

## Regulating Unfair Terms

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### INTRODUCTION

SINCE WRITTEN CONTRACTS are overwhelmingly in standard form,<sup>1</sup> regulating such contracts must be one of contract law's most important tasks. As Law Commissioner for England and Wales, Professor Beale brought his formidable scholarship, intellect and judgement to bear on the subject of unfair standard terms.<sup>2</sup> The Law Commission's avowed objective was to design a legislative regime that preserves the consumer protections currently afforded by both the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (UTCCR). This has borne fruit as part of the Consumer Rights Bill, currently before Parliament. However, while the substantive law embodied in UCTA and UTCCR is reasonably well settled, there has been relatively little theorising on the justification for the precise scheme of regulation contained therein.<sup>3</sup> Doing so is important in itself, for any law that demands obedience should also be justifiable. The task is also important to guide adjudication, to provide a basis for any critique of the current law, and to point the way of future reform.

At least three factors may have contributed to this situation. First, the basis for regulating unfair standard terms seems obvious, namely, that of 'unfair surprise' and 'harsh terms' buried in the fine print. But, while this explains the problems, it does not justify the particular responses contained in UCTA and UTCCR, in particular, the specific terms targeted and the precise mechanisms of regulation. Secondly, as

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<sup>1</sup> W David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 *Harvard Law Review* 529; Robert Hillman and Jeffrey Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429, 431; Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University Chicago Law Review* 1203, 1203–4.

<sup>2</sup> Law Commission and Scottish Law Commission, *Unfair Terms in Contracts: A Joint Consultation Paper* (Law Com CP No 166 and Scot Law Com No 119, 2002); Law Commission and Scottish Law Commission, *Unfair Terms in Contracts* (Law Com No 292 and Scot Law Com No 199, 2005).

<sup>3</sup> Eg Meryll Dean, 'Unfair Contract Terms: The European Approach' (1993) *Modern Law Review* 581, 585: 'At the heart of the test of unfairness is a desire to tackle the notion of unconscionability of unfair contract'; see also Law Commission and Scottish Law Commission, *Unfair Terms in Contracts*, (Law Com CP No 166 and Scot Law Com No 119, 2002) n 2 above, paras 2.5–2.9 referring to 'unfair surprise' and 'harsh terms'.

statutory (rather than common law) regulation, it is easier to regard them as ‘public policy’ implemented by a sovereign Parliament carrying out their Treaty mandate, and by the Council and the European Parliament, that does not demand the sort of legitimation (and so theorising) normally called for by common law doctrines. Thirdly, the proliferation of contract theory scholarship of the last 40 years<sup>4</sup> is very largely premised on the traditional paradigm of negotiated contracting and this translates poorly to the paradigm of non-negotiated contracting implicit in almost all contracts covered by UCTA and UTCCR. This last factor exposes the limitations of the orthodox contract paradigm in law-making and theorising, and the need to recognise multiple contract paradigms.

In the next section I contrast the negotiated and non-negotiated contract paradigms and examine the problems of questionable consent and unfair terms arising from the latter. In the third section I sketch the distinct tripartite pattern of control contained in UCTA and UTCCR; namely: (i) the types of dealing covered (consumer, standard form and standard form consumer contracts); (ii) the four types of terms controlled (exemptions of the trader’s liability, reduction of the trader’s obligations, increasing the customer’s obligations, and increasing the customer’s liabilities); and (iii) the method of control (invalidating some terms outright and subjecting others to a test of reasonableness or fairness). The fourth section then explores three possible justifications for this pattern of control (defective consent, market inefficiency and standard terms as defective product). These provide important insights, but not complete or satisfying justifications.

I then put forward and defend a justification for UCTA and UTCCR based on protecting the institution of contract. The primary purpose of this social institution is to expand valuable choices by providing the necessary security for exchange agreements that further each party’s conception of the good. Mass market standard form contracting entails severe risks to constitutive features of the institution, namely, respect for voluntary choice; facilitation of mutually valuable exchange; and guarantee of legal redress. In practice, informed consent to the fine print is impossible, while the substance of the fine print tends to subvert the legitimate expectations based on the main subject matter and price terms, establish unacceptable power relationships, or destroy the right to meaningful redress. UCTA and UTCCR protect the institution of contract in contexts that pose the most acute dangers to it (accounting for (i) the type of dealings covered), by invalidating terms that unjustifiably (accounting for (iii) the method of regulation) undermine contract’s underlying logic of voluntariness, reciprocity and right to redress (accounting for (ii) the type of terms targeted).

<sup>4</sup> Eg from Charles Fried, *Contract as Promise* (Cambridge, MA, Harvard University Press, 1981), to PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1985), to Michael Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA, Harvard University Press 1997), to Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford, Hart Publishing, 2003), to Stephen Smith, *Contract Theory* (Oxford University Press, 2004), to Brian Bix, *Contract Law: Rules, Theory, and Context* (Cambridge University Press, 2012).

## FROM NEGOTIATED TO NON-NEGOTIATED CONTRACTING

## Negotiated Contract Paradigm

A general law of contract necessitates abstracting from the whole range of transactions, to a necessarily paradigmatic view of the contracting process. The orthodox paradigm of contracting is familiar enough: two parties with equal bargaining power freely, voluntarily and at arm's length, negotiating every aspect of their agreement, and then reducing their understanding to a writing intended to embody their whole agreement. This is the voluntary exchange envisaged by liberal and economic theories of contract; each party freely agreeing to give up something of hers to obtain something from the other that she values more, generating a contract satisfactory to both. Thus, contract presupposes *dealing* (manifesting the parties' free choice) as well as a *deal* (the product of that joint mutually enhancing creative process).

On this view, legal regulation of *procedural* unfairness is regarded as legitimate, while regulation for *substantive* unfairness is generally regarded as not. Accordingly, the orthodoxy is that contracts may be invalidated if there is no agreement on the objective test of intentions or if the complainant's consent is defective in ways recognised by the vitiating factors, especially if the party seeking to enforce the contract created, exacerbated or otherwise exploited this defective consent. However, regulation for substantive unfairness is rejected as unnecessary (because procedural unfairness guarantees substantive unfairness), undesirable (because it replaces the parties' autonomy with unjustified state paternalism), and impracticable (because courts are not competent to judge substantive unfairness, doing so will introduce excessive uncertainty and will backfire in the long run, and any justified redistribution should be left to the tax and welfare regime).<sup>5</sup> Nevertheless, substantive unfairness may be part of the burden of proof,<sup>6</sup> operate as evidence of procedural unfairness<sup>7</sup> (the complainant's defective consent<sup>8</sup> or the enforcer's unconscientiousness inducement).<sup>9</sup>

This justification for control of unfairness generated by this paradigm of contracting is ill-suited to the problems of unfairness arising from standard form contracting.

<sup>5</sup> See Hugh Collins, *Regulating Contracts* (Oxford University Press, 2002) 284; Richard Epstein, 'Unconscionability: A Critical Reappraisal' (1975) 18 *Journal of Law and Economics* 283, 305–15; Fried, *Contract as Promise*, n 4 above, chs 3, 7; Randy Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269, 283–86; Michael Trebilcock, 'An Economic Approach to Unconscionability' in Barry Swan and John Reiter (eds), *Studies in Contract Law* (Oxford, Butterworth-Heinemann, 1980); Alan Schwartz, 'Justice and the Laws of Contract: A Case for the Traditional Approach' (1986) 9 *Harvard Journal Law and Public Policy* 107; Robert Nozick, *Anarchy, State and Utopia* (Oxford, Basil Blackwell, 1974) 64–65; Ludwig Von Mises, *Human Action*, 2nd edn (New Haven, CT, Yale University Press, 1963) 94–98, 242, 354, 727–30.

<sup>6</sup> Eg in finding an unconscionable bargain; for undue influence to be inferred, the transaction must 'call for an explanation'; the effect of infancy depends largely on whether the contracts are broadly beneficial to the infant.

<sup>7</sup> *Blomley v Ryan* (1956) 99 CLR 362, 405–6 (HCA).

<sup>8</sup> Eg *Credit Lyonnais v Burch* [1997] 1 All ER 144, 154, 155 (CA).

<sup>9</sup> Eg in respect of duress to the person, *Barton v Armstrong* [1976] AC 104 (PC) (appeal from New South Wales), and in respect of economic duress, *Huyton v Cremer* [1999] 1 Lloyd LR 620 (QB).

### Non-negotiated Contract Paradigm

Standard form contracting does not involve ‘bargain’, ‘negotiation’ or ‘consent’ in any meaningful sense. A standard form contract is conventionally described as a printed document containing many terms purporting to be the contract; put forward by a commercial (‘proffering’) party who makes many contracts of the same type; presented explicitly or implicitly on a take-it-or-leave-it basis to the other (‘adhering’) party who enters few such contracts, and is generally unaware of and unable to assess their substance. The situation is aggravated by the rise and rise of electronic commerce (worth £100 bn to the UK economy in 2010; this was more than 7 per cent of national income, and nearly as big as the financial services sector),<sup>10</sup> and the associated use of the following:

- ‘shrinkwrap’ contracts (typically used in software contracts; they bind a party to terms contained therein even if these terms cannot be seen or agreed to until the product is bought and opened);
- terms sent after a contract is made over the telephone (eg in insurance or banking);
- ‘clickwrap’ (when parties are bound by clicking ‘I agree’ or equivalent online; reference may be made to dense text standard terms in a hyperlink, elsewhere on the site, offsite or even on a different website), and
- ‘browsewrap’ (where the terms for use of a website or downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen, and the site user is bound by simply using the product, such as by entering the website or downloading software).

The non-negotiated paradigm generates different problems from those arising from negotiated contracting. First, the complainant suffers from no mental incapacity or mistake, which are the staple of the recognised vitiating factors. Indeed, most are perfectly competent by normal standards. Rather, the relevant weakness is situational, attaching to standard form contracting itself. Secondly, there is generally<sup>11</sup> no opportunity and no need for unconscientious conduct by the proffering party in the recognised senses of misrepresentation, duress, undue influence, unconscionable conduct, and so on. There is simply no negotiation for such conduct to ‘bite’ onto.<sup>12</sup> Thirdly, the concern with standard form contracts is not primarily about contractual imbalance in the sense of inadequacy of consideration. Rather, it is about the presence of terms that subvert the complainant’s reasonable expectations based on the price and main subject matter of the contract, deprive complainants of default rights, or render such rights and obligations subject to the other party’s discretionary power.

The non-negotiated paradigm is more akin to the imposition of the proffering party’s will than of a mutually agreed arrangement; hence, its description as ‘private

<sup>10</sup> See James Robinson, ‘UK’s Internet industry worth £100 bn: report’, *The Guardian* (London), 28 October 2010, available at [www.theguardian.com/technology/2010/oct/28/net-worth-100bn-uk](http://www.theguardian.com/technology/2010/oct/28/net-worth-100bn-uk).

<sup>11</sup> Of course, this is not ruled out. See Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 332, 2012).

<sup>12</sup> Initiating standard form dealing cannot be regarded as unfair per se, see discussion at p 120 below.

legislation' and 'contracts of adhesion'.<sup>13</sup> The dangers of standard form contracts for the adhering party are indeed questionable consent and objectionable terms. But the important specifics of these problems contain the clues to the solutions contained in UCTA and UTCCR.

### Problem of Consent

'Adhering' parties can realistically be taken to know and consent to the main subject matter and price terms of the contract. Beyond that, absent a lawyer at their elbow, adhering parties may not even know of the existence of the fine print. If they do know, reading will be deterred by the density and length of the fine print, the complicated and unintelligible language, the confusing layout, and the strong social pressure not to appear awkward or confrontational. One study found that even in an environment conducive to reading (the comfort of one's home or office) only one in every thousand retail software shoppers chooses to access the licence agreement for more than one second. And, those few spend too little time to have read more than a tiny portion of the text (the average time spent was 47.7 seconds and the median time was 29 seconds).<sup>14</sup> The *New York Times* reported that software from four major sellers 'were an average of 74,000-plus words, which is basically the length of the first Harry Potter book'.<sup>15</sup>

Lord Denning is thus vindicated in his assessment that 'no customer in a thousand ever read the conditions';<sup>16</sup> Lord Megaw anticipated the likely indignation of service providers if customers actually tried to read and understand the terms provided.<sup>17</sup> Indeed, there is much literature showing that an adhering party will be 'rationally ignorant' of such terms.<sup>18</sup> For, even if, freakishly, she invests the hours reading the terms, her comprehension and assessment of them will be significantly hindered by her lack of legal and financial literacy. One commentator concluded that 97 per cent of all American adults lack the basic literacy skills required to understand consumer

<sup>13</sup> Fredrich Kessler, 'Contracts of Adhesion: Some Thoughts about Freedom of Contract' (1943) 43 *Columbia Law Review* 629.

<sup>14</sup> This tracked the Internet browsing behaviour of 45,091 households with respect to 66 online software companies. Yannis Bakos, Florencia Marotta-Wurgler and David Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, CELS Fourth Annual Conference on Empirical Legal Studies Paper (New York, 2009).

<sup>15</sup> See Alina Tugend, 'Those wordy contracts We all so quickly accept', *New York Times*, 12 July 2013, available at [www.nytimes.com/2013/07/13/your-money/novel-length-contracts-online-and-what-they-say.html?pagewanted=1&src=me&r=1&](http://www.nytimes.com/2013/07/13/your-money/novel-length-contracts-online-and-what-they-say.html?pagewanted=1&src=me&r=1&).

<sup>16</sup> *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 169 (CA).

<sup>17</sup> *ibid* at 173.

<sup>18</sup> Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211, 241, 243. Peter Alces, 'Guerrilla Terms' (2007) 56 *Emory Law Journal* 1511, 1529–30. ('[T]he "search" cost of discovering the higher price and greater risk is too great given the benefit the buyer imagines she would derive from discovering the cost'); Lucian Bebchuk and Richard Posner, 'One-Sided Contracts in Competitive Consumer Markets' (2006) 104 *Michigan Law Review* 827, 832 (arguing the cost imposed on consumers in gaining information may exceed the benefit, resulting in consumers' rational ignorance); Robert Prentice, 'Contract-based Defenses in Securities Fraud Litigation: A Behavioral Analysis' (2003) *University of Illinois Law Review* 337, 358–62 ('Personally, I neither read most of the contracts that I sign nor know anyone who does. I do not believe that this makes me unusually irrational, particularly stupid, or unreasonably lazy').

standard form contracts of even moderate complexity.<sup>19</sup> Aside from these limitations, the average person suffers from a long list of systematic cognitive biases<sup>20</sup> that inhibit her rational assessment of standard terms and their associated risks.<sup>21</sup> For example, most fine print terms lack salience; they usually deal with contingent (often highly contingent) events, which the bounded rationality of human beings will discount. Finally, anyone who has got as far as reading, understanding and objecting to any of the fine print would be told to ‘take it or leave it’. If she then went to another supplier the result is likely to be the same.

A person today who refused to contract without being adequately apprised of the fine print would deny herself of most means of living in a modern society, or would lead a not very interesting or productive life. In reality then, the obstacles to giving informed consent to a standard form of any complexity is simply *insurmountable*. The fine print is for all intents and purposes invisible. This must inform the concept of the ‘average consumer’, which the Consumer Rights Bill defines as ‘reasonably well-informed, observant and circumspect’.<sup>22</sup> Contract law should be responsive to what we know about human behaviour in respect of choice. After all, it is pervasively in the business of constructing the procedures and contexts for identifying choice, and for enforcing the choices made.<sup>23</sup>

### Problem of Objectionable Terms

In any market where one party can unilaterally create most of the rules of the game by imposing its own terms, highly disproportionate contracts are likely to result. Whatever protection against unfairness a process of negotiation might give, standard form contracting gives no such protection. The problem is not primarily that of contractual imbalance between the main subject matter of the contract and

<sup>19</sup> Wayne Barnes, ‘Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement (Third) 211(3)’ (2007) 82 *Washington Law Review* 227, 229–30, 261–62, citing Alan White and Cathy Lesser Mansfield, ‘Literacy and Contract’ (2002) 13 *Stanford Law and Policy Review* 233, 237–38, 233, 234.

<sup>20</sup> See, eg discussion in Anthony Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (Oxford, Hart Publishing, 2006) 232–38.

<sup>21</sup> See, in general, Cass Sunstein, ‘Behavioral Analysis of Law’ (1997) 64 *University of Chicago Law Review* 1175, and in particular Amos Tversky and Daniel Kahneman, ‘Rational Choice and the Framing of Decisions’ (1986) 59 *Journal of Business Law* (Supp) S251; Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’, n 1 above; Lynn Baker and Robert Emery, ‘When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage’ (1993) 17 *Law and Human Behaviour* 439; Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, NJ, Princeton University Press, 2012) 26; Alces, ‘Guerrilla Terms’, n 18 above, 1523; Xavier Gabaix and David Laibson, ‘Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets’ (2006) 121 *Quarterly Journal of Economics* 505; Shmuel Becher and Esther Unger-Aviram, ‘The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction’ (2010) *DePaul Business and Commercial Law Journal* 199, 214; Ted Cruz and Jeffrey Hinck, ‘Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information’ (1996) 47 *Hastings Law Journal* 635, 638–40; Eric Posner, ‘Economic Analysis of Contract Law after Three Decades: Success or Failure?’ (2003) 112 *Yale Law Journal* 829, 843; David Horton, ‘The Shadow Terms: Contract Procedure and Unilateral Amendments’ (2010) 57 *University of California at Los Angeles Law Review* 605, 647–48.

<sup>22</sup> Consumer Rights Bill 2013, cl 64(5).

<sup>23</sup> See generally, Cass Sunstein (ed), *Behavioral Law and Economics* (Cambridge University Press, 2000).

its price; even ‘rationally ignorant’ consumers bring their judgement to bear on these logically more transparent terms of the contract. The danger lurks in the ‘invisible’ fine print, for which there is no competitive market. The result is a ‘race to the bottom’; a trend towards contracts characterised by low cost but harsh ‘non-core’ terms. The oft-stated concern about ‘unfair surprise’ in standard form contracting must be seen in this light. Fair surprises raise no concern. Thus, lack of knowledge or choice as to the non-core terms, while relevant, does not go to the nub of the problem

Objectionable terms are of four overlapping types. First, are terms that reduce or delete the remedial rights that the adhering party would otherwise have, leaving her with no or inadequate redress and allowing the proffering party to evade substantive legal oversight of the contract. Second which may amount to the same thing, are terms that reduce the proffering party’s obligations against the baseline of the main subject matter term. Third are terms that inflate the adhering party’s obligations against the price term. Fourth are terms that maximise protection of the proffering party’s interests by imposing disproportionate or otherwise unfair burdens or liability on the adhering party.

#### STATUTORY CONTROL OF UNFAIR TERMS

Here, I sketch the types of contracts covered, the types of terms targeted, and the control mechanisms contained in UCTA and UTCCR, as a precursor to examining four justifications for this tripartite scheme.

#### Type of Contracts Targeted

UCTA operates in favour of both consumers (whether a natural person or a business acting as a consumer, and whether in standard form or not), *and businesses* (primarily those contracting on the other’s standard form). UTCCR only protects *consumers who are natural persons in relation to non-negotiated terms*. Both UCTA and UTCCR operate only against businesses contracting for business purposes.

#### Type of Terms Targeted

UTCCR specifically immunises from challenge (a) negotiated terms, and (b) non-negotiated terms expressed in plain and intelligible language<sup>24</sup> that define the main subject matter or price.<sup>25</sup> Otherwise, UCTA and UTCCR together broadly target the four overlapping types of objectionable terms mentioned above (terms that shrink the proffering party’s, or inflate the adhering party’s, obligations or liabilities).<sup>26</sup> UTCCR also permits the review of any other non-negotiated non-core terms.

<sup>24</sup> Consumer Rights Bill 2013, cl 64(2) refers to ‘transparent and prominent’.

<sup>25</sup> UTCCR, reg 6(2).

<sup>26</sup> They are discussed at p 121–24 below.

## Mechanisms of Control

First, UTCCR requires all terms to be in plain and intelligible language on pain of *contra proferentem* construction and review for unfairness of otherwise immune core terms.<sup>27</sup>

Secondly, UCTA and UTCCR divide the targeted terms into two categories: black-listed terms are automatically invalid,<sup>28</sup> and grey-listed terms<sup>29</sup> are subject to the test of reasonableness under UCTA or fairness under UTCCR. Invalid terms are severed from the rest of the contract, which continues to bind the parties if possible.

The tests of reasonableness,<sup>30</sup> and of fairness<sup>31</sup> as contravention of good faith causing significant imbalance are very similar although not identical. *Chitty* concludes that any differences between them come down to the differences in the scope of the two pieces of legislation: the parties affected and types of terms tested.<sup>32</sup> Broadly speaking, the non-exhaustive factors relevant to the determination of validity of grey-listed terms fall into two overlapping categories. First, are factors that go to the quality of the adhering party's deliberation and so consent; this mirrors the common law's preoccupation with *procedural unfairness*. Thus, the court is directed to consider all the circumstances existing at formation, taking into account, inter alia, the parties' relative bargaining power, the availability of alternatives, and any pressure on the adhering party to conclude the contract or to do so in haste and without time to think about its significance, even if this pressure would not amount to duress or undue influence.<sup>33</sup> UCTA<sup>34</sup> and UTCCR<sup>35</sup> also direct the court to consider the adhering party's realistic opportunity to read, understand, consider and decide upon the challenged term.

<sup>27</sup> See UTCCR, reg 6(2) and 7.

<sup>28</sup> UCTA, ss 2(1), 5, 6(1), (2), 7(2), (3A)). These are discussed further at p 126–29 below.

<sup>29</sup> UCTA, ss 2(2), 3, 4, 6(3), 7(3), (4); terms listed in UTCCR, Sch 2 and other terms not going to the main subject matter or price of the contract (reg 6).

<sup>30</sup> Strictly speaking, three slightly different tests of reasonableness appear in UCTA: the general test in s 11(1); the test applicable to statutory implied terms falling within ss 6–7, detailed in Sch 2; and the test applicable to terms which limit rather than exclude liability referred to in s 11(4). However, the courts have made clear in *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1984) 2 Const LR 109, 151 (QBD); *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 1 QB 600, 608 (CA), that all the factors mentioned in the various guidelines are applicable to *all* cases in which they appear relevant. Moreover, these factors are neither exhaustive nor determinative; the court may take into account any other relevant circumstances. In practice, therefore, there is a single test of reasonableness.

<sup>31</sup> UTCCR, reg 5(1): a term is 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'. This is supplemented by the guidance contained in reg 6(1) and in recital 16 of the originating Directive, and by the Sch 2 list of indicatively unfair terms.

<sup>32</sup> Hugh Beale (ed), *Chitty on Contracts*, 31st edn (London, Sweet & Maxwell, 2012) para 15-100.

<sup>33</sup> *ibid* para 15-084.

<sup>34</sup> UCTA, Sch 2, para (c) 'whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties)'.

<sup>35</sup> UTCCR, Sch 2, para 1(i) lists as indicatively unfair a term which has the object or effect of 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. See statement in Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095, recital 20 that 'the consumer should actually be given an opportunity to examine all the terms'.



Secondly, in a departure from the common law, the court must consider the *substance* of the challenged term. Thus, the court must specifically consider:<sup>36</sup> whether the customer received any inducement to accept the challenged term; the reasonableness of conditions imposed on claims; whether the goods were manufactured, processed or adapted to the customer's special order; and the proffering party's resources to meet or insure against likely claims.

#### UNDERSTANDING THE PATTERN OF CONTROL UNDER UCTA AND UTCCR

Here, I assess possible explanations for the pattern of control found in UCTA and UTCCR based on defective consent, market inefficiency, contract as product and protection of the institution of contract.

#### Defective Consent

The concern with defective consent of orthodox contract theory is consistent with some aspects of UCTA and UTCCR. First, it explains the type of contracts or dealing covered: broadly speaking, consumer, standard form and non-negotiated consumer contracts which entail particular risks of informational asymmetry and non-negotiability. Secondly, it explains why non-core terms in general are targeted (for which consent will be doubtful at best) while plain and intelligible core terms that will have been consented to are immune from review under UTCCR. Thirdly, it explains the requirement for all terms to be in plain and intelligible language.

However, defective consent does not readily explain the identity of the non-core terms that are specifically targeted; the automatic invalidity of some these terms; and the invalidity of others only if they are unfair and unreasonable, when consent is equally questionable in respect of *all* terms in the fine print. One rationale, used to justify common law rules on the enforceability of standard form contracts, is that the adhering party has given 'blanket consent'<sup>37</sup> to everything contained in the fine print that is not unfair or unreasonable, and that even those that *are* (the 'onerous or unusual' terms) are binding if the adhering party has received 'adequate notice' of them.

This explanation is problematic. First, the implicit assumption that it is up to the adhering party to read and understand the fine print (so that if she does not, that is her look-out) is unrealistic and premised on a 'world of make-believe which the law has created'.<sup>38</sup> Thus, Lord Denning returned repeatedly to the injustice of the signature rule (which he helped to create) in his extra-legal writings.<sup>39</sup> Secondly,

<sup>36</sup> UCTA, s 11(1), (4), and Sch 2.

<sup>37</sup> Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Buffalo, NY, WS Hein, 1960) 370; Randy Barnett, 'Consenting to Form Contracts' (2002) 71 *Fordham Law Review* 627.

<sup>38</sup> *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, 436 (HL) (Lord Devlin).

<sup>39</sup> '[G]oing back to my junior days when I induced the Court of Appeal to uphold a most unrighteous clause in *L'Estrange v Graucob*'; Lord Denning, 'Foreword' (1986) 1 *Denning Law Journal* 1, 2; '[i]n those days I wasn't concerned so much with the rightness of the cause. I was concerned only ... to win if I could', Lord Denning, 'This is My Life' (1986) 1 *Denning Law Journal* 17, 20; 'I thought I had done well by my clients, but since I have become a judge I have done everything I can to get that decision altered', Lord Denning, 'The Right Standards of Conduct' (1957) *Law Society's Gazette* 609, 610.

the idea that voluntary assent and personal autonomy are ‘fixed’ by disclosure is misguided because it ignores the evidence that people are not substantially more likely to read disclosures than the form terms themselves,<sup>40</sup> and that people’s problems go well beyond ignorance.<sup>41</sup> Indeed, ‘[t]o the extent that one does not understand the terms of the agreement, requiring the same to be printed in bold letters is like yelling at a deaf man’.<sup>42</sup> Thirdly, the notice rule contradicts the well-justified rule that silence is no acceptance.<sup>43</sup> Fourthly, neither the notice nor the signature rules would satisfy the objective test of intention based on what a reasonable person in the position of the proffering party has reason to believe.<sup>44</sup> Such a person knows that adhering parties (unless relatively powerful businesses represented by lawyers) do not read standard terms and would not understand them if they did. In many, perhaps most, cases we might even infer that businesses intend this. The proffering party cannot even ‘reasonably’ understand adhering parties as consenting to its terms, just because they fail to object by the expiry of a ‘cooling-off’ period. If this is right for physical signatures of physical documents, how much more so in cases of ‘clickwrap’, ‘shrinkwrap’ or ‘browsewrap’ where the adhering party may not even know of the existence of the virtual terms.

More problematically, the defective consent thesis cannot easily accommodate UCTA and UTCCR’s evident concern with substantive unfairness. Even accepting the evidential role of substantive unfairness, defective consent cannot readily explain why the black-listed terms are automatically invalid *irrespective* of adequate notice or the presence of untainted consent. Moreover, while defective consent is relevant, it is neither sufficient nor necessary to the invalidity of the grey-listed terms. It is insufficient because the court must also take into account the lengthy list of factors going to the substance of the terms, and UTCCR expressly requires ‘significant imbalance’ to find unfairness. It is unnecessary because invalidity under UCTA and UTCCR is not preconditioned on a finding of procedural unfairness.

Although the requirement of contravention of ‘good faith’ in UTCCR’s test of unfairness looks like an invariable requirement of procedural unfairness, it is not. First, this is clear from the Schedule 2 list of indicatively unfair terms. These must, potentially at least, entail both ‘significant imbalance’ and ‘contravention of good faith’. But, only one of the 17 terms listed focuses on procedural unfairness,<sup>45</sup> while the other 16 highlight substantive unfairness. The key lies in recital 16

<sup>40</sup> Shmuel Becher, ‘Asymmetric Information in Consumer Contracts: The Challenge that is Yet to be Met’ (2008) 45 *American Business Law Journal* 723, 757.

<sup>41</sup> Omri Ben-Shahar and Carl Schneider, ‘The Failure of Mandated Disclosure’ (2011) 159 *University of Pennsylvania Law Review* 647, 712.

<sup>42</sup> Jacqueline Baum, ‘Note, Medical Malpractice Arbitration: A Patient’s Perspective’ (1983) 61 *Washington University Law Quarterly* 123, 148. In addition, disclosures can provide excessive information, resulting in cognitive overload and increased confusion, Becher, ‘Asymmetric Information in Consumer Contracts’, n 40 above, 758.

<sup>43</sup> *Felthouse v Bindley* (1862) 142 ER 1037 (Ct of CP).

<sup>44</sup> See *Hartog v Colin and Shields* [1939] 3 All ER 566 (KBD); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, paras 912–13 (HL).

<sup>45</sup> UTCCR, Sch 2, para 1(i) a term which has the object or effect of ‘irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract’.

of the European Directive (which is implemented by UTCCR).<sup>46</sup> This defines ‘contravention of good faith’ not only in terms of failing to deal ‘fairly and equitably’ with the consumer, *but also* crucially of failing to take account of the consumer’s ‘legitimate interests’. From the character of the Schedule 2 terms, these legitimate interests can be understood in the substantive terms of: obtaining adequate redress; receiving the performance legitimately expected from the main subject matter term; avoiding an unreasonable inflation of the price term; and avoiding disproportionate liability for breach. Thus, Lord Steyn<sup>47</sup> concluded that the Schedule 2 terms ‘convincingly demonstrate that the argument ... that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained. Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected’.<sup>48</sup>

Secondly, the European Court of Justice (CJEU) defined the ‘requirement of good faith’ in consent terms: whether the ‘seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations’.<sup>49</sup> This is the objective test of intention, which I argued above must be presumptively answered in the negative<sup>50</sup> in standard form consumer dealing. The best that can be said is that the consumer *may* have agreed to the relevant term if it was *not* unfair.

Thirdly, Lord Steyn added that the very ability of ‘qualifying bodies’ to apply for injunctions against the future use of specific terms means that ‘the primary focus of such a pre-emptive challenge is on issues of substantive unfairness’.<sup>51</sup> Logically, the issue must be determined without reference to any procedural unfairness that has occurred or might occur. And, once an injunction is granted, the term (and terms with like effect) is prohibited irrespective of the procedural safeguards surrounding its acceptance. It is the *term*, as opposed to the negotiating process, which must be in bad faith, in line with the policy of the European Directive to harmonise control of standard terms in consumer contracts.

Fourthly, any argument that UTCCR could not be aimed at substantive unfairness because clear and intelligible core terms are immune from review is unsustainable. It is true that UTCCR are not primarily concerned with inadequacy of consideration. However, recital 19 of the European Directive makes clear that the fairness of other terms can be challenged *in the light of these core terms*. In any case, retaining the core terms allows consumers to obtain the desired goods or services, shorn of the offending terms that produced the original significant and objectionable imbalance.

<sup>46</sup> Directive 93/13/EC, n 35 above. Hugh Collins, ‘Good Faith in European Contract Law’ (1994) 14 *Oxford Journal of Legal Studies* 229, 249–50, and see *Director General of Fair Trading v First National Bank* [2001] UKHL 52, paras 36–37; [2002] 1 AC 481, 499–500.

<sup>47</sup> *ibid* para 36; pages 499–500.

<sup>48</sup> While Lord Bingham explicitly links ‘good faith’ to procedural unfairness, his Lordship’s description of it incorporates clear non-procedural elements (*ibid* para 17; page 494); ‘Appropriate prominence should be given to *terms which might operate disadvantageously* to the customer ... the supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, [and] *weak bargaining position*’ (emphasis added).

<sup>49</sup> Case C-415/11 *Aziz v Catalunya Caixa* [2013] OJ C141, para 77.

<sup>50</sup> See text related to n 44 above.

<sup>51</sup> *Director General of Fair Trading*, n 46 above, para 33; pages 498–99.

## Market Inefficiency

From the economic perspective, the adhering party's lack of informed consent to the fine print undermines contract as an aggregate welfare-maximising scheme based on mutual preference satisfaction. One legal response would be to impose information obligations on the proffering party and set aside the contract in the absence of a genuine expression of preference. Since informational asymmetry is the economic approach's equivalent of defective consent, the same problems identified there<sup>52</sup> (on its partial fit with the solution contained in UCTA and UTCCR) applies here.

A second response flows from the insight that invalidating contracts tainted by information failure would nevertheless, be inefficient. In their influential paper Calabresi and Melamed<sup>53</sup> argued that in certain circumstances, it would be more efficient to allow exceptions to the consent requirement as long as *compensation* is paid. That is, the 'property rules' that allow owners to choose whether and on what conditions to transfer their entitlements, should be degraded into 'liability rules' that tolerate the confiscation of the owners' entitlement without consent on payment of compensation. Thus, for example, where someone's building project mistakenly encroaches on another's land, it is more efficient to require her to pay compensation than to pull down the whole building. Analogously, unconsented to standard terms should be enforced if adhering parties are compensated. Here, supporters of standard form contracting point to the efficiency savings that are passed on in the form of lower prices. To align this with the orthodox paradigm of contract, the language of 'hypothetical consent' is sometimes deployed on the basis that a rational wealth-maximising adhering party 'would' or 'should' have consented to this arrangement.<sup>54</sup>

The routine criticism of the economic approach is that it adopts an over-simplistic view of incentive structures,<sup>55</sup> and rests on untested empirical assumptions.<sup>56</sup> In this context, it is unclear how the right amount of compensation should be calculated

<sup>52</sup> See p 113–16 above.

<sup>53</sup> Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089; see discussion in Emily Sherwin et al, 'Symposium, Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective' (1997) 106 *Yale Law Review* 2081.

<sup>54</sup> Eg Jason Scott Johnston, 'The Return of the Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers' (2006) 104 *Michigan Law Review* 857, 862–63.

<sup>55</sup> Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 *Duke Law Journal* 1, 37, comments that: 'any serious pursuit of efficiency ... will often require complex rules. After all, the goals and constraints relevant to a given policy are likely to be numerous, and the legal rules, in order to be efficient, must take account of, and be tailored to, each of them. Accomplishing this may necessitate a system of multi-factored rules, complex defences, complex party structures, sequential burden shifting, and so on'.

<sup>56</sup> Posner, 'Economic Analysis of Contract Law after Three Decades', n 21 above, 880, famously observes that: 'Economics fails to explain contract law ... And economics provides little normative guidance for reforming contract law. Models that have been proposed in the literature either focus on fine aspects of contractual behaviour or make optimal doctrine a function of variables that cannot realistically be observed, measured, or estimated. The models do give a sense of the factors that are at stake when the decisionmaker formulates doctrine, and might give that decisionmaker a sense of the trade-offs involved, but in the absence of information about the magnitude of these trade-offs—and the literature gives no sense of these magnitudes—the decisionmaker is left with little guidance'.

and it is impossible to verify the empirical assumption that businesses are passing on the right amount of their savings to the right people. Craswell<sup>57</sup> therefore refines this approach by leaving the ‘liability’ or ‘compensation’ to the courts rather than to the proffering party’s unilateral determination. This may account for UCTA and UTCCR’s review of non-core terms and the relevance in this review of efficiency factors (such as inducement; special order; the proffering party’s ability to meet claims; and the availability and cost of insurance) in assessing the validity of terms.

However, it is not easy to equate the invalidation of unfair non-core terms with ‘compensation’ for being bound to non-core terms without consent, and it leaves other relevant considerations unexplained. Further, the assumption that any non-core term can be made binding for the ‘right price’ is contradicted by the black-listed terms. Most problematically, Craswell’s theory is conditioned on courts having the institutional competence to determine the appropriate compensation, when there is general scepticism about the courts’ competence in this respect.<sup>58</sup>

Even if these problems were surmountable, this approach may still lead to inefficient results. This is because the competitiveness and quality of products depend on the existence of at least a subset of well-informed and sophisticated adhering parties (on whom others free-ride) who can drive the appropriate structure of market demand.<sup>59</sup> This is unlikely to be true in respect of non-core standard terms. Indeed, even Alan Schwartz who came up with the thesis does not seem to believe in the existence of an informed minority any more, at least in the consumer context.<sup>60</sup> By ignoring the actual preference of adhering parties, enforcement of these contracts may not, after all, maximise aggregate welfare by moving commodities to highest valuers.

### Standard Terms as Defective Product

A third approach is to treat non-core standard terms as part of the product being traded: the ‘legalware’ being bundled with the hardware.<sup>61</sup> The reasoning is that since dealing over the non-core standard terms is absent, the law is justified in

<sup>57</sup> Richard Craswell, ‘Property Rules and Liability Rules in Unconscionability and Related Doctrines’ (1993) 60 *University of Chicago Law Review* 1; Richard Craswell, ‘Remedies When Contracts Lack Consent: Autonomy and Institutional Competence’ (1996) 33 *Osgoode Hall Law Journal* 209; see also Radin, *Boilerplate*, n 21 above, 76–77.

<sup>58</sup> Note that the Consumer Rights Bill 2013, cl 71(2) and (3) require the court to consider the fairness of a term ‘even if none of the parties to the proceedings has raised that issue’, unless ‘the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term’.

<sup>59</sup> See Alan Schwartz and Louis Wilde, ‘Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests’ (1983) 69 *Virginia Law Review* 1387, 1391–92. Johnston, ‘The Return of the Bargain’, n 54 above, 862–63 (‘Regardless of whether any particular consumer had ever read, understood, or bargained over the terms of the standard form, informed consumers generated a form of hypothetical market assent, which would bind all consumers’).

<sup>60</sup> Ian Ayres and Alan Schwartz, *The No Reading Problem in Consumer Contract Law*, Yale Law School, Public Law Research Paper No 314 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2341840](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341840).

<sup>61</sup> See, eg *Hill v Gateway 2000, Inc*, 105 F 3d 1147, 1150 (7th Cir 1997). See Arthur Leff, ‘Contract as Thing’ (1970) 19 *American University Law Review* 131; Lewis A Kornhauser, ‘Unconscionability in Standard Forms’ (1976) 64 *California Law Review* 1151; Radin, *Boilerplate*, n 21 above, ch 6.

regulating the deal itself. This deftly sidesteps the issue of consent since non-core standard terms are transubstantiated into the product. Baird explains that:<sup>62</sup>

The warranty that comes with your laptop computer is one of its many product attributes. The laptop has a screen of a particular size. Its microprocessors work at a particular speed ... Just as I know the size of the screen, but nothing about the speed of the microprocessor, I know about some of the warranty terms that come with the computer and remain wholly ignorant of the others ... To say that a product comes with boilerplate [standard form fine print] is to say that one of its attributes, along with many others, is partially hidden and is one over which there is no choice on the part of the buyer. But why should this raise any special concern? ... Hidden product attributes over which sellers give potential buyers no choice are a commonplace, necessary and entirely unobjectionable feature of mass markets.

This new paradigm of manufacturer and end-user of a commodity opens up the possibility of direct regulation of the fine print by analogy to product liability law. The main problem is that it is unclear how the standards applied to products—of ‘danger’ or ‘defect’, ‘fitness for purpose’ or such like—can be applied to *terms*. In order to provide a point of reference, we need a theory of rights or legitimate expectations that should not be harmed. The idea of non-core terms as product provides little help in building such a theory. For this, I advance the fourth and preferred explanation for UCTA and UTCCR.

### Preventing Abuse of the Institution of Contract

The state’s justification includes the creation and maintenance of the institution of contract that makes possible a regime of private ordering. This institution is defined by its primary purpose of expanding valuable choices by providing the necessary security for (normally) exchange agreements. This generates three overlapping features that lie irreducibly at the heart of the institution. First, is the importance of voluntary choice about which much has already been said. Secondly, the institution of contract enhances the valuable choices of participants by normally requiring an exchange to further each party’s conception of the ultimate good. This is supported by the idea of Kantian respect in our dealings with others. Each party should treat the other not merely as a means of enhancing her own ends, but also as an end which she simultaneously serves; this tracks the instinct of reciprocity as the mark of just dealing, and preserver of social stability.<sup>63</sup> Thirdly, the institution of contract enhances the reliability of voluntary exchanges, and bridges any gap in trust and sanctions between parties in the market domain, by guaranteeing redress for breach, backed up by the coercive power of the state. While bargains would still be struck without legal enforcement, parties would tend to regard each other with suspicion like participants of hostage swap, and adopt a ‘you first!’ stance. They would have to devise alternative enforcement schemes (think of the Mafia) or bias exchanges toward those that take place instantly, or toward persons with a reputation for

<sup>62</sup> Douglas Baird, ‘The Boilerplate Puzzle’ (2006) 104 *Michigan Law Review* 933, 939. And see Douglas Baird, *Reconstructing Contracts* (Cambridge, MA, Harvard University Press, 2013) 124–27, 133–34.

<sup>63</sup> See Mindy Chen-Wishart, ‘In Defence of Consideration’ (2013) *Oxford University Common Wealth Law Journal* 209.

keeping their promises. Thus, 'the supportive role of the law helps make contracts outside the framework of ongoing relations much more common',<sup>64</sup> and allows individuals to project their intentions into the future and plan actions that require concrete pre-commitments.

Accordingly, the legal infrastructure of the institution of contract should, very broadly speaking, enforce voluntary reciprocal agreements and not enforce involuntary or unreciprocated ones. The determination of voluntariness, reciprocity and redress for breach are *public* functions that safeguard the institution of contract. My thesis is that excessive privatisation of these public functions undermines the possibility of private ordering *by* contract. If you change the rules of a game of chess, you are no longer playing chess. Contracting out of contract's constitutive rules uses contract to destroy itself. This explains why the parties' ability to contract out of contract law's constitutive rules on formation (including the objective test of intention and the requirement of consideration), vitiation and the default remedies for breach is non-existent in most cases, and severely restricted in others.<sup>65</sup>

Standard form contracting subverts the institution of contract when it: (i) binds parties to unconsented to terms; (ii) undermines the reciprocity contained in the core terms; and (iii) shrinks the right to redress or otherwise ousts the court's remedial jurisdiction. Here, the adjective 'valuable' that qualifies the primary purpose of contract law in expanding individual choice comes to the fore. It signifies that contract law is not merely a mechanism for preference satisfaction; it facilitates valuable, and not worthless, choices.<sup>66</sup> While the value of autonomy itself requires a wide margin of tolerance in the law's conceptions of the worthwhile, eliminating the worst choices that do not contribute to the parties' worthwhile life plans actually increases people's chances of living good autonomous lives, whilst still leaving them plenty of sub-optimal options to choose from. This explains the refusal of the law to enforce contracts, on the grounds of illegality or contravention of public policy, that relate, for example, to babies, kidneys, human blood, slaves, sexual intercourse, love, endangered species of animals and human organs from living patients.<sup>67</sup>

Likewise, terms that unjustifiably derogate from the voluntariness, reciprocity and right to redress that are constitutive of the institution of contract are not valuable choices that the law should facilitate. They are 'defective' and not 'fit for purpose' in the language of non-core terms as product theory. The tripartite scheme of UCTA and UTCCR responds to these challenges in a nuanced way.

(a) *Voluntariness*: We have already seen that the concern with voluntariness provides a very partial justification for the scheme of control found in UCTA and UTCCR. It explains:<sup>68</sup> the types of dealing and the general non-core character of

<sup>64</sup> Joseph Raz, 'Promises in Morality and Law' (1981) *Harvard Law Review* 916, 934.

<sup>65</sup> Eg the parties cannot contract out of fraud or duress; the limit on forfeitures and penalties of money payments are well known; contract law also severely curtails the parties' power to agree specific performance. See Daniel Friedmann, 'Good Faith and Remedies for Breach of Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract* (Oxford, Clarendon Press, 1997).

<sup>66</sup> Joseph Raz, *Morality of Freedom* (Oxford University Press, 1988) 417; Hugh Collins, *The Law of Contract*, 4th edn, (London, LexisNexis Butterworths, 2003) ch 6.

<sup>67</sup> See Margaret Radin, 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849 and Margaret Radin, *Contested Commodities* (Cambridge, MA, Harvard University Press, 2001).

<sup>68</sup> See p 113 above.

the terms subject to invalidity, the factors going to invalidity that interrogate the quality of the adhering party's consent, and the requirement of plain and intelligible language. Most explicitly, UTCCR identifies as indicatively unfair and invalid a term with the object or effect of 'irrevocably binding the consumer to [other] terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'.<sup>69</sup> Such a term privatises the law's role in determining the presence of voluntary consent. It allows the proffering party to bind the adhering party to unknown terms by reference to some stipulated conduct (such as clicking a box, not clicking a box or entering a website). Agreeing to allow the proffering party to do that is not a valuable choice that the law should facilitate because it undermines the voluntariness feature of the institution of contract, the determination of which must remain with the court. The effect of invalidating this term is to release the consumer from those other terms.<sup>70</sup>

More broadly, it is arguable that standard form contracting *itself* has the effect, if not the object, of 'irrevocably binding the [adhering party] to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. This line of reasoning would invalidate the whole contract. This is because the orthodoxy on contract formation fuses the commitment question (whether the parties have committed to the contract) with the content question (what the parties committed to). This escalates defective consent to any term into defective consent to the whole contract. But an institution of contract that requires informed consent to every term of the fine print is too demanding and so too fragile, and not useful to fallible human beings. Autonomy is threatened not only by binding parties to terms that they have not consented to, but also by refusing to enforce the essential exchange that they *have* consented to and want. The general threat to voluntariness from being bound to unconsented-to fine print must be weighed against the threat to voluntariness from refusing to uphold the consented-to main subject matter and price terms.

Moreover, standard form contracting is not necessarily unfair; their wide use in *commercial* transactions 'facilitate the conduct of trade', while industry wide standard forms (eg bills of lading, charterparties, insurance policies and contracts of sale in the commodity market) have generally resulted from extensive negotiations by parties of roughly equal bargaining power.<sup>71</sup> In addition, any systematic refusal to enforce standard form contracts would cause massive disruption in today's market environment.<sup>72</sup> This takes account of the efficiency concern. Mass production has increased general welfare, and this demands mass distribution and mass contracting. Standard form contracting reduces transaction costs lowers prices,<sup>73</sup> and allows senior management in large operations to maintain control.

<sup>69</sup> UTCCR, Sch 2, para 1(i).

<sup>70</sup> Beale, *Chitty on Contracts*, n 32 above, para 15-113. Thus, UTCCR can indirectly impose more onerous notice requirements than the common law.

<sup>71</sup> *Macaulay v Schroeder Music Publishing Co Ltd* [1974] 1 WLR 1308, 1316 (HL).

<sup>72</sup> See, eg Brian Bix, 'Contracts' in Franklin Miller and Alan Wertheimer (eds), *In the Ethics of Consent* (Oxford University Press, 2010).

<sup>73</sup> See, eg Robert Hillman, 'Rolling Contracts' (2002) 71 *Fordham Law Review* 743, 747.



In practice, exceptions have always been made to the requirement of fully informed consent where it would make the institution of contract more valuable and robust (often couched in the language of ‘certainty’ and ‘security’ of contract). The rules on signature and incorporation are two examples (although these sometimes go too far). Other examples are: the legal bias towards the enforcement of so-called ‘battle of forms’ cases,<sup>74</sup> vague or incomplete contracts<sup>75</sup> and conditional agreements,<sup>76</sup> especially where the parties’ commitment to the contract is clearly evinced by the commencement or completion of contractual performance. Analogously, an exception should be tolerated in the standard form context where the adhering party’s exercise of autonomy in respect of the consented-to core terms outweighs her questionable consent in respect of the unconsented-to non-core terms. However, it would be as inappropriate to enforce the latter wholesale, as it would be to refuse to enforce them wholesale. Even the welfare claim for mass-market standard form contracting is only in the *aggregate*. Individual abuses can and do flow from the practice. Thus, an all-or-nothing approach must be rejected in favour of a more targeted approach. And, UCTA and UTCCR provide precisely that by subjecting non-core terms to nuanced legal oversight.

(b) *Reciprocity and the protection of legitimate expectations*: standard non-core terms entail a heightened risk of unjustifiable subversion of the reciprocity embodied in the contract’s core terms. This explains two categories of non-core terms targeted by UCTA and UTCCR. On one side are terms that reduce or eliminate the proffering party’s primary obligations. These prevent the adhering party from obtaining what was legitimately expected from the core terms. Thus, UCTA<sup>77</sup> targets ‘terms and notices which exclude or restrict the relevant obligation or duty’ in respect of liability in tort or breach of statutory implied terms, and stipulates that an adhering party’s agreement to or awareness of a term purporting to exempt liability for negligence ‘is not of itself to be taken as indicating his voluntary acceptance of any risk’<sup>78</sup> to pre-empt any argument that there was no duty to exclude. It also targets terms that allow a business to ‘render a contractual performance substantially different from that which was reasonably expected of him’, or ‘render no performance at all’ in respect of the whole or any part of his contractual obligation. Such terms also feature extensively on the Schedule 2 list of indicatively unfair terms in UTCCR and bear setting out; namely, those with the object or effect of:

- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone; ...
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer;

<sup>74</sup> Eg *Butler Machines v Ex-Cello Corp* [1979] 1 WLR 401 (CA).

<sup>75</sup> Eg *Hillas Ltd v Arcos Ltd* (1932) 147 LT 503 (HL).

<sup>76</sup> Eg *RTS Flexible Systems Ltd v Molkerei Alois Muller GMBH* [2010] UKSC 14; [2010] 3 All ER 1.

<sup>77</sup> UCTA, s 13(2) and s 3(2).

<sup>78</sup> UCTA, s 2(3).

- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so; ...
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided; ...
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality; ...
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement.

The Consumer Rights Bill adds to the list a term that 'has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it' (Schedule 2, Part 1, paragraph 12).

On the other side are terms that may inflate the adhering party's obligations against the core terms. Thus, UTCCR, Schedule 2 targets terms that have the object or effect of:

- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early; ...
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded; ...
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.

The Consumer Rights Bill adds to the list a term which has the object or effect of 'giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound' (Schedule 2, Part 1, paragraph 14).

Shrinking the proffering party's obligations and inflating the adhering party's obligations can also result from terms that give the proffering party disproportionate and unilateral power to determine the scope of both parties' obligations and liabilities. All these terms have the potential to undermine the adhering party's legitimate (autonomy and welfare) interest in the stability of the contract derived from the consented to core terms.<sup>79</sup> Raz defended the objective test of intentions

<sup>79</sup> See further at (d) *Control mechanisms*, p 126 below and text attached to nn 101–04 below.

as necessary to protect the institution of contract: 'For if people were often to let it appear that they have promised when they have not, the currency of promises would be debased and their appeal and utility greatly diminished'.<sup>80</sup> The same applies to these targeted terms in UCTA and UTCCR. To allow the proffering party to do this constitutes potentially valueless choices that the law should not facilitate.

(c) *Right to redress*: what distinguishes contracts from promises is that contracts are enforceable by law and promises are not. Remedies are constitutive of a contract; they are *of its essence*. Indeed, the general right to legal redress is foundational to civil society and an integral feature of the rule of law. Any agreement between the parties to oust the jurisdiction of the courts, except as permitted by the Arbitration Act 1996 is unenforceable as contrary to public policy.<sup>81</sup> Likewise, article 6(1) of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR) lays down the right to a fair hearing. The Human Rights Act 1998 requires national courts to observe the Convention in their adjudication, even between private parties. *The House of Lords has read down this right* as merely a procedural guarantee of access to the courts without guaranteeing 'any particular content for civil rights and obligations in the substantive law of the contracting states'.<sup>82</sup> However, a right of access to redress is empty if the background remedial rights can be deleted in the fine print, and all the worse, given the widespread use of such terms in the mass-market where consent is questionable. This is the mischief addressed by Lord Denning's ill-fated doctrine of fundamental breach as a rule of law.<sup>83</sup> The doctrine barred a party committing a 'fundamental breach' from relying on an exemption clause because a party simply cannot eliminate its own obligations in this way, irrespective of their intention. The doctrine was rejected by the House of Lords,<sup>84</sup> but substantially resurrected in UCTA and UTCCR.

Thus, UCTA specifically regulates exemptions for: negligence liability (section 2), breach of specific statutory implied terms (sections 6, 7) and breach of contract generally (section 3). UCTA also regulates exemptions of liability hidden in consumer 'guarantees' (section 5), and indemnity clauses, which may add insult to injury by requiring the consumer to indemnify the business for its liability to a third party (section 4). It also targets terms that make it more difficult for the adhering party to prove her case (section 13(1)) by:

- (a) making the liability or its enforcement subject to restrictive or onerous conditions;
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
- (c) excluding or restricting rules of evidence or procedure.

<sup>80</sup> Raz, 'Promises in Morality and Law', n 64 above, 936.

<sup>81</sup> *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 (CA).

<sup>82</sup> *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, para 33; [2004] 1 AC 816, pages 834–35.

<sup>83</sup> *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 (CA), 943.

<sup>84</sup> *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

Likewise, Schedule 2 to UTCCR targets terms that have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; ...
- (f) permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract; ...
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

This is consistent with the invalidity of arbitration clauses that relate to claims for a 'modest amount'<sup>85</sup> and also of contract terms 'providing that a consumer bears the burden of proof in respect of showing whether a distance supplier or an intermediary complied with any or all of the obligations placed upon him resulting from the Directive' of 2002<sup>86</sup> concerning the distance marketing of consumer financial services.<sup>87</sup>

The proffering party can also usurp contract law's public function of determining fair redress by giving itself the power to inflate the adhering party's liabilities for breach. Other equitable doctrines assert contract law's jurisdiction to impose proportionate liability (eg rules controlling penalties, forfeitures and restraints of trade). Consistently, UTCCR subjects to review terms with the object or effect of:

- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.

The Consumer Rights Bill adds to the list a term that has the object or effect of 'requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied' (Schedule 2, Part 1, paragraph 5).

<sup>85</sup> Arbitration Act 1996, ss 89, 90; Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167.

<sup>86</sup> Council Directive 2002/65/EC of 23 September 2002 concerning distance marketing of consumer financial services [2002] OJ L271/16.

<sup>87</sup> Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095, reg 24, amending UTCCR, regs 3(1) and (5).

*Chitty* supports the ‘indirect horizontal effect’ of the Human Rights Act 1998<sup>88</sup> in relation to the tests of validity of terms under UTCCR<sup>89</sup> and UCTA.<sup>90</sup> That is, courts should legitimately take into account consistency with Convention rights (including that of the right to redress) when applying the reasonableness or unfairness tests.<sup>91</sup> This would merely reinforce the policy embodied in the statutory instruments to protect the adhering party’s right to meaningful redress. EU rights to effective judicial protection against unfair terms go much further than the English interpretation of Article 6(1) ECHR.<sup>92</sup> This should encourage English courts to adopt a very robust and *substantive* (rather than purely formal) approach to evaluating terms that have the object or effect of depriving the adhering party of redress.

Terms that supplant the default remedy also have the potential to undermine equality before the law. Contracts both reflect and exacerbate existing inequalities because they distribute not only goods and services, but also power. Contracts can thus affect the kinds of relations we have with others. Equality before the law is degraded where adhering parties (as a class) are deprived of the right to meaningful redress, while proffering parties not only retain this right, but can also inflate it by exercising powers it has awarded itself. The adhering party is subject to the unaccountable rule of the proffering party rather than to the rule of law. This is only partly a problem of the adhering party’s defective consent, for it also raises concerns about social justice and exploitation of unequal positions. It is no coincidence that at common law, courts have implied terms to restrain the dishonest, capricious, arbitrary or bad faith exercise of discretionary contractual power.<sup>93</sup> Common law

<sup>88</sup> Beale, *Chitty on Contracts*, n 32 above, para 1-079; see generally, Paul Craig, *Administrative Law*, 6th edn (London, Sweet & Maxwell, 2008) paras 18-027–18-028; Murray Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ (1998) *Public Law* 423.

<sup>89</sup> Beale, *Chitty on Contracts*, n 32 above, para 1-083. The Preamble to Directive 93/13/EC, n 35 above, suggests at recital 16 that the function of the requirement of good faith is to ensure that a court makes ‘an overall evaluation of the different interests involved’, and it then refers to matters which appear to relate to the public interest.

<sup>90</sup> A similar argument could be run as regards the application of the reasonableness test under UCTA, s 11(1), though this test does not explicitly draw attention to the relevance of issues of public interest for its assessment.

<sup>91</sup> But not when interpreting contracts or implying terms since courts would be open to the charge of remaking the contract, Beale, *Chitty on Contracts*, n 32 above, paras 1-080 and 1-081.

<sup>92</sup> See, eg C-240/98 *Oceano Grupo Editorial SA v Roció Murciano Quintero*, 27 June 2000 (ECJ) and C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Gyrfi* [2009] ECR I-4713, where the CJEU held that it is not necessary for the consumer to contest the validity of an unfair term. Courts of the Member States have the power to evaluate whether a specific contract term is unfair of their own motion and a clause in a consumer contract conferring jurisdiction to the seller’s seat may be considered unfair. And see C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875, where it was held that a provision in the law of a Member State which prevents a national court from finding a contractual term in a consumer contract to be unfair after the expiry of a limitation period, is not compatible with the Unfair Terms Directive (Directive 93/13/EC, n 35 above).

<sup>93</sup> See Hugh Collins, ‘Discretionary Powers in Contracts’ in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contracts* (Oxford, Hart Publishing, 2003) 219; Terence Daintith, ‘Contractual Discretion and Administrative Discretion: A Unified Analysis’ (2005) 68 *Modern Law Review* 554. See *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918 (CA); *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466; [2002] 2 All ER 248; *Horkuluk v Cantor Fitzgerald* [2004] EWCA Civ 1287; [2004] IRLR 942; *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] EWCA Civ 116; [2008] Bus LR 1304.

has also refused to enforce a contract for absence of consideration where one party's performance is agreed to be entirely at its own discretion.<sup>94</sup>

These concerns have been swept aside by those who argue that a proffering party's reputational concern would ensure that it exercises its discretion fairly and reasonably.<sup>95</sup> However, this is much more likely in the case of large, recurring and sophisticated customers (whose goodwill is more valuable) than in the case of weak, occasional and unsophisticated customers (whose goodwill is less valued). The concern to counter such unjustified preferential treatment in the exercise of discretionary power is evident elsewhere in contract law. It explains why the doctrine of frustration will not relieve a party from her obligations if the partial destruction of her supplies leaves her with an arbitrary choice as to which of her contracts she will perform. The frustration is said to be 'self-induced'<sup>96</sup> because preference can be given to the more profitable contract partners. The same concern explains why a harsh limitation clause in a contract to supply seeds was invalidated under UCTA when evidence showed, *inter alia*, that the seller had in many other cases agreed settlements exceeding the stated limitation.<sup>97</sup>

Even if the proffering party's exercise of discretion is even-handed, and indeed even if fair and reasonable, the very existence of excessive unaccountable power remains problematic. A term that amounts to a blank cheque, allowing the proffering party to do as it pleases once a dispute arises, makes adhering parties 'nothing more than supplicants'.<sup>98</sup> And, if successful, the adhering party's fair treatment will be by virtue of a favour bestowed, rather than a legitimate entitlement upheld. This undermines the rule of law and, paradoxically, the concept of contract as a regime of private ordering.

(d) *Control mechanisms*: It would be excessively heavy-handed to automatically invalidate all non-core terms. A flexible approach that invalidates a terms only if it derogates unjustifiably from the parties' core obligations or default liabilities enhances the utility of the institution of contract. UCTA and UTCCR adopt a four-toned approach. At one extreme are the black-listed terms. Here, the prohibition on exempting negligence liability causing personal injury or death<sup>99</sup> reflects individuals' legitimate interest in freedom from physical harm and the individual's responsibility to avoid causing such harm to others, usually expressed in tort law. The state should not abdicate its responsibility to give redress by allowing a proffering party to privatise the adhering party's right to safety and freedom from physical harm and immunise itself from negligently causing such harm. The adhering party is not permitted to waive this right, even with consent and for consideration. This is a worthless choice that the state should not facilitate. This right is 'market inalienable', as one's

<sup>94</sup> *Stabilad Ltd v Stephens and Carter (No 2)* [1999] 2 All ER (Comm) 651 (CA), 659–60.

<sup>95</sup> Bebachuk and Posner, 'One-Sided Contracts in Competitive Consumer Markets', n 18 above; Johnston, 'The Return of the Bargain', n 54 above.

<sup>96</sup> *J Lauritzen AS v Wijsmuller BV* ('The Super Servant Two') [1990] 1 Lloyds Rep 1 (CA).

<sup>97</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737 (HL).

<sup>98</sup> Todd Rakoff, 'The Law and Sociology of Boilerplate' (2006) 104 *Michigan Law Review* 1235, 1236.

<sup>99</sup> UCTA, s 2(1), and s 5 which invalidates a manufacturer's or distributor's liability in tort to a person injured by goods proving defective in consumer use where the exemption is contained in a 'guarantee' of the goods.

kidney and one's vote are.<sup>100</sup> As for the inalienability of the customer's right to title and satisfactory quality of the goods purchased,<sup>101</sup> these most basic expectations (implicit in the core terms) have been recognised by Parliament through the democratic process and made the subject of rights via statutory implied terms.<sup>102</sup> These represent the customer's legitimate interest when buying goods. They cannot be erased by standard form contracting. Indeed, the Consumer Rights Bill broadens the scope of such inalienable rights in consumer contracts for the supply of goods, digital content and services,<sup>103</sup> whether negotiated or non-negotiated.

At the other extreme are the white-listed terms that are immune from challenge. In consumer contracts, these are main subject matter and price terms expressed in plain and intelligible language<sup>104</sup> that will generally have received informed consent, and anyway, cannot be reviewed without undermining the most basic freedom of contract, and, if invalid, depriving consumers of the goods or services sought. In respect of commercial contracts, the concern to uphold contractual freedom also underlies the immunity from review of terms other than those exempting liability or having like effect. The various extensions of the scope of regulated 'exemption clauses'<sup>105</sup> reduce the scope of that immunity. Nevertheless, the wider immunity from review (and so lesser protection of businesses) is justified by the generally greater bargaining power of businesses to look after their own interests. Even so, small businesses may have little more bargaining power than consumers;<sup>106</sup> they may be just as affected by unfair surprise and lack of choice. And, unfairness attaches to many terms beyond those regulated by UCTA.<sup>107</sup> These legitimate concerns prompted the Law Commission to suggest extending the scope of review in favour of small businesses<sup>108</sup> to all non-negotiated non-core terms. But this has yet to be taken up.

In between the black- and white-listed terms are grey-listed terms of two shades that are subject to the tests of reasonableness or fairness. These terms lie along the inalienability spectrum attracting scrutiny of different severity and different burdens

<sup>100</sup> See Radin, 'Market-Inalienability', n 67 above; Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London, Penguin, 2013).

<sup>101</sup> UCTA, ss 6(1), (2) and 7(2)–(3A).

<sup>102</sup> Sale of Goods Act 1979, ss 12, 14.

<sup>103</sup> Consumer Rights Bill 2013, cls 31, 47, 57.

<sup>104</sup> UTCCR, reg 6(2), now 'transparent and prominent' under the Consumer Rights Bill 2013, cl 67.

<sup>105</sup> UCTA, ss 3(2)(b) and 13(1).

<sup>106</sup> Eg where it sells all its output to a major car-maker or a supermarket chain, or buys goods or services of relatively low volume or value.

<sup>107</sup> Eg a small business may be required to indemnify the larger business for losses not caused by its default, forfeit deposits or accept price variations; the larger business may reserve the right to terminate the contract at will, or for only a minor breach, while the small business is more rigorously bound by the contract.

<sup>108</sup> Law Com No 166 and Scot Law Com No 119, n 2 above, para 4.8. 'Small businesses' are those with nine or fewer staff: see UCTA, ss 11 and 27.

of proof. The non-core terms expressly nominated in UCTA<sup>109</sup> and UTCCR<sup>110</sup> entail clear risks to the institution of contract and are presumptively invalid. The burden is on the proffering party (under UCTA),<sup>111</sup> or *in practice* on the proffering party (under UTCCR)<sup>112</sup> to justify the terms' validity. In contrast, it is up to the consumer to prove the invalidity of non-core terms not expressly featured in Schedule 2 of UTCCR,<sup>113</sup> and of core terms not expressed in plain and intelligible language.

In applying the tests of validity (reasonableness and fairness), the court must again have regard to the voluntariness, reciprocity and redress dimensions of the contract. It must balance, on the one hand:

- the quality of the adhering party's consent (taking into account the transparency of any notice given of the potentially abusive term, any inducement received for it and any realistic alternative of contracting without it); and
- the extent to which the substance of the term derogates from the adhering party's legitimate expectations generated by the core terms and the background or default rules which would apply in the absence of the challenged term,<sup>114</sup> or reduces or destroys her default right to redress, whether directly or by subjecting her to the proffering party's unilateral, arbitrary and unaccountable power;

with, on the other hand:

- the economic necessity of the term for the proffering party's protection in view of the subject matter of the contract, the proffering party's resources to meet or insure against likely claims, and all the other terms of the contract and any other related contract.

<sup>109</sup> Indemnities against consumers (UCTA, s 4); exemptions of negligence liability causing loss other than personal injury or death (UCTA, s 2(2)); exemption of liability for breach of contract (UCTA, s 3); exemptions of liability for breach of implied terms relating to quality (the conformity of the goods with the description or sample, satisfactory quality and fitness for purpose) *against* non-consumers (UCTA, ss 6(3) and 7(3)); exemption of liability in respect of contracts passing ownership or possession of goods (UCTA, s 7(4)).

<sup>110</sup> The terms listed in UTCCR, Sch 2 and other non-negotiated terms in consumer contracts *not* going to the main subject matter or price of the contract (reg 6).

<sup>111</sup> UCTA, s 11(5) places the burden of proving unreasonableness on the business seeking to enforce the term.

<sup>112</sup> It is arguable that the list of indicatively unfair terms in UTCCR, Sch 2 has the same practical effect. The Unfair Contract Terms Bill proposed in Law Com No 166 and Scot Law Com No 119, n 2 above, puts the burden on the business to prove the validity of a term that exempts liability for negligence causing loss other than personal injury or death, and for breach of contract (s 15). Section 16 puts the burden on the business to prove the validity of other non-core terms against consumers. Consumer Rights Bill 2013 does not mention the burden of proof apart from s 63(6): 'A term of a consumer contract must be regarded as unfair if it has the effect that the consumer bears the burden of proof with respect to compliance by a distance supplier or an intermediary with an obligation under any enactment or rule implementing the Distance Marketing Directive'.

<sup>113</sup> UTCCR, regs 5 and 6(2). But see Unfair Contract Terms Bill, ss 16–17 proposed in Law Com No 166 and Scot Law Com No 119, n 2 above, which restricts this to actions brought by (a) the Directorate General of Foreign Trade (DGFT) or other qualifying body; or (b) a 'small business', leaving the business to prove the validity of all non-core terms against consumers to the business.

<sup>114</sup> *Aziz*, n 49 above, para 77: "significant imbalance" to the detriment of the consumer must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force'.



Since a clause will be judged according to its *potential* unfairness, very widely drawn terms are more likely to be invalidated as unreasonable or unfair for failing to take account of the adhering party's legitimate interests. A party's legitimate interests in contract can be described as that of: obtaining adequate redress; receiving the performance reasonably expected from the main subject matter term; avoiding an unreasonable inflation of one's own obligation; avoiding disproportionate liability for breach; and having a balanced power to determine the life of the contract.

A term which may look, *prima facie*, severely prejudicial to the rights of the adhering party may be fair if it is counterbalanced by a corresponding term to the adhering party's advantage. In the context of cancellation rights, for example, the Office of Fair Trading expressed the view that

[f]airness and balance require that consumers and suppliers should be on an equal footing as regards rights to end or withdraw from the contract. The supplier's rights should not be excessive, nor should the consumer's be over-restricted. This does not, however, mean a merely formal equivalence in rights to cancel, but rather that both parties should enjoy rights of equal extent and value.<sup>115</sup>

Thus, for example, an exemption clause may be justifiable if the goods were manufactured, processed or adapted to the customer's special order, especially if it was brought to the customer's notice and she received an inducement to agree, or if the proffering party does not have the resources to meet potential claims and is unable to cover itself by insurance. A discretion to reduce the proffering party's, or increase the customer's, obligations may be justifiable if, for example, it is conditional on specified and warranted circumstances (eg significant rise in the price of raw materials or particular difficulties in performance), especially if the customer is empowered to withdraw from the contract without penalty. Again, a term requiring the customer to pay an apparently disproportionate sum on breach may be justifiable in the circumstances (eg a 75 per cent charge for a customer who cancels a world voyage by clipper may be fair given the importance of her commitment to the venture).<sup>116</sup> Lastly, standard terms between experienced and substantial businesses of equal bargaining power in terms of size and resources are presumptively valid because

they may be taken to have had regard to the matters known to them. They should ... be taken to be the best judges of the commercial fairness of the agreement which they have made; including the fairness of each of the terms of that agreement.<sup>117</sup>

## CONCLUSION

Standard form contracting presents an acute challenge to the social institution of contract as primarily a mechanism for expanding valuable choices by providing the necessary security for exchange agreements. The practical impossibility of informed

<sup>115</sup> Office of Fair Trading, *Unfair Contract Terms Guidance* (2008), para 6.1.1, available at [www.offt.gov.uk/shared\\_oftr/reports/unfair\\_contract\\_terms/oft311.pdf](http://www.offt.gov.uk/shared_oftr/reports/unfair_contract_terms/oft311.pdf).

<sup>116</sup> *Clipper Ventures Plc v Boyde* 2013 SCLR 313; 2013 GWD 12-243.

<sup>117</sup> *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317; [2001] Build LR 143, para 63.

consent to the fine print, to which customers can only 'adhere', gives the proffering party a relatively free hand to smuggle in highly subversive terms. Faced with the undesirability of enforcing either all or none of the unconsented-to fine print, UCTA and UTCCR steer a middle path by encouraging conditions that increase the likelihood of informed consent, while directly targeting potentially harmful non-core terms and subjecting them to nuanced control.

This pattern of control cannot be fully explained by reference only to defective consent, or to market inefficiency, or by treating non-core terms as defective products, although all three provide important insights. UCTA and UTCCR strike down harmful terms that abuse the institution of contract, and those who rely on it, by unjustifiably undermining voluntariness, subverting the essential exchange embodied in the consented-to core terms, establishing unacceptable power relationships, or destroying the right to meaningful redress. UCTA and UTCCR refuse to allow the institution of contract to be used to degrade the underlying logic of the institution of contract. Using contract to destroy contract is a worthless choice that the law should not facilitate.