS, and Art 83 CESL are all phrased in a very open textured manner, raising issues concerning interpretative certainty. Notions such as 'significant disadvantage', 'significant imbalance' or 'good faith' are broad and amorphous concepts and are open to great divergence in meaning.[77] The same is true for the definitions of unfairness in Arts II.-9:404 and II.-9:405 DCFR, Art 85 FS, and Art 86 CESL. For this reason they will need to be substantiated. One might expect that national lawyers will be tempted to follow their national legal systems for interpretative guidance.

For example, a German lawyer will be tempted to follow § 307(2) BGB. § 307(1)(1) BGB is phrased in a very similar fashion to Art II.-9:403 DCFR, Art 81 FS, and Art 83 CESL. It only speaks of an unreasonable, instead of a significant disadvantage. But this difference is of no importance.[78] § 307(2) BGB then substantiates what may count as an unreasonable disadvantage:

[73] Art II.-1:110 DCFR, Art 7 CESL.

[74] DCFR Art II.-9:403 Comment A.

[75] Strictly speaking, the Acquis Group did not take a position on this extension, since it only based its draft on non-negotiated rules.

[76] FS Introduction, p 8.

[77] See also the criticism in Schulze/Mazeaud/Sauphanor-Brouillaud Art 83 para 13.

[78] MüKo/Wurmnest § 307 para 24.

> In case of doubt, an unreasonable disadvantage is to be presumed to exist 1. if a term contradicts fundamental principles inherent in the statutory provision from which it deviates, or 2. if a term limits the essential rights or duties, which arise from the nature of the contract, to such extent that the purpose of the contract is endangered.[79]

According to § 307(2)(1) BGB, default rules have a model character (*Leitbildfunktion*).[80] Parties are free to depart from them. Yet, in the case of standard terms, or of not individually negotiated terms, the fact that the parties not only departed from the default rules but also 'agreed' on a term which contradicts the legislator's fundamental value judgements (*Gerechtigkeitsgehalt*) behind the default rule can be an indication that the term is unfair. But this raises the question of why § 307(2)(1) BGB presumes that an infringement of the *Gerechtigkeitsgehalt* of default rules only leads to unfairness in the case of standard terms or terms not individually negotiated. We find the explanation in another concept, that of the guarantee of correctness (*Richtigkeitsgewähr*).[81] If the content of the contract is the outcome of a bargaining process, then one has to assume that it is fair in the eyes of the parties. The bargaining process is said to guarantee the correctness of the result of this process. There is no reason to step in. Yet, in the case of standard terms and of not individually negotiated terms, there is no bargaining process and therefore no *Richtigkeitsgewähr*.

There are a number of problems with the application of § 307(2)(1) BGB. Not every section of the BGB strives to balance out the interest of parties in a just and reasonable way and, as a consequence, not every section of the BGB embodies a *Gerechtigkeitsgehalt*. Some simply try to find a practical result to a problem which is of a rather technical nature. They are based on pure *Zweckmäßigkeitserwägungen* (considerations of practicability).[82] Thus, in the application of § 307(2)(1) BGB one first has to know whether a default rule enshrines a *Gerechtigkeitsgehalt* and whether it, therefore, serves a *Leitbildfunktion* or whether it is simply based on *Zweckmäßigkeitserwägung*. Secondly, one has to identify the *Gerechtigkeitsgehalt*. And thirdly, one has to answer the question of whether the contract term merely departs from the default rule or whether it also infringes its core. Further problems in the application of § 307(2)(1) BGB arise in cases where default rules are missing.[83] It is obvious that the application of § 307(2)(1) BGB requires a rich body of case law. The same is true for Art II.-9:403 DCFR, Art 81 FS, and Art 83 CESL. The advantage of § 307(2) BGB is that it gives guidance as to how to substantiate § 307(1) BGB. And for a German lawyer, the substantiations of § 307(1) BGB are so self-evident that, as a consequence, he will be tempted to interpret Art II.-9:403DCFR, Art 81 FS, and Art 83 CESL on similar terms.

[79] § 307(2) BGB. Translation by the authors.

[80] On the notion of *Leitbildfunktion* see MüKo/Wurmnest § 307 para 65.

[81] The notion of *Richtigkeitsgewähr* was introduced into the debate by W Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts' AcP 147 (1941) 130. On Schmidt-Rimpler see HKK/Hofer Introduction to § 241 para 241, n 31. On his impact on the law of standard terms see Hellwege (n 2) 310–11, 547–9.

[82] Palandt/Grüneberg § 307 para 30.

[83] On this problem see M Stoffels, *Gesetzlich nicht geregelte Schuldverträge. Rechtsfindung und Inhaltskontrolle* (Tübingen: Mohr Siebeck 2001) 357–451.

When an English lawyer reads the provisions of the DCFR, the FS, and the proposed CESL, they will be coloured by a completely different set of assumptions even though, since the Unfair Contract Terms Directive forms the original blueprint for these provisions, one finds a similarity in text in both German and English law. In customary fashion,[84] the Unfair Contract Terms Directive was implemented into English law by way of a 'copy-out'[85] practice, meaning that the Directive was simply parachuted into English law through an almost verbatim statutory instrument: the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). An identical rendition of Art 3(1) of the Directive can be found in Reg 5(1) of the UTCCR 1999. In line with its origins, Reg 5(1) of the UTCCR 1999 adopts the language of 'significant imbalance', rather than that of 'significant disadvantage' and in this way mirrors the text of the proposed CESL rather than that of the DCFR and of the FS. But, as we have concluded above, this difference is of minor substantive importance.

The textual similarities between the fairness test in Reg 5(1) of the UTCCR, on the one hand, and that in Art II.-9:403 DCFR, Art 81 FS, and Art 83 CESL on the other mean that the English lawyer will find it difficult to interpret the fairness test in any of these latter documents in an autonomous fashion. It will be difficult to extract the provision from the extensive academic literature that has emerged in response to the Directive's implementation and the case law that has interpreted the Regulation. Under Reg 5(1) of the UTCCR 1999, the two notions that are central to the test of fairness are whether the term is 'contrary to the requirement of good faith' and whether it 'causes a significant imbalance' in the parties' rights and obligations under the contract, to the detriment of the consumer. In relation to the notion of 'significant imbalance', it is generally accepted that this 'directs attention to the substantive unfairness of the contract',[86] and the idea that the fairness test has a substantive element has not been especially controversial. In its interpretation by the courts, a 'significant balance' is recognized as being present if 'a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour'.[87]

The second limb of the fairness test under Reg 5(1) of the UTCCR concerns the notion of good faith and the much-discussed issue of the relationship between the two limbs. There are a number of views on the relative importance of both of these limbs and the relationship between them. The most accepted view is that there needs to be both a significant imbalance as well as a violation of good faith and this approach was followed by the House of Lords.[88] However, the view that the two tests are independent of each other raises an additional and interrelated element of the unfairness test which has proved rather vexed in English law; if the two tests are independent of each other, and if significant imbalance is concerned with *substantive* unfairness, this would seem

[84] See also the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 ('Consumer Sales Directive').

[85] See C Bright and S Bright 'Unfair Terms in Land Contracts: Copy Out or Cop Out?' (1995) 111 LQR 655.

[86] H Collins, 'Good Faith in European Contract Law' (1994) 14 OJLS 229, 249. Approved by Lord Steyn in *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 AC 481, [37].

[87] *Director General of Fair Trading v First National Bank* (n 86) [17].

[88] *Director General of Fair Trading v First National Bank* (n 86) [17].

to suggest that good faith is concerned with *procedural* elements—otherwise good faith would seem to be surplus. The result would be that a term could only be found to be unfair if both substantive and procedural unfairness were present. On the other hand, it has also been argued that good faith is *also* concerned with substantive elements, demonstrating that unfairness could be found on purely substantive grounds. Contributing to the debate on the proper interpretation of the fairness test, the Law Commission[89] has observed that unfairness can be found on procedural grounds alone, even if there is substantive fairness. This is admittedly difficult to square with the 'significant imbalance' part of the test.[90]

In this way, the nature of the fairness test of Reg 5(1) UTCCR has proved a contentious one in English law and, unfortunately, has not yet been resolved by the courts. For our purposes here, the brief summary of the position illustrates how the general test of fairness under English law may raise both procedural and substantive issues, and it is likely that the provisions of the DCFR, FS, and the proposed CESL will be deemed to do the same. The similarity in text will raise an assumption that there is similarity in meaning. English lawyers will have difficulty departing from their nationally rooted ideas, and the provisions of the DCFR, the FS, and the proposed CESL might become bogged down with particularly English problems.

In the light of these observations on German and English law, one must ask whether, in substantiating the provisions of Art II.-9:403 DCFR, Art 81 FS, and Art 83 CESL, it is permissible to adopt either the German approach as we find it in § 307(2) BGB or the one found in English law. Or does the autonomous interpretation of the DCFR, the FS, and the proposed CESL require a third solution? At first sight it is indeed the German approach which is in line with both the DCFR, the FS, and the proposed CESL.[91] It finds support in the *acquis communautaire* as it is understood by the Commission. The Commission believes that the use of unfair terms 'undermines not only the interests of the consenting party but also the legal [...] order as a whole' because they 'aim to replace the legal solutions drawn up by the legislator'.[92] It seems the Commission is following the concept of the *Leitbildfunktion* of default rules. If they were not to fulfil such a function then it would be no problem that terms 'replace the legal solutions drawn up by the legislator'. That is the very idea of default rules: they can be replaced. Furthermore, the authors of the DCFR Principles make clear that the default rules of the DCFR strive for fairness,[93] and the default rules of the DCFR thus fulfil the precondition of serving a *Leitbildfunktion*. They enshrine a

[89] Law Commission and Scottish Law Commission, *Unfair Terms in Contracts: A Joint Consultation Paper* (CP No 166, Scot DP No 119, 2002) para 3.68.

[90] However, as the Law Commission and the Scottish Law Commission note, a significant imbalance in the parties' right and obligations can exist if the consumer does not know what their rights and obligations are and, had they known, might have been able to safeguard their interests or might not have entered the contract, *Unfair Terms in Contracts* (n 89) para 3.68.

[91] With regard to the Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 14 final, see E-M Kieninger, 'Die Vollharmonisierung des Rechts der Allgemeinen Geschäftsbedingungen—eine Utopie?' RabelsZ 73 (2009) 793, 799–800; Jansen (n 8) 82–3.

[92] Report on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(2000) 248 final.

[93] DCFR Principle 57.

Gerechtigkeitsgehalt. Finally, the authors of the comments to Art II.-9:403 DCFR explicitly refer to the concept of *Leitbildfunktion*: 'The phrase "significantly disadvantages" should make clear that a core element of the unfairness test is to compare the contract term in question with the default rules which would be applicable if the term had not been agreed. In other words, the question is whether the contract term in question significantly disadvantages the consumer in comparison with the default rule which would be applicable otherwise'.[94] Thus, even though the DCFR does not substantiate Art II.-9:403 DCFR along the lines of § 307(2) BGB, it seems one could legitimately read Art II.-9:403 DCFR in this way, too. Since both the FS and the proposed CESL are based on the DCFR, it might be argued that the same is also true for these instruments.

However, we should be cautious. Even if the Comments suggest that Art II.-9:403 DCFR may be substantiated along the line of § 307(2) BGB, we do not find a corresponding rule in the DCFR itself. The Comments only assist us in interpreting the DCFR. They are not binding on us. Similarly, we do not find an equivalent to § 307 (2) BGB in the FS or the proposed CESL.[95]

Furthermore, we do not know who the authors of the Comments to the DCFR are. However, we are informed that the 'Comments to many Articles in the DCFR which have been derived from the Acquis Principles (ACQP) are partly based on the Comments to the ACQP'.[96] And indeed, the comments to the respective Arts 6:101–306 ACQP were authored by two Germans and these comments do contain a statement to a similar end: 'Consequently, the terms of the contract have to be seen against the background of the provisions of the applicable contract law'.[97] Thus, it might well be that the authors of the Comments referred to the German fairness test of § 307(2) BGB without questioning whether it is suitable for the DCFR.

(2) The meaning of unfairness in contracts between non-business parties

As mentioned, neither the FS nor the proposed CESL deals with the fairness control in contracts between non-business parties. With the DCFR, we find the definition of unfairness for NB2NB contracts in Art II.-9:404:

> In a contract between parties neither of whom is a business, a term is unfair for the purpose of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.

The Comments explain why this Article speaks of contracts between non-business parties and not simply of contracts between consumers:

[94] DCFR Art II.-9:403 Comment B.

[95] See also Möslein (n 29) 279–80 who argues that the *Leitbildfunktion* of default rules should have been made more explicit in the proposed CESL. And P Ayad and S Schnell, 'Gemeinsames Europäisches Kaufrecht—für Unternehmen attraktiv?' BB 2012, 1487, 1491–2 argue that the CESL does not follow the *Leitbildfunktion*.

[96] DCFR 'Academic contributors' 29.

[97] ACQP (Contract II) Art 6:301 Commentary B 3, § 12.

> The personal scope of the Article is defined in a negative way by the expression "parties neither of whom is a business". The provision therefore [...] also applies to contracts between two non-profit organisations which are neither qualified as businesses nor as consumers, as the notion of consumers does not include legal persons.[98]

The only difference between Art II.-9:403 and Art II.-9:404 DCFR seems to be that the former extends the fairness control to all not individually negotiated terms whereas the latter is restricted to standard terms. The definition of fairness is identical in both articles. The other party needs to be significantly disadvantaged contrary to good faith and fair dealing.

Applying identical definitions of unfairness in B2C contracts and in NB2NB contracts is in line with German law. § 307(1) BGB contains one general clause of fairness control which does not distinguish between B2C, B2B, and NB2NB transactions. The fairness control is modified in § 310(1) BGB. Yet, this modification does not apply to NB2NB contracts; it is limited primarily to B2B transactions. There is further resemblance between German law and the DCFR. Only in B2C contracts does the fairness control extend, according to § 310(3)(2) BGB, to terms not individually negotiated, whereas in all other contracts it is restricted to standard terms. Thus, a German lawyer will also assume that the fairness tests in Arts II.-9:403 and 404 DCFR are identical.[99]

English law once again takes a rather different stance. When turning to the Unfair Contract Terms Act 1977 (UCTA) we see that it is outside the personal scope that is covered by Art II.-9:404 DCFR. This is because, in general,[100] UCTA does not afford any protection to purely private contracts since it only controls *business* liability (breach of obligations from things done in the course of a business—s 1(3) UCTA). Moreover, in relation specifically to C2C contracts, this type of dealing is removed from UCTA's ambit since one element of the definition of consumer under UCTA is that one party makes the contract in the course of business while the other party does not (s 12(a) and s 12(b) UCTA).

So, the general extension of the unfairness control to contracts between non-business parties in Art II.-9:404 DCFR is something unfamiliar to the English lawyer. It is therefore likely that the starting position for the English lawyer will be to approach the test with similar preconceptions of fairness as found in the unfairness test of B2C contracts. The similarity of text in Arts II.-9:403 and II.-9:404 makes it likely that the two tests will be initially understood in a similar fashion. This being said, however, an English lawyer will clearly take into account the status of the parties as one factor when assessing fairness. As a result, for an English lawyer it is self-evident that the level of protection will be different.

Is it therefore feasible to adopt either the English or German position for interpreting Art II.-9:404 DCFR? The Comments to Art II.-9:404 DCFR suggest that a German lawyer would indeed be misled by his nationally formed preconceptions if he assumed

[98] DCFR Art II.-9:404 Comment B.

[99] See eg K Riesenhuber, 'Die Inhaltskontrolle im Common Frame of Reference (CFR) für ein Europäisches Privatrecht' in K Riesenhuber and IK Karakostas (eds), *Inhaltskontrolle im nationalen und Europäischen Privatrecht* (Berlin: de Gruyter 2009) 49, 74.

[100] Although, see s 6(1) UCTA 1977.

that the similar formulation in Arts II.-9:403 and 404 DCFR point to an identical standard of fairness:

> The criteria of the fairness test under this Article are identical to the criteria used in II.-9:403 [...]. Thus, the relevant comments to that Article apply accordingly. However, it has to be borne in mind that in the cases covered by the present Article the "content control" is not justified by the assumption of unequal negotiation power between a business and a consumer but by the assumption that the use of standard terms drafted in advance by one party enabled the party supplying these terms to restrict the other party's contractual freedom. This difference in the justification of the judicial control may lead to a difference in the application of the fairness test between II.-9:403 and II.-9:404.[101]

From a German point of view it is unfortunate that this difference is not reflected in the text of Art II.-9:404 DCFR, since it carries the risk that lawyers from jurisdictions which do not adopt different fairness tests for the two situations will simply interpret the DCFR with the assumption that it follows a similar route. Furthermore, from a German point of view, it is regrettable that the authors of the Comments were not more specific on the differences between the two tests. A German lawyer will not know what these differences are.

The English lawyer would have a stronger point when arguing that it is his understanding that should be adopted for the interpretation of Art II.-9:404 DCFR. The definition of fairness may be similar and yet still leave differences in its application, since the status of the parties is one factor that needs to be considered when assessing the unfairness of a contract term. However, one may still hesitate. Firstly, from the English perspective the status of the parties will most probably be a factor which should be taken into account via Art II.-9:407 DCFR. Yet the status of the parties is not referred to in Art II.-9:407. And secondly, the Comments to Art II.-9:404 DCFR point to a different justification of the judicial content control. There seems to be a fundamental difference between Arts II.-9:403 and 404 DCFR. This difference in principle would not be reflected by the English perspective.

(3) The meaning of unfairness in contracts between businesses

In Art II.-9:405 DCFR we find the provision on the fairness control in contracts between businesses:

> A term in a contract between businesses is unfair for the purpose of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

Article II.-9:405 DCFR underwent important changes in the FS, but further modifications to the provision both in the FS 2nd and in the proposed CESL bring it back closer to the text of the DCFR. Article 85(1) FS provides:

[101] DCFR Art II.-9:404 Comment C.

> A term in a contract between businesses is unfair for the purpose of this Section only if: (a) it is a term forming part of not individually negotiated terms supplied by one party; (b) it significantly disadvantages the other party; and (c) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

Article 86 CESL provides:

> In a contract between traders, a contract term is unfair for the purposes of this Section only if: a) it forms part of not individually negotiated terms [...] and b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

In respect of all these provisions there is little risk that a German lawyer would approach them with nationally formed preconceptions.[102] The differences between them and German law are too significant.[103] German courts apply very much the same standards when assessing unfairness in B2B contracts and in B2C transactions. After all, the text of the general clause of fairness control in § 307(1) BGB makes no difference between the two situations. Furthermore, German courts also apply the grey and black lists of §§ 308–309 BGB to B2B contracts. The BGB would allow a different interpretation. § 310(1) BGB states that these lists are not applicable to B2B contracts. Yet according to the (controversial) case law, both lists nevertheless have an indicative effect even in contracts between businesses.[104] Furthermore, § 310(1) BGB also demands that business practices and customs be taken into consideration when assessing fairness in B2B contracts. Yet this has not led to a marked difference in the application of the general clause of § 307 BGB in B2C transactions on the one hand and B2B contracts on the other hand. One main effect of taking business practices and customs into consideration is that they may neutralize the indicative effect of the grey and black lists in the B2B context.[105] The only other significant difference is that with B2B transactions, only standard contract terms are subjected to the fairness control, whereas in B2C contracts the content control extends to all contract terms not individually negotiated.

The reason it is unlikely that a German lawyer will approach the provisions of the DCFR, the FS, and the proposed CESL with national preconceptions turns on the significance of business practices. Article II.-9:405 DCFR, Art 85(1) FS, and Art 86 CESL make clear that it is not the default rules which have a *Leitbildfunktion* but rather that it is good commercial practice which does.[106] In comparison with Art II.-9:405 and Art 86 CESL, however, Art 85(1) FS adds that the deviation from good commercial practice contrary to good faith and fair dealing must significantly disadvantage the

[102] See, however, F Graf von Westphalen, 'AGB-rechtliche Reformbestrebungen und das Europäische Kaufrecht' NJOZ 2012, 441, 445–9. See also Möslein (n 29) 283–5; Wendehorst (n 47) 104.

[103] On the following see Staudinger/Coester (2006) § 307 para 14. From the case law see eg BGH 19 September 2007, NJW 2007, 3774.

[104] See eg BGH, (n 103), and Staudinger/Coester (2006) § 307 para 14.

[105] See eg BGH, (n 103), and MüKo/Basedow § 310 para 10.

[106] For a detailed analysis see P Hellwege, 'UN-Kaufrecht oder Gemeinsames Europäisches Kaufrecht?' (n 63) 226–8.

other party. To recognize a *Leitbildfunktion* of good commercial practice for the purpose of the fairness control of standard contract terms is, as far as we can see, novel in European private law.

From the English perspective, it is also likely that the fairness tests in the DCFR, FS, and the proposed CESL will be given an autonomous interpretation since they differ considerably from the English approach to terms in B2B contracts. In England, the regulatory background for the control of terms in business contracts is rather piecemeal. This position largely stems from English law's desire to maximize commercial freedom of contract, an approach which generally outweighs any arguments which might support the need for a more extensive framework of protection for businesses faced with the problem of unfair terms.

Between the two statutory regimes in UCTA and the UTCCR, only the former has any implications for the control of terms in B2B contracts and, even here, control is limited, owing to UCTA's restricted application to exclusion and limitation of liability clauses. In brief, UCTA applies to B2B contracts unless otherwise stated in the Act, and either renders ineffective those clauses which attempt to restrict liability for death or personal injury (s 2(1) UCTA or, in the case of other loss or damage, subjects them to a test of reasonableness (s 2(2) UCTA). With respect to breach of contract, control over the exclusion or restriction of liability in B2B contracts will only be exercised where the term is contained in one party's written standard terms of business (s 3(1) UCTA), and again must satisfy the test of reasonableness (s 3(2) UCTA).

This is not the place to give a full account of the terms that UCTA controls in B2B transactions;[107] instead, the point is to emphasize that English law has no *general* test for controlling B2B contracts, and the piecemeal control that it does exercise is far removed from the general fairness tests that we find in the DCFR, FS, and the proposed CESL. One would therefore expect that the English lawyer would approach the provisions contained within these instruments without any deeply-rooted assumptions as to their meaning.

It should be added that even if the Law Commission's recommendations of 2005 are implemented,[108] this conclusion will still be valid since terms in B2B contracts will be broadly subject to the same elements of control as found within UCTA 1977.[109] One modification is that in contracts where one of the parties is a 'small business',[110] any non-negotiated, 'non-core' term that is included within one party's written standard terms of business and which is detrimental to the recipient of the terms must satisfy the fair and reasonable test.[111] Although this means that B2B contracts where one of the parties is a 'small business' would be subject to a general test, it is clear that both the scope of application and the standard of judicial control for B2B contracts in the Draft Bill are vastly different from the general fairness tests that we find in both the DCFR

[107] See also ss 3(2)(b)(i) and (ii), s 6(1) and (3), and s 7(3) UCTA 1977.

[108] See the consultation process on Unfair Terms launched in 2002 (n 89) and completed in 2005: Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com No 292, Scot Law Com No 199, 2005).

[109] This detail can be found in Clause 9 of the Draft Bill.

[110] Those businesses with 9 or fewer employees (Clause 27(1) of the Draft Bill).

[111] See Clause 11 of the Draft Bill.

and FS. Again, therefore, one would expect the English lawyer to approach the DCFR, FS, and the proposed CESL free from nationally derived assumptions about their meaning.

(4) Factors to be taken into account in assessing unfairness

Article II.-9:407(1) DCFR states that when assessing the unfairness of a contractual term under Arts II.-9:403 to II.-9:405 DCFR regard is to be had, among other things, to the circumstances prevailing during the conclusion of the contract. Articles 82, 85(2) FS and Arts 83(2)(c), 86(2)(b) CESL contain identical provisions. They all follow Art 4 (1) of the Unfair Contract Terms Directive and therefore the provisions of the FS and the proposed CESL do not necessitate separate discussion.

Originally, German law took a different approach. The fairness of standard terms was to be assessed in a typifying, abstract way.[112] That meant that the individual circumstances prevailing during the conclusion of the contract were of no importance. When implementing the Unfair Contract Terms Directive, German law had to be changed. We find the respective provision in § 310(3) BGB:

> With contracts between a business and a consumer (consumer contracts) the rules in this title [§§ 305–310] apply with the following modifications: [...] 3. when assessing the unreasonable disadvantage under § 307(1) and (2) the circumstances surrounding the formation of the individual contract have to be taken into account.

§ 310(3)(3) BGB is understood to modify the original German law only for consumer contracts. With other contracts, in particular with B2B and C2C transactions, the unreasonable disadvantage is still assessed in a typifying, abstract way. And also, with B2C transactions the German literature and German courts still adhere to the original position of German law. The predominant view holds that the fairness control always starts with an abstract and typifying assessment of the fairness of the term. In a second, and only in a second, step regard may be paid to the individual circumstances of the case.[113]

For English law, the guidelines for application of the fairness test offered in these instruments do not appear problematic. The 'unprincipled', casuistic approach of English law means that one looks at the particular circumstances of each individual situation. The notion of 'fairness' will only have meaning when it is applied to the case at hand. Since Art II.-9:407 DCFR finds its origins in the Directive, a similar provision can be found in Reg 6(1) UTCCR. But, we also find similar guidelines to assist with the assessment of 'reasonableness' under UCTA. Here, Schedule 2 lists a number of factors to which regard is to be had. They strongly resemble those that are found in Recital 16 of the Directive. Indeed, there is a 'profound similarity in the two tests [...]'.[114] In

[112] See MüKo/Basedow § 310 para 77–8. From the rich case law, see eg BGH 8 October 1986, NJW 1987, 487; BGH 9 February 1990, NJW 1990, 1601. Even though neither the AGBG nor the BGB explicitly require such a typifying and abstract approach it is clear that the legislator was working on the assumption that this is the correct approach, see BT-Drs 13/2713, 7–8.

[113] M Stoffels, *AGB-Recht* (2nd edn, Munich: CH Beck 2009) paras 478–9. From the case law, eg, BAG 23 September 2010, NJW 2011, 408; OLG Frankfurt 17 November 2000, NJW-RR 2001, 780.

[114] *Chitty on Contracts* (30th edn, London: Sweet and Maxwell 2008) para 15–090.

addition, English law's 'contextual' approach is favoured in recent reform proposals. The Law Commission recommends that the terms should be assessed according to all the circumstances in existence at the time the contract was made.[115] Clause 14(4) of the Draft Bill contains a non-exhaustive list of factors to be taken into account when assessing whether a term is fair and reasonable.

Again there is the risk that English and German lawyers will approach the DCFR, the FS, and the proposed CESL from their respective national backgrounds. Whereas an English lawyer will assume that the consideration of the concrete circumstances prevailing during the conclusion of the contract is most natural, a German lawyer will consider these circumstances only in a second step. Again the German position finds support in the Comments to the DCFR:

> As the unfairness test starts from an abstract assessment of an individual term, the "circumstances prevailing during the conclusion of the contract" might only influence the result of the test in exceptional cases.[116]

But again, the Comments are not binding. They only help in interpreting the rules. Thus, one may ask whether the Comments take the correct approach. We have already noted that the Comments to many Articles in the DCFR are, at least in part, based on the Comments to the ACQP[117] and that the Comments to the respective Arts 6:101–306 ACQP were authored by two German lawyers. Again, we find in the Commentary to Art 6:301 ACQP a similar statement:

> Consequently, the present Article usually requires an abstract assessment of the unfairness of a term itself according to its content. [...] As far as the provision refers to the specific circumstances at the conclusion of contracts, this may, in some cases, justify modifying the result of the initial abstract assessment.[118]

Is it perhaps that the authors of these comments, too, fell for their nationally framed preconceptions? Furthermore, such an interpretation of Art II.-9:407(1) DCFR does not receive any support in the wording of this article. How does German law justify its approach? The German literature argues that standard terms are themselves aimed at regulating the individual case in an abstract and typifying manner. For this reason the assessment of fairness needs to follow an abstract and typifying approach, too.[119] Yet, the object of Art II.-9:403 DCFR is also terms which do not form part of standard terms. Thus this argument does not apply. Still, there is some force to the German position. In everyday contracts regulated by standard terms, often no individual circumstances will prevail. In practice, the fairness of standard terms will indeed by assessed in an abstract way. This is not done as a matter of principle but simply because individual circumstances are missing.[120]

[115] See n 108. [116] DCFR Art II.-9:407 Comment B.
[117] See the quotation to and the reference in n 96.
[118] ACQP (Contract II) Art 6:301 Commentary B 3, § 13.
[119] MüKo/Basedow § 310 para 78.
[120] Hellwege (n 2) 580.

(5) The rationale underlying the fairness control

There has been consensus among European private lawyers that the fairness control of the Unfair Contract Terms Directive reacts to an inequality of bargaining power.[121] The consumer, as the vulnerable party to the contract, needs protection. The Commission avers that, in addition, terms not individually negotiated also have the potential to undermine 'the legal and economic order as a whole'.[122] Thus, there seems to be a second rationale underlying the fairness control of the Directive. The most recent literature follows a similar route by alleging that the fairness control is a reaction to market failure.[123]

Among German scholars, the rationale underlying the fairness control has always been and continues to this day to be hotly contested.[124] Today, two rationales dominate the discussion. Many authors believe that the fairness control was introduced to remedy unequal bargaining powers.[125] Others argue that the fairness control reacts to a market failure which is caused by information asymmetry.[126] And, according to some, one does not have to avow oneself to one single rationale; there may be a bundle of reasons justifying judicial fairness control.[127]

In England, debate on the philosophy that underpins substantive control over terms has predominantly focused on the notion of 'inequality of bargaining

[121] P Nebbia, *Unfair Contract Terms in European Law* (Oxford: Hart 2007) 21; S Weatherill, *EU Consumer Law and Policy* (Cheltenham: Elgar 2005) 115; P Nebbia and T Askham, *EU Consumer Law* (2nd edn, Oxford: OUP 2004) 255; N Reich and HW Micklitz, *Europäisches Verbraucherrecht* (4th edn, Baden-Baden: Nomos 2003) 493–4, 498. See also ECJ Case C-168/05 *Mostaza Claro v Centro Móvil Milenium* [2006] ECR I-10421 [25]; ECJ Case C-372/99 *Commission of the European Communities v Italian Republic* [2002] ECR I-819 [14].

[122] Commission (n 92) 13.

[123] H Eidenmüller, 'Privatautonomie, Verteilungsgerechtigkeit und das Recht des Vertragsschlusses im DCFR' in R Schulze, C von Bar, and H Schulte-Nölke (eds), *Der akademische Entwurf für einen gemeinsamen Referenzrahmen* (Tübingen: Mohr Siebeck 2008) 73, 92–3; H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner, and R Zimmermann, 'Towards a Revision of the Consumer Acquis' (2011) 48 CMLR 1077, 1087–8; HB Schäfer and PC Leyens, 'Judicial Control of Standard Terms and European Private Law' in P Larouche and F Chirico (eds), *Economic Analysis of the DCFR. The work of the Economic Impact Group with CoPECL* (Munich: Sellier 2010) 97–119. See also HW Micklitz, 'Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts' and AN Hatzis, 'An Offer You Cannot Negotiate' in H Collins (ed), *Standard Contract Terms in Europe* (Alphen aan den Rijn: Kluwer Law International 2008) 19, 32 and 43, respectively. For a fuller account see Jansen (n 8) 83–90.

[124] For a full account see Hellwege (n 2) 540–63.

[125] Stoffels (n 113) para 81; Wolf/Lindacher/Pfeiffer Introduction para 4, § 307 para 1; P Bülow and M Artz, *Verbraucherprivatrecht* (3rd edn, Heidelberg: CF Müller 2011) para 503; Erman/Roloff Introduction to § 305 para 1; Staudinger/Schlosser (2006) Introduction to § 305 para 3; Ulmer/Brandner/Hensen/Fuchs Introduction to § 307 para 26; K Larenz and M Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (9th edn, Munich: CH Beck 2004) para 2.49, 43.1; B Dauner-Lieb, *Verbraucherschutz durch Ausbildung eines Sonderprivatrechts für Verbraucher* (Berlin: Duncker und Humblot 1983) 72.

[126] MüKo/Basedow Introduction to § 305 para 5; T Schlösser, 'Die formularvertragliche Regelung der Durchführung von Schönheitsreparaturen aus rechtsökonomischer Perspektive' Jura 2008, 81–2; HB Schäfer and C Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th edn, Berlin: Springer 2005) 513; M Adams, *Ökonomische Theorie des Rechts* (2nd edn, Frankfurt am Main: Lang 2004) 119; H Kötz, 'Der Schutzzweck der AGB-Kontrolle' JuS 2003, 211. See also Stoffels (n 113) para 85; Erman/Roloff Introduction to § 305 para 1; Ulmer/Brandner/Hensen/Fuchs Introduction to § 307 para 34; Staudinger/Coester (2006) § 307 para 3.

[127] This is alleged eg by C Lass, 'Zum Lösungsrecht bei arglistiger Verwendung unwirksamer AGB' JZ 1997, 68. See also L Leuschner, 'Gebotenheit und Grenzen der AGB-Kontrolle' AcP 207 (2007) 493.

power',[128] a notion which has justified the control of terms since the enactment of UCTA in 1977.[129] The concern with inequality of bargaining power is linked to a more general concern with standard form contracts. As Lord Reid stated in the 1960s, terms in standard form contracts raise two sets of related problems:

> [i]n the ordinary way the customer has no time to read [the terms], and if he did read them he would probably not understand them. And if he did understand [the terms] 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 to bargain.[130]

The question of the rationale underlying fairness control is controversial. There is again the risk that both English and German lawyers simply take it for granted that the DCFR, the FS, and the proposed CESL follow the position which they favour for their respective national laws.[131] This risk is even greater because we find no explicit discussion of the rationale underlying the fairness control in the Comments to the DCFR. And where the Comments refer to the policy considerations underpinning certain rules, they are sometimes beside the point and confusing.

By way of example, according to Art II.-9:406(2) DCFR, Art 78(2) FS, and Art 80(2) CESL, the fairness control does not extend to the adequacy or appropriateness of the price to be paid. It makes perfect sense that the price is excluded from the fairness test, and we find equivalent rules in Germany (§ 307(3) BGB) and in England (Reg 6(2)(b) UTCCR 1999). There are a number of factors on which a person will base his decision of whether or not to contract. Of these, the price is the most important factor. Even in the case of an unequal bargaining position, the weaker party will usually refrain from entering into the contract if the price which the other party demands is unfair. The price will be influenced by market mechanisms. As a consequence, the weaker party cannot apply for judicial control of the contract price after entering into such contract.[132] Yet one of the explanations given in the comments to Art II.-9:406(2) DCFR is the following: 'Usually, the choice of the parties to enter into an exchange of goods and services for a certain price will be made individually so that there is neither room nor need for judicial control'.[133]

This Comment does not directly address the policy considerations which the authors of the DCFR had in mind when drafting the sections on fairness control. However, the policy reasons for excluding the price from the fairness control are discussed. And we

[128] Justification for control is also reinforced by arguments based on market failure, see M Chen-Wishart, *Contract Law* (Oxford: OUP 2010) 461.

[129] eg UCTA 1977 provides that one of the guidelines for the application of the reasonableness test under Schedule 2 is 'the strength of bargaining positions of the parties relative to each other'. This is explicit recognition of inequality of bargaining power.

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

[131] Compare Möslein (n 29) 256–8. For further analysis see M Hesselink, 'Unfair Terms in Contracts Between Businesses' in R Schulze and J Stuyck (eds), *Towards a European Contract Law* (Munich: Sellier 2011) 131–47.

[132] See the explanation of this rule of MüKo/Wurmnest § 307 para 16; M Stoffels, 'Schranken der Inhaltskontrolle' JZ 2001, 844; Möslein (n 29) 272.

[133] DCFR Art II.-9:406 Comment A.

may deduce from these arguments the policy considerations in favour of fairness control. The quotation suggests that one party is in need of protection when no individual negotiations take place and that a fairness control is effectuated whenever such individual negotiations do not take place. But usually, the price is not open to individual negotiations. Electricity, water, gas, gasoline, mobile phones, groceries: everywhere, the consumer is exposed to prices that are determined by one party only and which are not open to negotiation. Following the explanation of Art II.-9:406(2) DCFR, these prices should be subjected to a fairness control.[134]

In addition, even with the given explanation of Art II.-9:406(2) DCFR it remains unclear why in NB2NB contracts and B2B transactions only standard terms are subjected to the fairness control and why it does not extend to all non-negotiated contract terms. Article II.-9:406(2) DCFR is not restricted to B2C contracts. The explanation given in the Comments to this Article should be of general application. However, this would mean that fairness control would also be justified in NB2NB and B2B transactions whenever no individual negotiations took place.

The approach adopted by Art 85(1)(a) FS and Art 86(1)(a) CESL are identical. Since there are no comments to these documents we may assume that they follow the same line as the Comments of the DCFR.

Furthermore, one could argue that the drafters of the DCFR were not guided by a clear idea as to the rationale underlying the fairness control. The Comments suggest that Arts II.-9:403 to II.-9:405 DCFR are underpinned by different policy considerations.[135] We may assume that the same is true for Arts 81 and 85 FS and for Arts 83(1) and 86(1) CESL. One might therefore question why some of the provisions in the sections on unfair terms apply to all definitions of unfairness. Let us return to Art II.-9:407 DCFR which states that 'when assessing the unfairness of a contractual term [...] regard is to be had [...] to the circumstances prevailing during the conclusion of the contract [...]'. Article II.-9:407 applies to both Arts II.-9:403 and II.-9:405 DCFR. And we find similar rules in Arts 82 and 85(2) FS and Arts 83(2) and 86(2) CESL. If we assume that the idea underlying Art II.-9:403 DCFR, Art 81 FS, and Art 83(1) CESL is that there is an unequal bargaining position, it is imperative that the actual bargaining position is taken into account. Yet if Art II.-9:405 DCFR, Art 85 FS, and Art 86(1) CESL are based on a different rationale, one may question why we should also observe these concrete circumstances. If these provisions are, for example, underpinned by the assumption that unfair standard terms in B2B contracts have the potential to undermine the 'legal and economic order as a whole', then one could argue that we should only assess fairness in an abstract way. The concrete circumstances of a single case are unimportant for the legal and economic order as a whole.[136]

Thus, we may conclude that there is no open or systematic discussion of the policy considerations underlying the fairness control in the Comments to the DCFR. Where

[134] See also the criticism of Hesselink (n 131) 133.

[135] DCFR Art II.-9:404 Comment C; DCFR Art II.-9:405 Comment A. However, Schulze/Mazeaud/Sauphanor-Brouillaud Art 7 para 1, Art 83 para 7 and Art 86 para 6 assume that Arts 83 and 86 CESL are both reactions to an unequal bargaining power. Möslein (n 29) 258 identifies market failure as the rationale underlying Arts 83 and 86 CESL.

[136] Hellwege (n 2) 585.

there are hints at such policy considerations, they are not at all convincing. And the drafters do not seem to have been guided by a clear idea as to the rationale underlying the fairness control.[137]

This issue is important for our discussion of the interaction between the DCFR and the national legal systems. Since the Comments do not guide the reader as to the rationale underlying the fairness control, each reader will approach the rules with his nationally framed preconceptions when interpreting and applying the DCFR. Take just one example. We have already mentioned that the DCFR knows three different general clauses for a fairness control: one for B2C, one NB2NB, and one for B2B transactions. There is an obvious risk in drafting three exclusive general clauses by using three different legal concepts which do not work exclusively: the risk of gaps. And this risk has been realized.[138] There is no fairness control for terms in contracts between a business party and a person which is neither a business nor a consumer: Art II.-9:403 DCFR does not apply, as it is not a B2C contract. Article II.-9:404 DCFR does not apply since one of the parties is a business. And Art II.-9:405 DCFR does not apply because one of the parties is not a business. We may assume that this gap is not intended by the drafters; they simply have not thought of this case. Thus, we need to decide how to carry out a fairness control in such an instance. The most obvious thing to do is to draw an analogy and, thus, to apply Arts II.-9:403, II.-9:404, or II.-9:405 DCFR. In the proposed CESL we find a similar gap. It only deals with the fairness control in B2C and in B2B transactions. However, a literal reading of Art 7 of the proposed Reg-CESL suggests that the proposed CESL also covers contracts between a business as seller and a person as buyer which is neither a business nor a consumer.[139] The proposed CESL is silent on the fairness control of contract terms in such contracts. Again, the most obvious thing to do is to draw an analogy to Arts 83–85 or 86 CESL.[140] However, in order to know which Article to apply we need to know the policy consideration of which Article is most suitable for our case. It is easy to foresee that the answers will be different when lawyers from different jurisdictions approach the problem.

(b) The proposed CESL as an optional instrument

(1) The limited scope of application of the proposed CESL as compared to the DCFR

We have already assessed the impact of the limited scope of application of the proposed CESL compared to the DCFR on the question of incorporation of retention of title clauses.[141] We now need to examine how the limited scope of the optional instrument will affect the fairness control of such clauses.[142] We have three possibilities.

[137] See also the critique by M Maugeri, 'Is the DCFR ready to be adopted as an Optional Instrument?' (2011) 7 ERCL 219, 223.

[138] Hellwege (n 55) 683.

[139] See pp 437–8 of this volume and the reference in n 63.

[140] Hellwege, 'UN-Kaufrecht oder Gemeinsames Europäisches Kaufrecht?' (n 63).

[141] See pp 436–7 of this volume.

[142] See also H Eidenmüller, N Jansen, EM Kieninger, G Wagner, and R Zimmermann, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht' JZ 2012, 269, 278–9.

black list in German law in § 309 BGB is much longer than the German grey list in § 308 BGB. By contrast, the black list of Art 84 CESL is much shorter than the grey list of Art 85 CESL. A more detailed analysis seems to confirm this impression, at least initially. A clear example is provided by Art 85(a) CESL according to which a 'term is presumed to be unfair [...] if its object or effect is to [...] impose on the consumer a burden of proof which should legally lie with the trader'. We find the respective provision of the BGB not in the grey list of § 308, but in the black list of § 309(12)(a). However, with other provisions we find differences in detail which make it hard to compare the level of protection. For example, we find in the grey list of Art 85(c) CESL the provision that a 'term is presumed to be unfair [...] if its object or effect is to [...] inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader'. Again, the corresponding provision in the BGB is to be found in the black list of § 309(3). However, it is restricted to claims that the consumer has against the business party and which are, for example, uncontested by the business. Furthermore, Art 85(c) CESL not only covers an exclusion of the right to set-off but also its limitation. In contrast, § 309(3) BGB is restricted to an exclusion of the right to set-off. The picture is even further complicated by the fact that the courts are permitted to fall back on the general clause of Art 83 CESL or of § 307 BGB in case the black list or the grey list do not apply. Thus, a detailed analysis of these many and subtle differences is impossible in this contribution.

Let us look closely at one more example. The optional instrument was first thought to apply to electronic distance consumer sales transactions. With such contracts, terms that limit or exclude the business's liability for damages are of great importance. When comparing the resulting standard of protection with regard to such clauses in the proposed CESL and German law we must remember, however, that in the sale of consumer goods a business cannot exclude or limit his liability. We find the respective rules in Art 7 of the Consumer Sales Directive, Art 108 CESL, and § 475(1)(1) BGB. Thus, there is no marked difference in the level of protection between the CESL and German law.

We may therefore conclude for B2C transactions that the difference between the fairness control in the proposed CESL and the fairness control in the BGB are unlikely to result in a markedly different level of consumer protection.[150]

Turning to B2B transactions, it seems to be more advantageous for the supplier of standard terms to contract under the optional instrument than under German law:[151] § 310(1)(1) BGB tells us that the grey list of § 308 BGB and the black list of § 309 BGB do not apply to the fairness control when the other party to the contract is a business or a public body. Thus, in B2B transactions only the general clause of fairness control of § 307(1)(1) BGB and its substantiations in § 307(1)(2) and § 307(2) BGB are applicable. One would assume that as a consequence there exists a marked difference between the fairness control in B2C and in B2B contracts. This assumptions finds support in § 310 (1)(2) BGB: 'reasonable account must be taken of commercial customs and practices'

[150] Ayad and Schnell (n 95) 1492.

[151] See also Ernst (n 47) 103–4; Ayad and Schnell (n 95) 1492. Graf von Westphalen (n 102) 445–9 argues the opposite, that there will not be any differences in the standards of control.

when assessing unfairness, especially in B2B transactions. However, § 310(1)(2) BGB states that a standard term which is unfair under §§ 308 or 309 BGB in a consumer contract may also be held unfair under § 307 BGB in a B2B transaction. And the courts have followed the route opened to them by § 310(1)(2)(1) BGB: they apply more or less the same standards to B2C and to B2B transactions.[152] They have thereby turned the lists of § 308 and § 309 into an indicative list for B2C transactions.[153] This state of affairs is currently seen to be highly problematic by many, who argue that the courts should instead define fairness in B2C and B2B transactions differently and apply stricter standards to the B2C transactions.[154]

On the whole, a business party may hope that the fairness control in B2B contracts is not as strict under the proposed CESL as under German law. As a consequence, the stronger party in a B2B transaction may offer to contract exclusively under the proposed CESL if it can be chosen in internal B2B transactions, too. The proposed CESL would have the potential to replace German law.[155] Yet stronger parties can currently only hope that it allows them to evade a stricter regime: the eventual outcome depends very much on what the courts will make of the provisions of the optional instrument.

There is a further point which might make it more attractive for businesses to choose the proposed CESL in B2B transactions. According to Art 86(1)(b) CESL, commercial practice is not merely taken into account when assessing unfairness as under § 310(1)(2) BGB. Good commercial practice is also the point of comparison when assessing unfairness in the context of B2B contracts.[156] By contrast, in German law the point of comparison is the default rules of the BGB.[157] That greater importance of commercial practice may turn out to be a more liberal approach to content control.

There are, however, two points which might at first sight make it unattractive to choose the proposed CESL in B2B transactions. First, Art 86(1)(a) CESL extends the fairness control to contract terms not individually negotiated, whereas Art 307 BGB is restricted to standard contract terms in the context of B2B contracts. And secondly, in the B2B context, fairness is assessed in an abstract and typifying way under German law.[158] In contrast, Art 86(2)(b) CESL demands that the 'circumstances prevailing during the conclusion of the contract' have to be considered. However, these differences seem to be of little practical importance.[159]

We may conclude that the fear on the part of German lawyers that the proposed CESL has the potential to replace German law altogether is unfounded, at least for B2C

[152] See n 103. [153] MüKo/Basedow § 310 para 7–8.

[154] See eg R Koch, 'Das AGB-Recht im unternehmerischen Verkehr' BB 2010, 1810–15.

[155] However, we should not forget that in B2B transactions the choice of a national law which has even lower standards of protection might be even more desirable for the stronger party, see JW Rutgers, 'An Optional Instrument and Social Dumping Revisited' (2011) 7 ERCL 350, 358–9; S Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?' (2010) 6 ERCL 143, 178 (with further references to the German literature).

[156] See pp 448–9 and 456 of this volume.

[157] See p 442 of this volume.

[158] See p 450 of this volume.

[159] See p 451 of this volume.

transactions. Equally, there is no reason why the optional instrument will be of little importance. Even though there are a number of differences between the fairness control in German law and the proposed CESL, these do not favour one side only. The picture in B2B contracts is a different one. With them, the supplier of terms not individually negotiated may have the hope that the fairness control of the proposed CESL turns out to be less strict.

In turning to English law, if we are to evaluate the extent to which the optional instrument is likely to be chosen to govern internal transactions (ie those that would otherwise be governed under English law), the standards of protection between the proposed CESL and equivalent rules under English law need to be compared. Within the confines of this chapter it is not possible to enter into detailed discussion of the substantive differences between levels of protection and so discussion will be restricted to some general observations.

In relation to B2C transactions and the general test of unfairness, as we have seen, Art 83(1) CESL follows the wording of Reg 5(1) UTCCR 1999,[160] and it seems reasonable to conclude that the general test of fairness is unlikely to be a factor in the trader's decision of whether to choose the optional instrument or not.

By contrast, an area in which the proposed CESL would seem to offer a higher standard of protection for the consumer can be identified in Art 83(2)(a) CESL. This provision provides that one of the factors which needs to be taken into account when assessing fairness is whether the trader complied with the duty of transparency as set out in Art 82 CESL. As English law currently stands,[161] breach of the duty of transparency is not generally relevant for the assessment of fairness, except in the case of so-called 'core terms', which lose the exemption from fairness control that would otherwise operate if the terms were expressed in plain and intelligible language.[162] The only other consequence for breach of the transparency requirement is a *contra proferentem* construction.[163] In dealing with transparency as a vital aspect of fairness, the proposed CESL clearly goes further than English law. Whilst *by itself* this is unlikely to wholly determine the trader's choice over whether to opt in to the proposed CESL, taken together with the factors to be discussed in the subsequent paragraphs, it adds to the impression that the optional instrument will not be the instrument of choice for traders in B2C contracts.

There is a further difference in the level of protection between the two regimes which lends support to the conclusion that the instrument may lack appeal for traders in B2C contracts. This relates to the proposed CESL's use of a 'black list' of proscribed terms (Art 84 CESL) in tandem with a 'grey list' or, more precisely, a list which includes terms which are rebuttably presumed to be unfair (Art 85 CESL). In contrast, under English law, Schedule 2 of the UTCCR 1999 (following the Unfair Contract Terms Directive) only includes an indicative list of terms which *may* be considered unfair. This

[160] See p 443 of this volume.

[161] The Law Commission (n 108) has recommended reform of the present position in the context of its review of the law on unfair terms: see Draft Bill Clause 14(1).

[162] Reg 6(2) UTCCR 1999.

[163] Reg 7(2) UTCCR 1999.

indicative list is also known as a 'grey' list but seems to have a different emphasis from that of the CESL: whilst the precise status of the list is unclear, the general consensus is that the consumer does not benefit from a presumption and would instead need to show that the clause was unfair. Two points are worthy of emphasis here, since they illustrate the higher level of protection that the proposed CESL offers to the consumer in comparison with English law. First, terms that fall within the purview of Art 84 CESL will always be considered unfair, thereby precluding the trader from arguing that, in the particular circumstances, the term is indeed fair. English law has never entertained the idea of such a 'black list' and it was not discussed as a relevant factor in the consultation over reform of this area of law.[164] Of course, it should not be forgotten that going beyond UTCCR 1999, UCTA 1977 has the potential to automatically render certain clauses inapplicable, but such control only operates in the narrow domain of those clauses which attempt to exclude or limit the liability of the business for death or personal injury.[165] Article 84 CESL embraces a far broader range of clauses within its ambit and therefore offers a far more stringent control over terms. The second point worthy of emphasis is that even when the term would fall within the 'grey list' of either the proposed CESL or UTCCR 1999, the consumer's position under the optional instrument is also favourable since the burden of proof falls on the trader to show that the clause is fair. As mentioned, under English law the consumer needs to show that the clause is unfair. Both of these factors may well mitigate against the trader's use of the optional instrument.

In turning to the detail of the lists, we can observe that some terms included within the indicative list in UTCCR 1999 have been 'elevated' into the 'black list' of Art 84 CESL. For example, Schedule 2 para 1(q) of the UTCCR 1999, concerning clauses which exclude or restrict the consumer's right to take legal action, can be found in Art 84(d) CESL.[166] And para 1(a) of the UTCCR 1999, concerning clauses which attempt to exclude or limit liability for death or personal injury, can also be found in Art 84(a) CESL. In practice, of course, it is highly unlikely that the clauses would be deemed fair, and thus their inclusion on a grey list would make little practical difference[167] except that the consumer would still need to show that they were unfair. Nevertheless, the tenor of the proposed CESL is certainly one that promises a higher level of protection for the consumer than under English law and this may well influence the trader's choice whether to use the instrument.

In relation to B2B contracts, a general observation relates to the fact that the control of terms in B2B contracts is by means of a general test of unfairness (Art 86 CESL), a practice that, as we have seen above, is not familiar to English law. Regardless of the level of protection offered by Art 86 CESL,[168] the mere fact that terms not individually negotiated in B2B contracts may be subject to challenge under this general clause might

[164] The Law Commission (n 108), para 3.108, has not recommended extending protection beyond an indicative list of terms.

[165] s 2(1) UCTA 1977.

[166] Strictly speaking, this clause has been separated and its elements have been shared between both the black list of Art 84(d) and the grey list of Art 85(a) CESL.

[167] Moreover, para 1(a) would be caught by s 2(1) UCTA 1977 and automatically rendered ineffective.

[168] As we have seen, the clause must 'grossly deviate from good commercial practice, contrary to good faith and fair dealing' thereby suggesting that control is of a relatively lenient nature.

prove a determinative factor which renders the optional instrument less attractive than English law for domestic commercial transactions. This conclusion follows not only because the general clause is likely to lead to uncertainty as to whether a clause might be caught within its ambit and thereby rendered ineffective. But it also relates to the general clause's broader reach in comparison to English law. Under English law the guiding principle is that of contractual freedom, and this is seen in its most heightened form in the context of commercial contracts. Control over terms is therefore of a limited nature. First, terms in a B2B contract would be subject to control where they attempted to exclude or limit liability for negligence[169] or for breach of contract, where the clause was contained within 'written standard terms of business'.[170] In addition to this statutory control, the common law operates a control of terms through rules against the use of penalty clauses, including in B2B contracts. However, in practice, in commercial contracts control is minimized by the (flexible) classification of the clause as a (valid) liquidated damages clause rather than an (invalid) penalty clause.[171] The limited nature of English intervention in B2B contracts would in this way seem to offer a more attractive regime to the supplier of terms than the proposed CESL.

This admittedly brief survey seems to show that there are solid indicators that traders would find English law a more attractive legal system in the context of the control of standard terms in both B2C and B2B contracts than that offered by the proposed CESL.

(c) The DCFR, the FS, and the proposed CESL as toolboxes

In a fourth step we will now turn to the last form of interaction, that of the toolbox. We will focus on those provisions that depart from English and German law and which go beyond the *acquis communautaire.*

(1) The meaning of unfairness in contracts between businesses

Perhaps it is the definition of unfairness in B2B contracts which both German and English law should examine more closely. Article II.-9:405 DCFR defines unfairness for B2B contracts differently than Art II.-9:403 does for B2C transactions. The same is true for Arts 81 and 85 FS and Arts 83 and 86 CESL. A different definition of unfairness in B2B contracts could also help to distinguish between the different situations in German law.[172]

Although the approach of treating the fairness control in B2B transactions differently is attractive to English and German law, it does not seem advisable to follow Art II.-9:405 DCFR, which states that a term is unfair if it is 'of such nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing'. There is one significant difference between this Art II.-9:405 DCFR on the one hand and Art II.-9:403 and Art II.-9:404 DCFR on the other hand, and this

[169] s 2 UCTA 1977. [170] s 3 UCTA 1977.

[171] See L Miller, 'Penalty Clauses in England and France: A Comparative Study' (2004) 53 ICLQ 79.

[172] See however Schulze/Mazeaud/Sauphanor-Brouillaud Art 86 para 7, who are critical of the approach taken by the proposed CESL. They prefer a uniform approach.

difference will detract from Art II.-9:405 DCFR's suitability as a source of inspiration. It is no requirement for unfairness in the sense of Art II.-9:405 that the deviation from good commercial practice disadvantages the other party. And such a requirement of disadvantage to the other party does not follow from the requirement that the deviation needs to be contrary to good faith. It is not clear whether the requirement of disadvantage has been dropped deliberately in the drafting process. The Comments to Art II.-9:405 DCFR[173] state that the definition of unfairness is derived from Art 3(3) of the 2000 Late Payment Directive.[174] This Article refers to the disadvantage of the other party:

> Member States shall provide that an agreement on the date for payment or on the consequences of late payment which is not in line with the provisions of paragraphs 1(b) to (d) and 2 either shall not be enforceable or shall give rise to a claim for damages if, when all circumstances of the case, including good commercial practice and the nature of the product, are considered, it is grossly unfair to the creditor.

A deviation from good commercial practice will only suffice if the agreement is grossly unfair to the creditor. Thus, Art II.-9:405 DCFR needs to be clarified and indeed, it has undergone changes in the FS. Article 85(1)(b) FS requires a significant disadvantage to the other party. However, Art 87(1) FS 2nd then dropped again this requirement and it was not later re-inserted in Art 86(1) CESL.[175] For the said reasons, Art 86(1) CESL cannot stand as a model.

There are further problems with Art II.-9:405 DCFR, Art 85 FS, and Art 86 CESL. The function of these instruments as toolboxes is based on the assumption that they represent a European solution to a given problem. Yet, there is no general fairness control in the *acquis communautaire*. And there seems to be no consensus as to whether and as to how terms in B2B contracts should be exposed to a fairness control. Finally, the *Leitbildfunktion* of good commercial practice is unprecedented in European private law. In Art 3(3) of the 2000 Late Payment Directive, good commercial practice is only one factor which has to be taken into account when assessing fairness. It does not fulfil a *Leitbildfunktion*. Thus, it is unclear whether the approach taken can be said to be a common rule of Europe and it is open to question whether it represents the best rule.[176]

(2) Separating the problem of incorporation from the fairness control

Article II.-9:407(2) DCFR states that for 'the purpose of II.-9:403 [...] the circumstances prevailing during the conclusion of the contract include the extent to which the consumer was given a real opportunity to become acquainted with the term before the

[173] DCFR Art II.-9:405 Comment C.

[174] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions [2000] OJ L200/35 ('2000 Late Payment Directive'), now contained in Art 7(1) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1 ('2011 Late Payment Directive').

[175] Nevertheless, Schulze/Mazeaud/Sauphanor-Brouillaud Art 86 para 2 assume that the 2011 Late Payment Directive served as a model for Art 86 CESL.

[176] Critically on the use of good commercial practice see Maugeri (n 137) 221.

conclusion of the contract'. Neither German nor English law recognizes a similar rule, and both the FS and the proposed CESL are also missing identical provisions. Should German or English courts look to Art II.-9:407(2) DCFR when substantiating national law? Or should the German or English legislator introduce such a provision? We have our reservations.

Article II.-9:407(2) DCFR is a straightforward confusion of a content control with the control of whether terms are incorporated into the contract. Furthermore, the justification of Art II.-9:407(2) DCFR given by the drafters in the Notes is misconceived. Article II.-9:407(2) DCFR is said to be based on Annex 1(i) of the Unfair Contract Terms Directive.[177] Yet Annex 1(i) of the Unfair Contract Terms Directive only states that terms 'which have the object or effect of: [...] (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract' may be regarded as unfair. Thus, Annex 1(i) of the Unfair Contract Terms Directive does not rule that a term may be regarded as unfair to which the consumer is bound although he had no real opportunity of becoming acquainted with before the conclusion of the contract. However, this is how the drafters understand Annex 1(i) of the Unfair Contract Terms Directive as the Notes to Art II.-9:407 DCFR make clear: Annex 1(i) of the Unfair Contract Terms Directive 'provide[s] that a term irrevocably binding the consumer although he or she had no real opportunity of becoming acquainted with the content may be considered as unfair'.[178]

For the application of Annex 1(i) of the Unfair Contract Terms Directive we need a term which has not been individually negotiated and which has the effect of binding the consumer to *another* term with which he had no real opportunity of becoming acquainted with before the conclusion of the contract. It is the first term which may be regarded as being unfair. It is not the term which the consumer had no real opportunity of becoming acquainted with before the conclusion of the contract which may be unfair.[179] An example of Annex 1(i) of the Unfair Contract Terms Directive would be a term which irrefutably presumes that the consumer agrees to certain other terms. Thus, Art II.-9:407(2) DCFR is based on a misapprehension of Annex 1(i) of the Unfair Contract Terms Directive. Finally, the notes to Art II.-9:407 DCFR refer to Art 4(2)(b) of the Package Travel Directive[180] and to Art 5(1) of the Distance Marketing Directive.[181] However, neither provision deals with content control.

As a consequence, Art II.-9:407(2) DCFR cannot be said to be based on the *acquis communautaire;* it is neither a common nor a best rule in Europe. Hence, it is no

[177] DCFR Art II.-9:407 Notes 6–10.

[178] DCFR Art II.-9:407 Note 6. See Grabitz/Hilf/Pfeiffer A5 appendix, para 76; T Pfeiffer, 'Der Vertragsschluss im Gemeinschaftsrecht' in R Schulze, M Ebers, and HC Grigoleit (eds), *Informationspflichten und Vertragsschluss im Acquis communautaire* (Tübingen: Mohr Siebeck 2003) 103, 113.

[179] See Hellwege (n 2) 377–9.

[180] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59 ('Package Travel Directive').

[181] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16 ('Distance Marketing Directive').

candidate for inspiring the future development of English or German law and it is to be welcomed that the proposed CESL refrained from introducing a similar provision.

(3) The duty of transparency

The Unfair Contract Terms Directive recognizes a duty of transparency. Nevertheless, the provisions of the Directive are problematic. Article 5 of the Directive mentions the duty only with respect to written terms and it names as the only consequence in case of breach an interpretation *contra proferentem.*[182] Article 4(2) of the Directive makes clear that a breach is also of importance with regards to the fairness control, but it only expressly speaks of terms that relate to the definition of the main subject of the contract and of the adequacy of the price and remuneration. Thus, is the DCFR clearer on the scope of application of the duty and the consequences of its breach? And are the provisions of the DCFR therefore able to influence the legal development in the Member States for the better?

Article II.-9:402(1) DCFR states that terms not individually negotiated have to be drafted and communicated in plain, intelligible language. It is to be welcomed that Art II.-9:402(1) goes beyond Art 5 of the Unfair Contract Terms Directive in so far as it is not restricted to written terms.[183] However, Art II.-9:402(1) DCFR is misplaced in the section on unfair terms as it is of relevance not only for the fairness control but also, as the Comments make clear,[184] for the interpretation of terms. Thus, whereas Art 5 of the Unfair Contract Terms Directive gives the impression that the primary legal consequence of a breach of the duty of transparency is an interpretation *contra proferentem,* the DCFR, by placing the duty of transparency in Chapter 9, Section 4 of Book II, suggests that the primary role of the duty is to be found in the fairness control.

Article II.-9:402(2) then turns to the fairness control. In B2C contracts, a term not individually negotiated may be unfair simply because it is not drafted and communicated in plain, intelligible language. Yet, the transparency control as part of the fairness control is not restricted to B2C transactions. The duty of transparency has to be followed also in NB2NB and in B2B transactions. But with these contracts, the fact that the term is not in plain, intelligible language does not necessarily mean that it is to be considered unfair. Rather, the transparency of the term is only one factor which has to be taken into account when assessing the fairness of the term: Art II.-9:407(1) DCFR. Again, it is to be welcomed that the DCFR makes explicit that a breach of the duty of transparency may lead to an unfairness of a term.

However, it is the interaction between these articles that is problematic. If one reads Art II.-9:407(1) DCFR on its own, it seems possible to regard a term as unfair only because the supplier of it has breached the duty of transparency. However, if one reads Art II.-9:407(1) alongside Art II.-9:402(2) the latter seems to suggest that in NB2NB and B2B contracts breach of the duty of transparency is not sufficient in itself to make the term unfair but there always needs to be an extra element. The reason for this

[182] Riesenhuber (n 23) paras 619–20.
[183] DCFR Art II.-9:402 Note 1.
[184] DCFR Art II.-9:402 Comment C.

interpretation is that Art II.-9:402(2) DCFR explicitly states that in B2C contracts breach of the duty of transparency *may on that ground alone* render a term unfair. Such an interpretation seems to be problematic. Should the difference not be a gradual rather than a categorical one? Is it not possible to consider a term in NB2NB and in B2B transactions also unfair only because of a breach of transparency if this breach is grave? If we turn to the Comments to these articles we do not find any answers to these questions.

To summarize, the DCFR further develops the *acquis communautaire* with regard to the duty of transparency. Nevertheless the provisions of the DCFR do not, as yet, seem fit to positively influence the further legal development of the Member States.

Turning to the proposed CESL we see a different picture. Other than in Art 80(2) CESL, we find the duty of transparency in Art 82 CESL. Yet, this provision is restricted to B2C contracts. We do not find an equivalent duty for B2B transactions. It is thus unclear whether the duty of transparency extends to B2B transactions. For these reasons, it is unlikely that the provisions of the proposed CESL on the duty of transparency will inspire German or English law.[185]

(4) The effects of unfair terms

The legal consequences of unfairness are dealt with in Art II.-9:408 DCFR: an unfair term is 'not binding on the party who did not supply it'. Yet the remainder of the contract and the remainder of the terms remain valid unless it would be unreasonable. Article 79 CESL is phrased very similarly. It only refrains from introducing the requirement of reasonableness to uphold the remainder of the contract and thereby more closely follows Art 6(1) of the Unfair Contract Terms Directive. The Comments to Art II.-9:401 DCFR make clear that the DCFR does not opt for absolute invalidity but rather for relative invalidity,[186] and it is likely that the drafters of the proposed CESL also had relative invalidity in mind.[187] The choice for relative invalidity is in line with Art 6(1) of the Unfair Contract Terms Directive.

German law opts for a different grade of invalidity: §§ 307–309 BGB state that an unfair term is invalid (*unwirksam*), but what is meant is that this term is void. Should the German legislator rethink his choice and instead follow Art II.-9:408 DCFR? Again, we have our reservations.

Article II.-9:408 DCFR and Art 79 CESL are not consistent with Art II.-9:405 DCFR and Art 86 CESL. We have seen above that the wording of the latter provisions do not require that the term disadvantage one of the parties. The term just needs to grossly deviate from good commercial practice, contrary to good faith and fair dealing.[188] If the other party need not have been disadvantaged, one wonders why he should rely on the term not being binding on him. And more fundamentally, relative invalidity is the appropriate grade of invalidity only if the invalidity is introduced for the protection of

[185] See the criticism by Möslein (n 29) 275–7.
[186] DCFR Art II.-9:401 Comments; DCFR Art II.-9:408 Comments.
[187] And indeed that is how Art 79 CESL is already read by some: see Schulze/Mazeaud/Sauphanor-Brouillaud Art 79 para 2.
[188] See pp 462–3 of this volume.

one of the parties. We have seen that the rationale underlying the fairness control of the Unfair Contract Terms Directive is indeed to protect the weaker party in the situation of an inequality of bargaining powers. However, we have seen that there are other possible policy considerations that inform the current debate, such as the protection of the market as a whole.[189] In line with this policy consideration, the notion of relative invalidity would not be the appropriate grade of invalidity.

IV. Conclusion

The aim of this chapter has been to analyse the interaction of the rules on the control of standard contract terms between, on the one hand, the academic DCFR, the FS, and the proposed CESL and, on the other hand, English and German law. We have carved out four different forms of interaction.

1. Generally, there is a danger that any lawyer will approach international instruments with nationally rooted assumptions. The national legal background will form the context within which the reading of the international instrument takes place, despite the fact that these instruments call for an autonomous interpretation. This form of interaction is, of course, undesirable. In a first step we have identified those provisions of the DCFR, the FS, and the proposed CESL which are most likely to be approached from the national perspective. Our conclusion has been that both English and German lawyers will interpret these documents in rather different ways.[190] These findings are not surprising for two reasons. First, in the introduction we have highlighted that, for historical reasons, the national laws approach the control of standard contract terms very differently and that the harmonizing effect of the Unfair Contract Terms Directive has been limited.[191] But the very presence of this Directive has meant that both English and German lawyers will feel that they are on familiar territory when reading the DCFR, the FS, or the proposed CESL. This further emphasizes how important it is to draw attention to this form of interaction.

2. If the proposed CESL becomes an optional instrument, it will only cover the first three books of the DCFR and the provisions of Book 4 in relation to sales and services. Yet, as we have seen, terms of business may go beyond these areas, as is the case with retention of title clauses, which belong to the law of property. Such clauses have been dealt with by the DCFR, but the proposed CESL is silent on them. As a result there is potentially a second form of interaction, namely the question of how those standard terms which cover questions relating to both the law of obligations and the law of property are to be controlled—by the optional instrument only or whether, in addition, the national law will need to be applied.

We have argued for a differentiated solution. With respect to the question of incorporation it is possible to apply the proposed CESL without the need for it to be supplemented by national law. As a consequence, the supplier of the terms is relieved

[189] See pp 452–5 of this volume.
[190] See pp 430–6 and 440–55 of this volume.
[191] See pp 423–6 of this volume.

from the burden of having to observe the requirements of both the optional instrument as well as national law.[192] As we have discussed, the same is possible for the fairness control in B2B contracts.[193] However, we have argued that this approach is not open in the context of B2C transactions. The fairness of such terms of business is assessed both on the basis of the proposed CESL and the applicable national law. As a consequence, suppliers run the risk that their terms will be exposed to two separate regimes. Thus, the limited scope of the optional instrument and its resulting interaction with national law will deter traders from choosing the optional instrument.

3. In a third step we have compared the level of protection between national law and the proposed CESL. We have argued that such a comparison is necessary because the stronger party to a contract (in B2C transactions, the trader) will either decide not to offer to contract under the optional instrument, or he will only want to offer his services and goods under the optional instrument. In the context of cross-border transactions, it seems likely that the dominant factor will be whether opting for the CESL will be the only practical way to market goods or services outside his home jurisdiction. The more difficult situation is in the context of internal transactions. If the CESL offers a higher level of protection to the other party, then the supplier will not opt for the optional instrument and the optional instrument will remain insignificant in these circumstances. If, however, the level of protection is lower, the supplier will choose to contract under the CESL and in these situations the optional instrument has the potential to replace national law altogether. This is clearly the strongest form of interaction.

We have argued that the requirements for incorporation will not play a significant role in the supplier's choice as to whether the optional instrument or national law will govern his contract.[194] With respect to the fairness control we have concluded that there are many differences between the CESL on the one hand and English and German law on the other hand.[195] However, it is difficult to firmly predict that these differences will operate in favour of only one party. The picture is a different one in the context of B2B transactions. Here, the CESL has the potential to replace German law altogether but fails to be an attractive instrument in comparison with English law.

4. It is said that the DCFR and the optional instrument will inspire national legislators and courts to adopt what might be said to be European solutions. The FS might also serve as a toolbox if its provisions prove to be superior to those of the DCFR and the CESL. The provisions that we have analysed in this contribution are not suitable candidates for this form of interaction.[196]

[192] See pp 436–7 of this volume.
[193] See pp 455–7 of this volume.
[194] See p 438 of this volume.
[195] See pp 457–62 of this volume.
[196] See pp 438–9, 439–40, and 462–7 of this volume.