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ARTICLE

Policing Consumer Contract Terms under US and EU Law: A Comparative Analysis of the Directive 93/13/EEC on Unfair Terms in Consumer Contracts and the Restatement of Consumer Contracts

Frederick Rieländer

University of Bremen, Bremen, Germany
Email: frielaen@uni-bremen.de

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Abstract

The control of standard contract terms has become one of the most important yet controversial areas of contract law. By comparing the Directive 93/13/EEC on unfair terms in consumer contracts with the recently adopted US Restatement of Consumer Contracts, this Article sheds light on the relative strengths and weaknesses of the EU and US regulatory approaches to the use of standard terms in consumer contracts. Particular emphasis is placed on the review of dispute resolution clauses. The central thesis of this Article is that the personal scope of the European and US consumer contract control regimes should be broadened to protect small and medium sized enterprises and that their interplay with private international law needs to be clarified.

Keywords: Standard Terms; Directive 93/13/EEC; Consumer Contracts Restatement; unfair terms; party autonomy

A. Introduction

The widespread use of standard terms, so-called boilerplate, in both consumer and commercial contracts raises difficult policy questions and complex regulatory challenges. On the one hand, pre-formulated contract terms have long become an indispensable part of modern contracting, allowing businesses to streamline the formation and execution of bulk transactions and thus to offer lower prices for their products and services, which should ultimately benefit all market participants, including consumers.[1] On the other hand, the drafting of standard terms evidently lends itself to inappropriately shift risk to the detriment of the other party to the contract, because both consumers, and also professional customers usually do not familiarize themselves with the fine print imposed by sellers and traders.[2] Indeed, from an economic point of view, it makes little sense for customers to invest time and effort in trying to study and fully understand the content of a myriad of standard terms imposed by businesses, because it is almost hopeless to engage in individual negotiations in order to amend or modify the terms, or even to look for another

[1] *See* Matteo Fornasier, Freier Markt und zwingendes Vertragsrecht [Free Market and Mandatory Contract Law] 145–46 (2013). *See also* Peter McColgan, Abschied vom Informationsmodell im Recht allgemeiner Geschäftsbedingungen [Farewell to the Information Model in General Terms and Conditions Law] 6–12 (2020).

[2] *See* Matteo Fornasier, *Preliminary Notes to § 305*, in Münchener Kommentar zum BGB [Munich Commenentary to the German Civil Code] para. 3 (2022).

supplier offering better terms.[3] Standard form contracts are thus characterized by information and power asymmetries, a notorious problem that has been exacerbated by ongoing technological advances in the digital age, which have made it increasingly easy for companies to insert and periodically modify overly complex terms throughout the "life cycle" of a contractual relationship.[4] This well-known phenomenon not only creates a risk of "contract failure" at the micro level, but also fuels a "race to the bottom" at the macro level: If competition is based solely on price, because the customer ignores the standard terms anyway, there will be competitive pressure to reduce one's own production and distribution costs more than the competitor by offering increasingly customer-unfriendly terms in order to be able to offer a lower price than the competitor.[5]

Even though there is widespread agreement both in Europe and the United States that the standard contract terms require thorough regulation, it is striking to note that even within the EU there has never been a consensus on the policy reasons for subjecting contract terms to judicial review and the limits of the associated interference with contractual freedom.[6] In fact, this has not fundamentally changed even since the Council Directive on unfair terms in consumer contracts, hereinafter referred to as "Directive 93/13/EEC,"[7] was adopted and came into force.[8] Even though the Directive 93/13/EEC was aimed at aligning the divergent national regimes of the Member States of the European Economic Community on unfair contract terms and to ensure that unfair terms are completely removed from consumer contracts,[9] it fundamentally failed to achieve this very objective for two reasons. First the Directive 93/13/EEC is, like all of the older Community instruments in the area of consumer law, based on the principle of minimum harmonisation, expressly allowing the Member States to retain or to introduce more consumer-friendly national rules than it prescribes—Article 8 of the Directive.[10] Even though this could be welcomed in so far as it may contribute to boost competition between the Member States in ensuring a high level of consumer protection, it is contrary to the objective of the Directive 93/13/EEC, which, as stated, is to eliminate distortions of competition caused by different consumer protection rules. On the one hand, the Directive thus provides no more than a minimum level of protection for consumers; on the other hand, it offers businesses only minimum legal certainty concerning the applicable consumer protection rules which must be observed when supplying services throughout the internal market. Second, the Court of Justice of the European Union (CJEU) has, in its case law on the Directive 93/13/EEC, largely shied away from clearly fleshing out the concept of "unfair term" within the meaning of Article 3(1) of the Directive 93/13 and in the Annex thereto, granting the Member State courts a wide margin of appreciation in determining whether or not a disputed contract term must be considered as unfair.[11]

[3]Michael Adams, *Ökonomische Begründung des AGB-Gesetzes – Verträge bei asymmetrischer Information* [*Economic Justification of the General Terms and Conditions Act: Contracts with Asymmetric Information*], 12 Betriebsberater 781, 787 (1989) (providing a more detailed economic analysis of information asymmetries in consumer contracts); Fornasier, *supra* note 1, at 154–162; Eirik G. Furubotn & Rudolf Richter, Institutions and Economic Theory – The Contribution of the New Institutional Economics 241–246 (2005).

[4]Restatement of the Law of Consumer Contracts § 90(2) (Am. L. Inst., Tentative Draft No. 2, 2022).

[5]*See* Fornasier, *supra* note 1, at 158–162; McColgan, *supra* note 1, at 48–58.

[6]Nils Jansen, *Klauselkontrolle im europäischen Privatrecht: Ein Beitrag zur Revision des Verbraucheracquis* [*Monitoring Terms in Eurpoean Private Law - A Contribution to the Revision sof the Consumer Acquis*], 18 Zeitschrift für Europäisches Privatrecht (ZEuP) 69, 70 (2010).

[7]Council Directive 93/13/EEC, 1993 OJ (L 95) 29 (EC).

[8]*See* Matteo Fornasier, *A Short Biography of the Unfair Contract Terms Directive on the Occasion of Its 30th Anniversary*, 31 Eur. Rev. of Priv. L. 1143, 1144–1146 (2023) (providing a detailed analysis of the shortcomings of the Directive, as interpreted by the CJEU). *See also* Jansen, *supra* note 6, at 76.

[9]Council Directive 93/13/EEC, *supra* note 7, at art. 6.

[10]*See* Council Directive 93/13/EEC, *supra* note 7 at art. 8. *See* Matthias Lehmann & Danny Busch, *Make It Stringent: A Plea for an Unfair Terms Regulation*, 31 Eur. Rev. of Priv. L., 1175, 1179–1180 (2023) (making a trenchant critique).

[11]*See* Fornasier, *supra* note 8, at 1153–1159, 1169, 1174.

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Against this backdrop, it is worth taking a closer look at the U.S. regulatory approach of standard contract terms, as encapsulated in the recently approved U.S. Restatement on Consumer Contracts. Even though the Restatement is, like all Restatements, not a source of law *stricto sensu*, but rather a treatise which purports to only demonstrate how the general common law principles of U.S. contract law have been applied by U.S. courts to consumer contract disputes, its non-binding black letter rules may nevertheless shape the future development of the U.S. jurisprudence on consumer contracts in a similar way as the Directive did across Europe.[12] A comparative analysis of the Directive 93/13/EEC and the equally controversial Restatement promises valuable insights for both sides of the Atlantic, not least with a view to possible future legislative reforms in the area of consumer law. This Article proceeds as follows. The first part provides an overview of the structure and content of the Directive 93/13/EEC and the main case law of the CJEU relating to this Directive. This is followed by a brief presentation of the Consumer Contracts Restatement in the second part, focusing on the key principles of U.S. consumer contract law as summarised and clarified in this new Restatement. The juxtaposition of these two regimes provides the basis for the third part, in line with the general theme of the international conference on the topic of "Informed Consent to Dispute Resolution Agreements" at the University of Bremen from June 20-21, 2024—at which this author gave a comparative presentation on the Consumer Contracts Restatement and the Directive 93/13/EEC—to examine how dispute resolution clauses are treated under the Directive 93/13/EEC and the Consumer Contracts Restatement. The Article concludes by looking at the prospects for further developing and revising the European and U.S. regimes of standard contract terms.

B. The Directive 93/13/EEC in a nutshell

I. Structure of the Directive and Legislative Objectives

Since its adoption more than three decades ago, the Directive 93/13/EEC has remained virtually unchanged.[13] It has only slightly been amended by Directive (EU) 2019/2161,[14] which was enacted as part of the so-called new deal for consumers, in order to strengthen enforcement mechanisms. As one of the cornerstones of EU private law, which primarily comprises consumer contract law, the Directive has generated more case law from the CJEU than any other EU private law instrument.[15] With hindsight, this is hardly surprising, given that the Directive only provides a basic framework for the control of non-negotiated terms in consumer contracts, consisting of eleven short articles and relying on highly abstract concepts such as the notion of "good faith"—which lies at the heart of the fairness control of consumer contract terms stipulated in Article 3(1) of the Directive—that need to be fleshed out and further specified in a case-by-case assessment by the judiciary. It should be noted, however, that the European Commission has issued an elaborate guidance on the application and the interpretation of the Directive in 2019, aiming at facilitating the effective application of this instrument throughout the Union.[16] In short, the Directive is structured as follows. Its purpose and scope are clarified in Article 1. Article 2 contains definitions of terms relevant to the application of the Directive. Article 3 sets out, as mentioned, the central control standard for consumer contract terms in form of a general clause, which is supplemented

[12]*See* Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's impossible Dream*, 32 Loy. L. Rev. 369, 369–70 (2020).

[13]The Directive was adopted on April 5, 1993 and had to be transposed into national law until December 31, 1994. *See also* Council Directive 93/13/EEC, *supra* note 7, at Article 10(1).

[14]Directive 2019/2161, of the European Parliament and Council of 27 November 2019, Amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as Regards the Better Enforcement and Modernisation of Union Consumer Protection Rules, 2019 OJ (L 328) 7–28.

[15]*See* Reiner Schulze & Fryderyk Zoll, Europäisches Vertragsrecht [European Contract Law] 243 (2021).

[16]Commission Notice of 27 September 2019, Guidance on the interpretation and Application of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 2019 O.J. (C 323) 4–92 (EC).

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by Article 4 and a non-exhaustive list of categories of potentially unfair contract terms included in the Annex to the Directive. Article 5 governs the interpretation of contract terms to which the Directive applies. Articles 6–8b and 10 set out the requirements for the transposition of the Directive into national law. Article 9 stipulates that the Commission issues a report concerning the application of the Directive five years after the period for the implementation into national law has expired.

As mentioned in the introduction, the Directive 93/13/EEC was originally designed as a market regulation instrument to contribute to the achievement of a fully functioning internal market and to further the EU's key objective of ensuring a high level of consumer protection, now proclaimed in Article 38 of the Charter[17] and Articles 169 and 114(3) of the TFEU[18].The underlying assumption was that by establishing a common European standard of judicial review of consumer contract terms, consumers would be encouraged to purchase goods and services throughout the Community and businesses would be relieved of the burden of having to adapt to a variety of different consumer laws when supplying goods and services abroad.[19] This, it was argued, would stimulate competition and lead to more choice for consumers.[20] At the same time, the Directive 93/13/EEC sought to strike a compromise between different legal traditions: The French tradition and the German tradition. Under French law, the terms of consumer contracts, whether unilaterally imposed by the trader or individually negotiated, are generally subject to strict control in order to compensate for the weaker position of the consumer vis-à-vis the business.[21] The opposing German *AGB-Gesetz*[22]— later incorporated into the German Civil Code[23]—under which only "genuine" standard terms—or in other words, terms pre-formulated for a large number of contracts and unilaterally imposed by one party— are strictly monitored, regardless of whether the terms are used against professional traders or consumers.[24] Directive 93/13/EEC is conceptually strongly inspired by the leading German doctrine—which considers the policing of contract terms as an essential means for counteracting the "de facto" power given by market forces to the user of standard terms to "legislate by contract."[25] However, its scope, in line with the French notion of *contrat d'ahesion*, covers only consumer contracts[26] and the *ex post* scrutiny provided for in its Article 3 is not limited to standard terms *stricto sensu*, but extends to all terms which have not been individually negotiated, including those which are not intended to be used in more than one transaction.

In view of the conceptual limitation of the Directive's scope of limitation to consumer contracts the CJEU has, in its case law, always focused on the protective purpose of the Directive 93/13,

[17]Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391–407.

[18]Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2007 O.J. (C 2020) 47. *See also* Hans Schulte-Nölke, *The Objectives of Directive 93/13/EEC on Unfair Contract Terms: An Overview after 30 Years of Case Law*, 32 Eur. Rev. of Priv. L. 315, 317–19 (2024) (providing a more detailed analysis); Jansen, *supra* note 6, at 70; Johannes Köndgen, *Grund und Grenzen des Transparenzgebots im AGB-Recht*, 15 Neue Juristische Wochenschrift (NJW) 943, 946–947 (1989).

[19]*See* Council Directive 93/13/EEC, *supra* note 7, at art. 6.

[20]*See* Council Directive 93/13/EEC, *supra* note 7, at art. 7.

[21]Jean-Luc Aubert & François Collart-Dutilleul, Le contrat. Droit des obligations 82–84 (2010) (offering the French tradition of consumer contract review); Patrick Brock, Der Schutz der Verbraucher vor mißbräuchlichen Klauseln im französischen Privatrecht 53–58 (1998); Paolisa Nebbia, Unfair Contract Terms in European Law 34, 38–40 (2007).

[22]Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen [AGBG] [Law Regulating the Law of General Terms and Contracts], Dec. 9, 1976, BGBl I at 3317.

[23]*See* Bürgerliches Gesetzbuch [BGB] [German Civil Code], §§ 305–31, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

[24]Schulze & Zoll, *supra* note 15, at 250–251.

[25]*See* Schulte-Nölke, *supra* note 19, at 318. *See also* Lars Leuschner, *Introduction*, *in* AGB-Recht im unternehmerischen Rechtsverkehr, Commentary at paras. 11–12 (Lars Leuschner ed., 2021).

[26]*See* Council Directive 93/13/EEC, *supra* note 7, at art. 1(1), art. 8.

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consistently emphasising that this instrument is based on the idea that the consumer was in a weak position vis-à-vis the business, as regards both his or her bargaining power and his or her level of knowledge.[27] However, this should not obscure the fact that the European legislator actually tried to merge two different normative justifications for policing contract terms, namely the aim of protecting the—presumably—weaker party to the contract on the one hand and compensating for the lack of influence on the content of the contract on the other hand, into a truly European concept of "control of contract terms."[28] However sensible it may have been from a political point of view to seek a compromise between different national traditions when drafting the Directive, the attempt to intertwine the conflicting objectives of judicial review of contract terms has created conceptual tensions and inconsistencies. In particular, the limitation of the scope of application to consumer contracts should be carefully reconsidered in the course of a possible future revision of the Directive.[29]

II. Scope of Application

According to Recital 10, Directive 93/13/EEC applies to "all contracts" between professionals and consumers, regardless of the subject matter of the contract.[30] The Directive defines the contracts to which it applies solely by reference to the capacity of the parties to the contract. The notion of contract, which like all other terms shall be defined autonomously,[31] hence captures not only sales contracts, but also gratuitous agreements, barter contracts, and unilateral contracts. According to its Article 1(2), the Directive does not apply for contractual terms which reflect mandatory provisions and the provisions or principles of international conventions to which the Member States or the EU are party.[32] A moot point is whether this exemption also excludes the application of the transparency requirement of Article 4(2) and Article 5 of the Directive.[33]

III. The Unfairness Test

It is striking that the Directive 93/13/EEC does not explicitly set out any specific requirements for the inclusion of non-individually negotiated terms in a consumer contract, leaving the conclusion of the contract and the requirements for the adoption of standard terms entirely to the applicable national law, as determined by the conflict rules of the Rome I Regulation.[34] The primary safeguard introduced by the Directive to protect consumers against the inclusion of unfair contract terms and to deter businesses from drafting and disseminating such terms is the *ex-post* control of non-individually negotiated terms provided for in Article 3(1) of the Directive 93/13/EEC.[35] To achieve this aim, the Directive stipulates that Member States must ensure that there are effective remedies to prevent unfair terms from continuing to be used in contracts and that organizations or individuals with a legitimate interest in protecting consumers' rights are entitled to institute legal proceedings against businesses to prevent unfair contract terms from being continually used—Article 7 of the Directive. Furthermore, the amended Directive now requires Member States to introduce "effective, proportionate and dissuasive penalties" for infringements

[27]*See e.g.*, Case C-200/21, BRD Groupe Societé Générale and Next Capital Solutions, ¶ 24 (May 4, 2023), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-200/21 (including the case law cited).

[28]Schulze & Zoll, *supra* note 15, at 253–254.

[29]*See infra* Part V.

[30]*See* Council Directive 93/13/EEC, *supra* note 7, at art. 10.

[31]*See* Thomas Pfeiffer, *"Article 1 Directive 93/13/EEC"*, *in* AGB-Recht Kommentar [General Terms and Conditions Law Commentary] para. 8 (Manfred Wolf, Walter F. Lindacher & Thomas Pfeiffer eds., 2020).

[32]*See* Council Directive 93/13/EEC, *supra* note 7, at art. 10.

[33]*See* Pfeiffer, *supra* note 31, at para. 5.

[34]Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6–16 [hereinafter Rome I].

[35]*See* Council Directive 93/13/EEC, *supra* note 7, at art. 3(1).

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relating to the use and dissemination of unfair contract terms. This includes the nature, gravity, scale and duration of the infringement, any action taken by the trader to mitigate or remedy the damage suffered by consumers, any previous infringements by the trader, and penalties imposed on the trader for the same infringement in other Member States in cross–border cases—Article 8b(1) of the Directive.[36]

According to Article 3(1) of the Directive 93/13/EEC, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Article 3(2) clarifies the expression of "not–individually negotiated terms," stating that a contractual term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.[37] As can already be inferred from the wording of this provision and is expressly confirmed by the third sub-paragraph, it is presumed that the disputed contract term has not been individually negotiated unless the contrary is proved by the business. Furthermore, the fact that certain aspects of a term or one specific term have been individually negotiated do not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre–formulated standard contract. Even though the unfairness test prescribed by the Directive does not extend to contract terms that describe and determine the main subject matter and also the adequacy of price to quality of goods or services, Article 4(2) of the Directive,[38] the Directive does not preclude Member States from establishing or maintaining fairness control mechanisms for core terms as well.

The general rule of Article 3 of the Directive is supplemented by a non-exhaustive, indicative list in the annex of the Directive which includes several contract terms which, typically, create a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. It should be noted, that the CJEU has, on the one hand, severely limited the significance of the list of terms in the annex. In its landmark case *European Commission v. Kingdom of Sweden,* the Court held that Member States were not obliged to transpose the list, as it had only an illustrative value, serving as a guide for assessing the unfairness of a term in the light of the principle of good faith.[39] Rather, it was only necessary to ensure that the public could become aware of the list, for example, by reproducing it in full in the preparatory documents of the national legislation transposing the Directive.[40] On the other hand, the CJEU has consistently emphasized that, although the content of the Annex was not sufficient to automatically establish the unfair nature of a contested term, it was nevertheless an essential element on which the competent court could base its assessment of the unfair nature of that term.[41]

Furthermore, as outlined in the beginning, the CJEU has, in its extensive case law on Directive 93/13/EEC, been reluctant to clearly ascertain whether and under which conditions particular terms are to be considered as "unfair" within the meaning of Article 3(1) of the Directive 93/13/EEC.[42]

[36]*See* Council Directive 93/13/EEC, supra note 7, at art. 3(1).

[37]*Id.* at art. 3(2).

[38]For a closer analysis of this exemption see Matteo Dellacasa, *Judicial Review of "Core Terms" in Consumer Contracts: Defining the Limits*, 11 EUR. REV. CONT. L. 152, 158–163 (2015) (giving a closer analysis of this exemption); Fernando Gómez Pomar, *Core versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?*, 15 EUR. REV. CONT. L. 177, 181–184 (2019); Michael Schillig, *Directive 93/13 and the "Price Term Exemption": A Comparative Analysis in the light of the "Market for Lemons" Rationale* (2011) 60 INT'L COMPAR. Q. 933, 945–53 (2011); STEPHEN WEATHERILL, EU CONSUMER LAW AND POLICY 153–156 (2013).

[39]Case C-478/99, Commission of the European Communities v. Kingdom of Sweden, ¶ 21 (May 7, 2002), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-478/99.

[40]*Id.* at 22–23.

[41]*See, e.g.*, Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt, ¶ 26 (Apr. 26, 2012), https://curia.europa.eu/juris/liste.jsf?num=C-472/10&language=EN.

[42]Fornasier, *supra* note 8, at 1153–1159, 1169, 1174.

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Rather, the CJEU has always left the Member State courts much room for maneuver in assessing the unfairness of a disputed term under the individual circumstances of the case, highlighting that it had only jurisdiction to deduce from the provisions of the Directive 93/13 the criteria that may or had to be taken into consideration when making such an examination.[43] More specifically, regarding the question as to whether the disputed term causes a "significant imbalance" in the parties' contractual rights and obligations to the detriment of the consumer, the Court has mainly only pointed out that it was necessary to consider what rules of national law would apply in the absence of an agreement by the parties, in order to determine whether the consumer is indeed put at a disadvantage.[44] In line with this, the Court has refrained from precisely defining the normative concept of "good faith" to which Article 3(1) of the Directive refers, emphasizing that this assessment—as already follows from Article 4(1) of the Directive 93/13/EEC—required a comprehensive, fact-sensitive examination of all the circumstances of the case in the light of the rights and obligations of the parties under the applicable national law.[45] Occasionally, it was held that in assessing whether the disputed term constituted a significant imbalance between the parties contrary to the principle of "good faith" special emphasis had to be placed on the question as to whether the business, "dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations."[46] Even though this hypothetical test might appear sound in so far as it responds to the information asymmetry problem associated with the use of standard terms, its practical value is clearly limited as it is difficult to see how a court may realistically second guess to what a consumer would have agreed in the hypothetical scenario that the disputed clause would have been the subject of individual negotiations.[47] Furthermore, one may doubt whether this test appropriately fulfils the regulatory purpose of the Directive given that consumers might, for lack of knowledge of the legal situation, hypothetically give their consent to contract terms placing them at a significant disadvantage even in individual negotiations.

All in all, it can be stated that due to the CJEU's traditionally reluctant approach, the Directive's harmonizing effect has been rather limited in terms of the *ex post* control of consumer contract terms.[48] Notwithstanding this, the CJEU's more recent case law reveals a slightly more assertive approach regrading those terms which deal with matters falling within the domain of EU law, especially EU private international law.[49] In this context, the case law does provide some clearer guidance concerning the relevant criteria and factors for examining the unfairness of contract terms. Notably, the CJEU has repeatedly held that a choice of court clause which has not been the subject of individual negotiation and which confers exclusive jurisdiction on the courts of the place where the business is established must be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[50] We will come back to this later.[51]

[43]*See, e.g.*, Case C-26/13, Árpád Kásler & aHajnalka Káslerné Rábai v. OTP Jegzálogbank Zrt, 40, 45 (Apr. 30, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-26/13 (and the case law cited); Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl, ¶ 65 (July 28, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-191/15.

[44]*See, e.g.*, Case C-342/13 Katalin Sebestyén v Zsolt Csaba Kovari and Other, ¶ 28 (Apr. 3 2014), https://curia.europa.eu/juris/liste.jsf?num=C-342/13&language=EN; Case C-415/11, Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), ¶ 66 (Mar. 14, 2013), https://curia.europa.eu/juris/liste.jsf?num=C-415/11.

[45]*Id.* at 66.

[46]*Id.* at 68.

[47]Fornasier, *supra* note 8, at 1159.

[48]Fornasier, *supra* note 8, at 1162; Jansen, *supra* note 6, at 1176.

[49]Fornasier, *supra* note 8, at 1161–62.

[50]*See* Joined Cases C 240, 241, 242, 243,& 244/98, Océano Grupo Editorial SA et al., ¶ 24 (June 27, 2000), https://curia.europa.eu/juris/liste.jsf?num=C-240/98; Case C 243/08, Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi, 40 (June 4, 2009), https://curia.europa.eu/juris/liste.jsf?language=en&T,F&num=c-243/08; Case C 137/08, VB Pénzügyi Lízing Zrt. v. Ferenc Schneider, 53 (Nov. 9, 2010), https://curia.europa.eu/juris/document/document.jsf?docid=80493&doclang=en.

[51]*See infra* Part IV.

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IV. The Transparency Principle

Although the Directive 93/13/EEC does not set out detailed requirements to be satisfied for the adoption of non-individually negotiated contract terms in consumer contracts, it would be wrong to assume that it was completely indifferent as to the required degree of consent on part of the consumer. Rather, the transparency principle enshrined in Article 4(2) and Article 5 of the Directive, according to which written terms must always be drafted in plain, intelligible language, has been used by the CJEU for devising stringent disclosure requirements that need to be met in order for the relevant terms to be incorporated in consumer contracts.[52] Although the transparency requirement of Article 5 of the Directive is conventionally regarded as a constituent element of the *ex post* scrutiny, it can also be conceptualized as a negative condition in the context of the incorporation of a term.[53] Referring to this transparency requirement in conjunction with Recital 20 of the Directive, the CJEU has emphasized that it was of vital importance that the consumer is given information, before concluding the contract, on the terms of the contract and the consequences of concluding it.[54] It was not only required that pre-drafted terms were plain from a linguistic point of view, but also the terms must be drafted in a way that allows the consumer to assess the extent of its obligations under the contract and the financial consequences arising from the contract.[55] Regarding the time at which this information must be provided to the consumer, the CJEU has made it clear that the consumer must be informed of the terms of the contract and the consequences of the conclusion of the contract before the contract is concluded. This enables the consumers to decide on the basis of this information whether they want to be bound by the terms pre-formulated by the trader.[56] From this angle, the transparency requirement can be conceptualized as a means of enabling informed consent.

V. The Directive's Substantive Provisions as "Overriding Mandatory Provisions"

What is particularly noteworthy in the present context is that Article 6(2) of the Directive 93/13/EEC, fully in line with a consistent trend in EU consumer law instruments, provides that Member States shall ensure that where there is a close connection with the territory of a Member State, the consumer may not be deprived of the protection afforded by the Directive by a choice of law agreement. This is not a conflict of laws rule *stricto sensu* because it does not determine the territorial scope of application of the substantive provisions of the Directive 93/13/EEC, but only prescribes a level of protection equivalent to that of the Directive in the case where the law of a non-EC state—third state—is chosen, provided that the facts of the case have a close connection with the territory of the Member States.[57] From a technical perspective, the rule can be conceptualised as an "*Exklusivnorm*" (a species of an overriding mandatory provision) which is to be transposed into national law by establishing unilateral conflict of laws rules providing for the application of the Directive, as transposed into the national law of the forum state.[58]

[52]*See* Pomar, *supra* note 38, at 184–89.

[53]*See* Christian Grüneberg, *"§ 305c", in* Bürgerliches Gesetzbuch (BGB) – Kommentar, at para. 1 (C.H. Beck, 83rd ed. 2024) (regarding the implementation of the transparency requirement into German law); Markus Stoffels, AGB-Recht, para. 329 (5th ed., 2024).

[54]Case C-92/11, RWE Vertrieb v. Verbraucherzentrale Nordrhein-Westfalen e. V., ¶ 44 (Mar. 21, 2013), https://curia.europa.eu/juris/liste.jsf?num=C-92/11; Case C-26/13, Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 70 (Apr. 30, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-26/13; Case C-154/15, Gutiérrez Naranjo et al. v. Cajasur Banco et al., 50 (Dec. 21, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-154/15; Case C-125/18, Marc Gómez del Moral Guasch v. Bankia SA, ¶ 49 (Mar. 3, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-125/18&language=EN.

[55]Case C-92/11, RWE Vertrieb, at ¶¶ 49–54; C-26/13, Kásler and Káslerné Rábai, at ¶¶ 71–5; C-96/14, Jean-Claude Van Hove v. CNP Assurances SA, 40-41(Apr. 23, 2015), https://curia.europa.eu/juris/liste.jsf?num=c-96/14; Case C-125/18, Gómez del Moral Guasch, at ¶ 50; Case C-452/18, XZ v. Ibercaja Banco, SA., 47 (July 9, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-452/18&language=EN.

[56]Case C 92/11, RWE Vertrieb, at 44.

[57]Pfeiffer, *supra* note 32. *See also*, Directive 93/13/EEC, *supra* note 7, at art. 6.

[58]*Id.*

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VI. Procedural Requirements

The more recent case law of the CJEU reflects a significant shift from merely construing the Directive's substantive rules to setting out uniform procedural requirements for the purposes of efficiently enforcing EU consumer law.[59] This is first and foremost reflected in the already settled case law according to which the national courts are required to assess whether a contractual term is unfair. If the CJEU has the legal and factual elements necessary to determine that the contractual terms are unfair, the consumer is compensated for the imbalance between the consumer and the business, unless the consumer has in full awareness of the consequences freely waived its rights guaranteed by the Directive.[60] The CJEU justifies an *ex officio* review of pre-formulated contract terms because it is allegedly necessary to ensure that consumers are appropriately protected against the use of unfair terms. It further argues that consumers were usually unaware of their rights or encounter difficulties in enforcing them, and that an *ex officio* review contributed to achieving the objectives of Articles 6 and 7 of the Directive, namely preventing consumers from being bound by unfair terms and providing an effective deterrent against the use of such terms.[61] In particular, the obligation to assess the unfairness of a consumer contract arises in all types of proceedings, including summary proceedings and enforcement proceedings. The CJEU has even gone so far as to hold that fundamental principles of national law, such as the rules on res judicata, may have to be overridden in order to ensure that the consumer is not bound by an unfair term.[62]

VII. Legal Effects of the Elimination of Unfair Terms

The establishment of procedural requirements for the efficient enforcement of the Directive is inextricably linked to the determination of the legal consequences of a finding that a particular term is unfair, which the CJEU has sought to elicit from Articles 6(1) and 7(1) of the Directive 93/13/EEC in a series of recent cases.[63] According to Article 6(1) Member States have to ensure that unfair terms used in a consumer contract must not be binding on the consumer and that the contract, with the exception of the unfair term, continues to bind the parties upon the other contract terms if it is capable of continuing in existence without the unfair terms, which the competent national court has to assess "on the basis of an objective approach."[64] Article 7(1) of the Directive requires the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts. As has been clarified in the seminal *Gutiérrez Naranjo* case: once the unfairness and unbinding nature of a term has been established, that term "must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer"[65] and furthermore that:

[59]Wendt Nassall, *Kapitel 6: Allgemeine Geschäftsbedingungen (§§ 305–310 BGB), in* Europäisches Zivilrecht, para. 8 (2021).

[60]Joined Cases C 240, 241, 242, 243 & 244/98, Océano Grupo Editorial SA et al., 28 (June 27, 2000), https://curia.europa.eu/juris/liste.jsf?num=C-240/98; Case C-154/15, Francisco Gutiérrez Naranjo et al. v. Cajasur Banco SAU et al., 58–59 (Dec. 21, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-154/15.

[61]*Id.* at para. 28.

[62]Case C-725/19, IO v. Impuls Leasing România IFN SA, 51–60 (May 17, 2022), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-725/19; Case C-693/19, SPV Project 1503 Srl et al. v. YB et al. v. YX & ZW, 56–64 (May 17, 2022), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-693/19; Case C-600/19, MA v Ibercaja Banco, SA., 50–52 (May 17, 2022), https://curia.europa.eu/juris/liste.jsf?num=C-600%252F19&language=en.

[63]See Frederick Rieländer, *Zum Reformbedarf des deutschen AGB-Rechts unter dem Eindruck der neueren EuGH-Judikatur zur Klausel-Richtlinie [On the Need for Reform of German General Terms and Conditions Law in Light of Recent CJEU Jurispurduence on the Clauses Directive]*, 7 Zeitschrift Für Europäisches Wirtschaftsrecht 317 (2023).

[64]Joined Cases Case C-80/21, C-81/21, C-82/21, D.B.P. et al., 66 (Sep. 8, 2022), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-80/21.

[65]Case C-154/15, Gutiérrez Naranjo, at 61.

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> [S]uch a finding must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer's detriment, by the seller or supplier on the basis of that unfair term.[66]

According to further case law, two things follow from this. First, unfair terms may not be revised and limited to the legally permissible minimum level by way of judicial intervention (*Verbot der geltungserhaltenden Reduktion*), as this would undermine the deterrent effect expressed in Article 7(1) of the Directive.[67] Second, the national courts are only allowed to fill a gap left by the elimination of unfair terms by referring to the applicable law if this is necessary to avoid the entire contract from being invalid where this would be detrimental to the consumer.[68] This may effectively result in a one-sided shift of rights and obligations under the contract in favor of the consumer. For example, if the consumer's liability is increased by an unfair term, the consumer will not be liable to pay damages for breach of contract under the non-mandatory rules of the applicable national law if the contract could continue without the term.[69] Furthermore, the restitutionary effects of a finding of unfairness may not be undermined by limitation periods provided for by national law. Although Member States are, in principle, free to set time limits for the consumer's claim for restitution, taking into account the principles of equivalence and effectiveness, they must ensure that the consumer has had the opportunity to become aware of his rights before the limitation period starts to run or expires.[70]

C. The Restatement of the Law, Consumer Contracts, in a Nutshell

I. Objectives, Structure, and Key Elements of the Restatement

In order to better understand, appreciate, and evaluate the new Restatement of the Law of Consumer Contracts, it is useful to first place it in the context of the American Law Institute's (ALI) self-proclaimed mission and the goals that the Institute pursues through the adoption of Restatements of the Law. In furtherance of its core mission "to clarify, modernise, or otherwise improve the law to promote the better administration of justice,"[71] the ALI has undertaken several landmark projects, categorised as Restatements, Codes, or Principles. Unlike Model Codes, which are primarily addressed to the legislature and are intended to serve as a blueprint for the introduction of new legislation or the amendment of existing statutes, Restatements seek to clarify and reflect the existing common law by comprehensively reviewing the existing case law and synthesizing it in the form of black letter rules appended to the Reporters' Notes. Thus, although Restatements strive for the precision of statutory language, they are generally more loosely "phrased in the descriptive terms of a judge announcing the law to be applied in a given case rather than in the mandatory terms of the statute."[72] Accordingly, the Consumer Contracts Restatement

[66]*Id.* at 66.

[67]Case C-618/10, Banco Español de Crédito, SA v. Joaquín Calderón Camino, 65-73 (June 14, 2012), https://curia.europa.eu/juris/liste.jsf?num=C-618/10; Case C-125/18, Gómez del Moral Guasch v Bankia SA, 59 (Mar. 3, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-125/18&language=EN (including the case law cited).

[68]Joined Cases C-482/13, C-484/13, C-485/13, C-487/13, Unicaja Banco SA v. José Hidalgo Rueda and others and Caixabank SA v Manuel Maria Rueda Ledesma and Others, 33 (Oct. 16, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-482/13&language=en; Case C-260/18, Dziubak et al. v. Raiffeisen Bank International AG, 48, 58 (Oct. 3, 2019), https://curia.europa.eu/juris/documents.jsf?num=C-260/18.

[69]Case C-625/21, VB v. GUPFINGER Einrichtungsstudio GmbH, ¶ 39–42 (Dec. 8, 2022), https://curia.europa.eu/juris/document/document.jsf?mode=DOC&pageIndex=0&docid=268446&part=1&doclang=DE&text=&dir=&occ=first&cid=15811211.

[70]Joined Cases C-776/19, C-777/19, C-778/19, C-779/19, C-780/19, C-781/19, C-782/19, VB et al. v. BNP Paribas Personal Finance, SA., 38–48 (June 10, 2021), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-776/19.

[71]*See* American Law Institute, https://www.ali.org/ (last visited Oct. 1, 2024) (click on "about us," then click on "Frequently Asked Questions"for more details).

[72]*Id.*

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is primarily intended to explain how the U.S. courts have applied the general common law of contracts, as set out in the Restatement (Second) of the Law of Contracts, in the context of consumer contracts—in other words, contracts between businesses and consumers other than contracts of employment.[73] It should be noted, however, that contrary to its title, the Consumer Contracts Restatement is not a complete restatement of U.S. consumer contract law. Rather, the scope of the Restatement, as clarified in its Section 1(1)(b), is limited to the key aspects of standard form contracts, setting out the requirements for the incorporation of "standard terms,"—in other words, terms drafted in advance for use in multiple transactions between a business and a consumer and the limitations placed on the enforceability of incorporated terms.[74] In other words, the Restatement is specifically concerned with the methods that U.S. courts have developed to protect consumers from the specific risks associated with the asymmetry of information that characterises standard form contracts, namely that businesses may include terms that are unreasonably one-sided, unfair and inefficient.[75]

Focusing specifically on standard form contracts, the Reporters identify three distinct sets of protective techniques that have emerged in U.S. common law jurisprudence: First, requirements regarding the adoption of standard contract terms; second, doctrines setting limits on permissible contract terms; and third, rules designed to ensure that standard contract terms are consistent with the bargain that consumers were led to expect by the business.[76] The central thesis of the reporters is that the U.S. jurisprudence reflects the so–called "blanket assent" principle, according to which companies are generally free to attach pre-drafted terms to contracts and to change them on an ongoing basis, as long as they provide adequate notice and consumers have the opportunity to effectively review the terms and avoid the transaction.[77]

The Restatement is structured as follows. Section 1 contains general definitions and defines the scope of the Restatement's rules.[78] Section 2 and 3 deal with the initial incorporation and the modification of properly incorporated terms.[79] Section 4 specifically addresses terms granting - the business unlimited discretion to determine and modify its obligations under the contract.[80] Of particular importance is Section 5 which lays down and further clarifies the application of the unconscionability rule to consumer contracts, and Section 6 deals with the problem where pre-formulated terms are inconsistent with express representations or promises made to the consumer. Section 6 is linked with Section 7 which sets out the legal effects of pre-contractual representations and warranties and Section 8 which creates presumptions for standard contract terms, under the parol evidence rule, and explains how such presumptions can be rebutted by pre-contractual statements of fact or promises.[81] Finally, Section 9 deals with the legal effects of a finding that a particular term has not been properly incorporated or held to be unenforceable.[82]

The Reporters claim that, based on a comprehensive analysis of the entire body of case law relating to consumer contract disputes, they have produced a Restatement that not only accurately reflects the most influential and persuasive court decisions and the rationales underlying those decisions, but that the black letter rules of this Restatement were also widely accepted by the majority of the courts in the many jurisdictions throughout the U.S.[83] At the same time, they

[73] Restatement of the Law of Consumer Contracts § 1(a)(4) (Am. L. Inst., Tentative Draft No. 2, 2022).
[74] *Id.* at § 1(1)(a)(5).
[75] *Id.* at Reporters' Introduction, 1.
[76] *Id.* at Reporters' Introduction, 2–6.
[77] *Id.* at Reporters' Introduction, 6.
[78] Restatement of the Law of Consumer Contracts § 1 (Am. L. Inst., Tentative Draft No 2, 2022).
[79] *Id.* at §§ 2–3.
[80] *Id.* at § 4.
[81] *Id.* at §§ 5–8.
[82] *Id.* at § 9.
[83] *Id.* at Reporters' Introduction, 6–7.

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sought to integrate the rules derived from existing case law with statutory and regulatory consumer protection laws, where consistent with these common law principles, into a coherent and holistic legal framework.[84] Despite the Reporters' confident presentation of the Consumer Contracts Restatement, it should be noted that it was one of the most difficult and controversial projects in the ALI's history. Work on the Restatement began in 2012 and continued for more than twelve years, with a total of ten drafts. Although the final draft was finally adopted at the ALI's Annual Meeting in 2024, the project has always been heavily criticized, both by ALI members and by consumer and business organizations.[85] The critics argue that the Reporters sought to promulgate and advocate doctrines and rules that were far from universally accepted, that they failed to take account of social science insights into consumer behaviour, and that they did not adequately respond to the challenges of an increasingly digital marketplace.[86] With this in mind, it remains to be seen whether the Restatement will actually be widely accepted by U.S. courts as the leading persuasive authority on consumer contract law. This is not the place to analyze the Restatement in detail. Rather, the following discussion will focus on the two primary safeguards against the drafting and dissemination of unfair terms, the adoption procedures contained in Sections 2 and 3 respectively, and the unconscionability rule of Section 5.

II. Incorporation of Standard Terms

With respect to the incorporation of standard terms into a consumer contract, the Reporters assert that the U.S. courts have adopted a "generally permissive approach" under which businesses may unilaterally draft the terms of the contract as long as they provide reasonable notice and a meaningful opportunity for the consumer to review the terms and to avoid the transaction.[87] This approach is reflected in Section 2, which distinguishes between situations where consent to the transaction and acceptance of the non-core terms occur simultaneously, and situations where the standard terms are disclosed prior to consent but are not shown to the customer until after the contract has been concluded—known as "pay now, terms later" (PNTL) or "shrinkwrap" contracts. For each of these situations, different requirements have to be met in order for the terms to be properly incorporated into the contract. It should be noted that this rule deals only with the inclusion of standard terms, in other words, the so-called "nonessential terms," and not with the conclusion of the contract as such or with the consumer's acceptance of the contract, which, according to sections 30, 50 of the Restatement (Second) of the Law of Contracts, may be manifested in any manner and by any medium which is reasonable in the circumstances.[88]

Section 2(a) deals with the setting, laying down three requirements: (i) "Assent" to the transaction or contract by the consumer, after (ii) having been given "reasonable notice" of both the terms and the intention to include them and (iii) having had "reasonable opportunity to review" the terms. From a comparative law perspective, this provision is hardly spectacular: It restates contract law principles which, by and large, are equally accepted in most civil law jurisdictions. Regarding post-transaction assent a more controversial solution is stated in Section 2(b). According to this rule, standard contract terms, which are made available to the client for review only after the formation of the contract, become part of the contract if the business demonstrates three things. First, before manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that the failure to terminate would result in the adoption

[84] *Id.* at Reporters' Introduction, 7.

[85] *See* Budnitz, *supra* note 12, at 1.

[86] *Id.* at 5.

[87] Restatement of the Law of Consumer Contracts at Reporters' Introduction, 6 (Am. L. Inst., Tentative Draft No. 2, 2022).

[88] *Id.* at § 2.

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of the standard contract term.[89] Second, after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term.[90] Third, after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and does not exercise that power.[91] Notably, it is not required that the consumer has expressly accepted the terms; much rather post-transaction silence, or more precisely, mere expiry of the period for exercising the power to terminate the contract is treated as assent in principle. The same applies, *mutatis mutandis*, for the subsequent modification of standard contract terms.[92]

The rationale behind this rather liberal rule is to preserve the convenience of simple and streamlined contracting by means of standard terms, while at the same time enabling consumers to familiarise themselves sufficiently with the terms in order to make an informed decision as to whether or not to conclude the contract on those terms. Nevertheless, it must be clearly stated that Section 2 is very accommodating to business in comparison with the legal situation in most European jurisdictions in so far as it establishes a rule of implied consent for situations in which the terms are not disclosed to the consumer until after the conclusion of the contract. Under German law, for example, it is absolutely essential for the proper incorporation of standard terms into a consumer contract that the consumer must be informed of the standard terms and be given the opportunity to review them at the latest at the time of conclusion of the contract or, more precisely, before the consumer consents to the contract.[93] Although German law also generally permits the inclusion of standard terms after the conclusion of the contract by way of a subsequent amendment of the terms the consumer's consent to such an amendment cannot simply be inferred from the circumstances of the case.[94] Given the subsequent inclusion of standard terms may affect the consumer's rights under the contract, the consumer's express consent is required for the subsequent inclusion or modification of terms.[95]

In light of this rather permissive approach, the Reporters make it very clear that, in their view, the assent doctrine and advance disclosures can hardly be regarded as effective means for ensuring informed consent on part of the consumer.[96] They argue that the proliferation of lengthy standard-term contracts, mostly in digital form, made it, in practical terms, impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent.[97] Therefore, whether standard terms were presented to the consumer before or after the decision to enter the transaction, in a conspicuous or less visible manner, and with or without specific alerts, had little bearing on the consumer's awareness or understanding of the terms in today's world of consumer contracts.

[89]Restatement of the Law of Consumer Contracts § 2(b)(1) (Am. L. Inst., Tentative Draft No. 2, 2022).

[90]*Id.* at § 2(b)(2).

[91]*Id.* at § 2(b)(3).

[92]*Id.* at § 3(4).

[93]Fornasier, *supra* note 2, at paras. 86–87. *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 305, para. 2, http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.).

[94]Bürgerliches Gesetzbuch [BGB] [Civil Code], § 311, para. 1, http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.).

[95]*BGH, 22-09-1983 – I ZR 40/81*19: *Transfer of the Right to Record Reproduction in a General Terms and Conditions Clause - Dubbing Speaker*, 19 Neue Juristische Wochenschrift 1112, 1112 (1984) (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 22, 1983, 1 ZR 40/81) (Ger.); Fornasier, *supra* note 2, at para. 88.

[96]Restatement of the Law of Consumer Contracts at Reporters' Introduction, 3–4 (am. l. inst., Tentative Draft No. 2, 2022); restatement of the law of consumer contracts § 2 (am. l. inst., Tentative Draft No. 2, 2022).

[97]*Id.* at Reporters' Introduction, 3–4.

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III. The Ex Post Review of Standard Terms

In light of this, the Reporters contend that the *ex post* review of standard terms by the courts is the primary safeguard against unfair terms.[98] However, just as the Directive 93/13/EEC does not contain an exhaustive list of "grey" or "black" contract terms, neither does U.S. law. It is an inherent feature of the common law method that it relies on traditional—uncodified—doctrines, such as unconscionability and misrepresentation.[99] The doctrine of unconscionability, the operation of which in the consumer contract context is set out in Section 5 of the Restatement, consists of two prongs, namely substantive and procedural unconscionability.[100] Substantive unconscionability refers to a contract or term that is fundamentally unfair or unreasonably one-sided, and procedural unconscionability refers to a contract or term that results in unfair surprise or from a lack of meaningful choice on the part of the consumer.[101] The Reporters maintain that the purpose of assessing whether a particular term is unreasonably one-sided or unfair requires a comprehensive examination of the contract, including consideration of the benefits that a consumer may receive under the contract in exchange for a particular harsh term.[102] Accordingly, although the substantive element is regarded as the primary component of the unconscionability doctrine, some degree of procedural unconscionability is generally also required to establish unconscionability. In making this assessment, a correlation between the two prongs exist. A greater degree of one of those two factors means that a lesser degree of the other could be sufficient to establish unconscionability. Furthermore, in appropriate circumstances, a sufficiently high degree of one of the two elements might be sufficient to establish unconscionability.[103]

The procedural prong of the unconscionability doctrine is concerned with defects in the bargaining process.[104] Importantly, compliance with the requirements for properly adopting terms, as stated in Section 2 of the Restatement, does not eliminate the possibility that a particular term may be held procedurally unconscionable. In this context, the element of "unfair surprise" is of particular importance. It refers to terms that, in the context of the bargain as presented to consumers, are not reasonably expected by consumers, be it because they undermine a particular purpose of the transaction or because they lead consumers into error with respect to the effects of a particular term.[105] Because non-core standard contract terms are generally not considered to materially influence the contracting decisions of consumers given that consumers usually do not take notice of such terms at all or, if so, do not appreciate their legal effects, the Reporters suggest that it could be presumed that such terms were procedurally unconscionable.[106]

To clarify the concept of unconscionability, Section 5(c) of the Restatement provides a non–exhaustive list of categories of standard contract terms that are substantively unconscionable terms, including: (1) Unreasonable limit on the business's liability or the consumer's remedies,[107] (2) unreasonable expansion of the consumer's liability, the business's remedies, or the business's enforcement powers, such as excessive liquidated damages and early-termination fees,[108] and (3) unreasonably limit the consumer's ability to pursue or express a complaint or seek reasonable

[98] *Id.* at § 5 (stating the doctrine of unconscionability is related to but distinct from the doctrine of illegality or unenforceability on grounds of public policy); *Id.* § 178 (stating that a contract or a term is unenforceable if its performance is inconsistent with statutory or regulatory law or with public policy).

[99] *Id.* at Reporters' Introduction, 3.

[100] *Id.* at § 5.

[101] *Id.*

[102] *Id.* at § 5.

[103] *Id.* at § 5(b).

[104] *Id.* at § 5.

[105] *Id.*

[106] *Id.*

[107] *Id.* at § 5(c)(1).

[108] *Id.* at § 5(c)(2).

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redress for a violation of a legal right.[109] The latter rule is of particular significance in the present context because it is meant to capture dispute resolution clauses, such as, choice-of-forum clauses, choice-of-law clauses, arbitration arrangements, and waivers of aggregate-litigation processes. Such terms may create an unreasonable redress mechanism by, for instance, imposing unreasonably high costs on consumers or providing some other unfair advantage to the business.[110] As a corollary, although the Reporters generally accept that it is possible for consumers to limit their process rights, they emphasize that the arrangements must not completely preclude consumers from effectively pursuing legally available redress for breach of contract or for violation of legal rights that govern the contractual relationship. In contrast, a limit on the consumer's ability to enforce a legal right is not to be held unconscionable if it is not too severe, serves to screen meritless claims, or when the consumer receives some value in return for it.[111] This rule will be considered in more detail in comparison with the CJEU's case law on unfair dispute resolution clauses in consumer contracts.[112]

IV. Legal Effects of a Finding of Unconscionability

In clear contrast to the strict case law of the CJEU on the legal effects of a finding of unfairness of a particular term under Article 3 of the Directive 93/13/EEC,[113] Section 2-302 of the Uniform Commercial Code grants the U.S. courts considerable leeway in fashioning the legal effects of a finding that a contract or any term is unconscionable. This approach is also reflected in Section 9 of the Consumer Contracts Restatement. According to Section 9(a) the competent court may, where it finds that a particular term is unconscionable within the meaning of Section 5 of the Restatement, either refuse to enforce the contract as such or sever the unconscionable term and enforce the remainder of the contract or enforce the remainder of the contract but limit the application of the unconscionable term.[114] Where it decides to enforce the remainder of the contract without the unfair term, the court may fill the gap in the contract by devising a term that is reasonable in the circumstances,[115] a term that effects the minimal correction necessary to bring the contract into compliance with the mandatory rule[116] or a term that is calculated to deter the business from drafting such a term.[117] This flexible approach to the problem of gap-filling in consumer contracts seems, in principle, preferable to the approach of the CJEU, which may significantly alter the allocation of risk under the contract, leaving the consumer in a better legal position than if the unfair term had not been included in the contract in the first place.

D. Dispute Resolution Clauses under the Directive and the Restatement

Given that party autonomy is one of the basic tenets of both European and U.S. private international law[118] and, in fact, most western legal systems,[119] it is almost self-evident that it is generally possible for consumers to enter into choice-of-law, jurisdiction and arbitration

[109] *Id.* at § 5(c)(3).
[110] *Id.* at § 5.
[111] *Id.*
[112] *See infra* Part IV.
[113] *See supra* Part II. 7.
[114] Restatement of the Law of Consumer Contracts § 9(a) (Am. L. Inst., Tentative Draft No. 2, 2022).
[115] *Id.* at § 9(b)(1).
[116] *Id.* at § 9(b)(3).
[117] *Id.* at § 5.
[118] Restatement (Second) of Contracts § 187 (Am. L. Inst. 1981) (recognizing the principle of party autonomy); U.C.C. § 1-301 (Am. L. Inst. & Unif. L. Comm'n 2022). *See also* Article 3 of the Rome I Regulation (presenting EU private international law).
[119] *See* Peter Hay, Patrick J. Borchers, Symeon C. Symeonides, & Christopher A. Whitelock, Conflict of Laws 999-1006 (2018) (providing the histotical development of this principle).

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agreements in the same way as commercial parties. Given that, the above examination has also shown that there is a consensus on both sides of the Atlantic that, in view of the potential impairment of the consumer's ability to effectively enforce legal rights and remedies granted by the objectively applicable law in the competent—state—courts associated with such agreements, some limits must be placed on party choice in consumer transactions. This applies in particular to dispute resolution provisions contained in boilerplate terms, which the consumer usually does not take notice of and in any case has no practical means of influencing. This is why—pre-formulated—choice-of-law, jurisdiction, arbitration and other redress clauses are subject to different sets of rules in the EU and the U.S., the main purpose of which is to prevent companies from excluding or impeding the customer's right to access to the—state—courts.[120] However, the techniques for protecting consumers' rights to redress in the EU and the U.S. are different and the interplay between the respective rules and systems is not fully understood.

I. Choice-of-Court Agreements

Under the Directive 93/13/EEC, dispute resolution clauses are partly covered by the category of terms listed in Paragraph 1(q) of the Annex, according to which terms which have the object or effect of "excluding or hindering the consumer's right to take legal action" may be regarded as unfair within the meaning of Article 3 of the Directive.[121] Although the CJEU has consistently reiterated that the list in the Annex is only illustrative and that the mere fact that a disputed term falls within one of the categories listed there does not in itself mean that the term is unfair, it has also emphasised that this is an important factor on which to base the assessment of the unfairness of the disputed term.[122] In particular, the CJEU expressly referred to Paragraph 1(q) of the Annex to the Directive in its landmark decision in the *Océano* case, where it clearly held that a jurisdiction clause conferring exclusive jurisdiction on a court in the territorial jurisdiction in which the company has its registered office fulfilled all the criteria for being regarded as "unfair" within the meaning of Article 3(1) of the Directive 93/13/EEC.[123] In its subsequent case-law, the Court has adopted a more cautious and restrained approach, emphasizing that it is only competent to clarify the general criteria laid down in the Directive for the purpose of clarifying the concept of unfair terms, and not to rule on the application of those general criteria to a particular term.[124] Nevertheless, it has repeatedly confirmed that a jurisdiction clause such as that in *Océano* may be regarded as unfair under Article 3(1) of the Directive 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, having regard to all the circumstances of the case.[125] The reasons for this were as follows. In support of this, the CJEU pointed out that such a clause, because it forced the consumer to litigate in a forum which could be a long way from his domicile, might constitute a deterrent and might cause consumers from foregoing legal remedies or defences in

[120]*See generally* Mascha Hesse, Diktierte Parteiautonomie [Dictated Party Autonomy] (2022) (providing a closer analysis of the EU private international law framework of dispute resolution).

[121]Pfeiffer, *supra* note 31.

[122]*See, e.g.*, Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt, 26 (Apr. 26, 2012), https://curia.europa.eu/juris/liste.jsf?num=C-472/10&language=EN.

[123]Joined Cases C 240, 241, 242, 243,& 244/98, Océano Grupo Editorial SA et al., 21–24 (June 27, 2000), https://curia.europa.eu/juris/liste.jsf?num=C-240/98.

[124]*See, e.g.*, Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, 40, 45 (Apr. 30, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-26/13; Case C-191/15, Verein für Konsumenteninformation v. Amazon EU Sàrl, ¶ 65 (July 28, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-191/15.

[125]Case C 243/08, Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi, 40 (June 4, 2009), https://curia.europa.eu/juris/liste.jsf?language=en&T,F&num=c-243/08; Case C 137/08, VB Pénzügyi Lízing Zrt. v. Ferenc Schneider, 53 (Nov. 9, 2010), https://curia.europa.eu/juris/document/document.jsf?docid=80493&doclang=en; Case C-519/19, Ryanair DAC v DelayFix, 58–59 (Nov. 18, 2020), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-519/19.

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small claims cases because the costs relating to the consumer's entering an appearance in court may be out of proportion to the amount of the dispute.[126]

This applies in particular to jurisdiction clauses which confer exclusive jurisdiction on the courts of a country other than that in which the consumer is domiciled. Accordingly, the CJEU confirmed in *Ryanair v. DelayFix* that the Directive covers jurisdiction clauses in international consumer contracts falling within the scope of Article 25 of the Brussels Ia Regulation[127] and that the unfairness of such clauses must be assessed on the basis of the law of the Member State of the chosen court, including its private international law rules, in accordance with Article 25(1) of the Brussels Ia Regulation.[128] It should be noted, however, that the inclusion of enforceable jurisdiction clauses in international consumer contracts is only possible under the strict conditions of Article 19 of the Brussels Ia Regulation,[129] which is without prejudice to the provisions of the Directive 93/13/EEC according to its Article 67.[130] According to Article 19 of the Brussels Ia Regulation, the provisions of Section 4 of the Regulation concerning consumer contracts can only be derogated from by agreement in three situations. Either by a subsequent agreement, by an agreement which extends the consumer's choice, and finally by an agreement which confers jurisdiction on the courts of the Member State in which both parties were domiciled or habitually resident at the time the contract was concluded and one of the parties subsequently moves to another Member State. Accordingly, any attempt to confer exclusive jurisdiction on the courts of the business's registered office or place of business by means of a standard jurisdiction clause or an individual agreement made at the time of the conclusion of the contract is doomed to failure.[131]

The situation is similar under U.S. law. Although dispute resolution clauses, such as jurisdiction and arbitration clauses, class action waivers, and choice of law clauses are not expressly and specifically listed, they are, as noted above, covered by Section 5(3)(c) of the Consumer Contracts Restatement, which provides that terms that "unreasonably restrict the consumer's ability to pursue or make a complaint or seek an appropriate remedy for a violation of a legal right" satisfy the substantive prong of unconscionability. The rationale underlying this section—which is the U.S. "counterpart" to Paragraph 1(q) of the Directive 93/13/EEC—is that terms which exclude or render impracticable the power to seek remedies for breach of contract undermine the very basis of the contract.[132] To illustrate this rule, the Reporters state, inter alia, that a clause which confers, exclusive, jurisdiction on a court in a distant place, so that the consumer would have to bear travel and accommodation expenses exceeding the value of the remedy sought, would render the clause substantively unconscionable. The same applies if the forum, whether a state court or an arbitral tribunal, requires a non-refundable filing fee in excess of the value of the relief sought.[133]

[126]Joined Cases C 240, 241, 242, 243,& 244/98, Océano Grupo Editorial SA et al., 22 (June 27, 2000), https://curia.europa.eu/juris/liste.jsf?num=C-240/98; Case C 243/08, Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi, 41 (June 4, 2009), https://curia.europa.eu/juris/liste.jsf?language=en&T,F&num=c-243/08.

[127]Commission regulation 1215/2012 of Dec. 20, 2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1.

[128]Case C-519/19, Ryanair DAC v. DelayFix, 58–63 (Nov. 18, 2020), https://curia.europa.eu/juris/liste.jsf?language=en&num=C-519/19. *See also* Frederick Rieländer, *Missbrauchskontrolle und Drittwirkung von Gerichtsstandsvereinbarungen bei der Rechtsnachfolge nach der EuGVVO* [*Abuse Control and Third-Party Effect of Jurisdiction Agreements in Legal Succession under the Brussels I Regulation*], 9 Zeitschrift Für Europäisches Wirtschaftsrecht 391 (2021) (commenting on this decision).

[129]Case C-519/19, Ryanair DAC, at 49–51.

[130]*See* Peter Mankowski, *"Article 19", in* European Commentaries on Private International Law: Brussels Ia Regulation at para., 6 (Ulrich Magnus & Peter Mankowski eds., 2023).

[131]*Id.* at para. 521.

[132]Restatement of the Law of Consumer Contracts § 5 (Am. L. Inst., Tentative Draft No. 2, 2022).

[133]*Id.* at § 5.

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II. Arbitration Agreements

Under the Consumer Contracts Restatement, similar considerations apply to class action waivers and arbitration agreements. The Reporters contend that such clauses are substantively unconscionable where they drastically prevent attempts to vindicate consumer rights, for example in small claims cases where individual litigation is not a viable alternative unless the arbitral tribunal allows class proceedings.[134] However, the Restatement does not address the relationship of the consumer contract law principle embodied in Section 5(c)(3) to federal law, and in particular, its potential preemption under the Federal Arbitration Act.[135]

More nuanced considerations apply in relation to arbitration agreements under the Directive 93/13/EEC. Given that arbitration agreements are excluded from the scope of application of the Brussels Regulation according to its Article 1(2)(d), the ex-post control under Article 3 of the Directive 93/13/EEC as transposed into national law is even more important with regard to arbitration clauses than with regard to jurisdiction clauses in consumer contracts. Indeed, Paragraph 1(q) of the Annex to the Directive explicitly mentions terms which require the consumer to submit disputes not covered by legal provisions exclusively to arbitration as a category of terms which may be regarded as unfair. The CJEU, however, did not finally decide whether a consumer contract term which confers exclusive jurisdiction in a permanent arbitration tribunal, against whose decisions there is no judicial remedy under national law, to hear all disputes arising out of that contract is unfair within the meaning of Article 3 of the Directive 93/13/EEC.[136] On the contrary, the Court first reiterated, in accordance with its settled case law, that its jurisdiction extends only to the interpretation of the concept of "unfair term" within the meaning of Article 3(1) of and the Annex to Directive 93/13/EEC and to the criteria which the national court must apply when examining a contractual term in the light of the provisions of that Directive, but that it is ultimately for the national court to determine whether that term is unfair in the light of all the circumstances surrounding the conclusion of the contract.[137] In addition, the CJEU pointed out that the national court had to consider, in the course of its examination, whether the consumer had been informed, before the conclusion of the contract in question, of the differences between the arbitration procedure and ordinary judicial proceedings.[138] In this context, the Court stressed the fundamental importance of pre-contractual information on the terms of the contract and the consequences of concluding it, referring to its case law on Article 5 of the Directive 93/13/EEC. Although the provision of information on the effects of an arbitration clause and, more generally, of any dispute resolution clause is therefore an important factor in the process of judicial review of that clause, the CJEU also stressed that this alone cannot exclude the unfairness of that clause.[139] Rather, the key question is whether the disputed term has the object or effect of excluding or hindering the consumer's right to bring an action or exercise any other legal remedy.[140] If the term is found to be unfair, it is for the court to draw the appropriate conclusions under national law in order to ensure that the consumer is not bound by it.[141]

III. ADR Clauses

As far as alternative dispute resolution (ADR) clauses in consumer contracts are concerned, it should be noted that these are not specifically dealt with by Article 10(1) of the ADR

[134] *Id.* at § 5.
[135] *Id.* at § 5.
[136] Case C-342/13 Katalin Sebestyén v Zsolt Csaba Kovari and Other, ¶ 37 (Apr. 3 2014), https://curia.europa.eu/juris/liste.jsf?num=C-342/13&language=EN.
[137] *Id.* at ¶¶ 25–26.
[138] *Id.* at ¶ 27.
[139] *Id.* at ¶¶ 33–34.
[140] *Id.* at ¶ 36.
[141] *Id.* at ¶ 35.

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Directive.[142] According to this rule, Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his or her right to bring an action before the courts for the settlement of the dispute. The Directive thus prescribes that alternative dispute resolution procedures must be voluntary and that consumers have unhindered access to state courts at all times. The gist of this rule is to avoid delaying tactics by businesses and to ensure that consumers are not hindered from enforcing their justified claims, either because consumers shy away from the higher costs of new state-court proceedings or because the arbitrator, who may be less legally qualified than the state judge or even close to the business, gives the false impression that the claim is not justified.[143]

IV. Choice-of-Law Agreements

Choice-of-law clauses are a difficult issue. As a starting point, it should be noted that it is generally permissible to insert pre-formulated choice-of-law agreements in consumer contracts under U.S. law, subject to the limits of the doctrines of unconscionability and misrepresentation. In line with this, the Reporters note that choice-of-law clauses may, however, fall under the category of terms that limit the consumer's right to redress as set out in Section 5(c)(3) of the Consumer Contracts Restatement.[144] However, the Reporters neither clarify under which conditions choice-of-law clauses must be considered as unconscionably impairing the consumer's ability to enforce their rights and remedies under the contract nor do they cite any U.S. case law specifically dealing with choice-of-law clauses. Unfortunately, the new Draft Restatement (Third) of the Conflict of Laws, provides no specific guidance as regards the limits placed on party autonomy in consumer contracts either.

Unlike in U.S. consumer-contract law, it is not self-evident under EU law that choice-of-law clauses in consumer contracts should be subject to a fairness check in accordance with Article 3 of the Directive 93/13/EEC at all.[145] This is because consumers are already amply safeguarded against the insertion of unreasonable choice-of-law clauses in consumer contracts on the level of EU private international law, which is guided by the objective of protecting the weaker party and thus to contribute to the achievement of a high level of consumer protection in the internal market.[146] The key provision for consumer contracts is Article 6 of the Rome I Regulation, which, in Paragraph 2, allows the contracting parties to choose the law applicable to a consumer contract within the meaning of Paragraph 1, in accordance with Article 3 of the Rome I Regulation.[147] This choice must not result in depriving the consumer of the protection afforded to him by mandatory provisions of the law designated by paragraph 1, namely the law of the country where the consumer is habitually resident at the time of the conclusion of the contract.[148] Article 6(2) of the Rome I Regulation therefore postulates a so-called "Günstigkeitsvergleich,"[149] which requires the court to make a comprehensive comparison between the chosen law and the law of the

[142]Directive 2013/11, of European Parliament and of Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), 2013 O.J. (L 165) 63.

[143]J. Becker, *BGB § 309 No. 14, in* BeckOK BGB at para. 1 (2024) (including further references).

[144]Restatement of the law of consumer contracts § 5, 97 (Am. L. Inst., Tentative Draft No. 2, 2022).

[145]*See* Ulrich Magnus, *Introduction*, *in* European Commentaries on Private International Law (ECPIL): Rome I Regulation, paras. 125–26 (Ulrich Magnus & Peter Mankowski eds., 2017).

[146]*See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 114(3), 169, Oct. 26, 2012, 2012 O.J. (C 326).

[147]Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 3.

[148]*Id.* at art. 19(3).

[149]*See* Gisela Rühl, *Article 6*, *in* BeckOGK BGB [Beck Online Grand Commentary on the German Civil Code] para. 260 (2023).

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consumer's domicile in order to determine which is more favorable to the consumer in the circumstances of the individual case. To the extent that the chosen law is less protective than the mandatory rules of the law of the consumer's domicile, it is ineffective. To the extent that the chosen law provides a higher level of protection, it prevails over the law of the consumer's domicile. This conflict of laws rule is in itself a mandatory and conclusive provision. It is therefore not permissible for a court to derogate from Article 6 of the Rome I Regulation in favor of a law that is allegedly even more favorable to the consumer, in particular the law that would have been applicable under Article 4 in conjunction with Article 6(3) of the Rome I Regulation.[150]

Although EU private international law defines and limits party autonomy in both commercial and consumer transactions, the CJEU held in the landmark *Amazon* decision that a choice of law clause designating the law of the country of the company's registered office may nevertheless be considered unfair within the meaning of Article 3 of the Directive 93/13/EEC "in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties."[151] The Court went on to say that the unfairness of such a term may result from a formulation which does not comply with the principle of transparency laid down in Article 5 of the Directive 93/13/EEC, stressing that the requirement that terms be drafted in plain and intelligible language must be interpreted broadly in the light of the asymmetry of information between the contracting parties.[152] It argued that it is essential that the business informs the consumer of mandatory provisions which determine the effects of the respective standard terms and that Article 6(2) of the Rome I Regulation is such a provision.[153] On this basis, the Court held that a choice of law clause designating the law of the country of the business's registered office was unfair in so far as it misled the consumer by giving him the impression that only the chosen law applied to the contract, without informing him that, under Article 6(2) of the Rome I Regulation, he also enjoyed the protection of the mandatory rules of the law of the consumer's place of residence.[154]

In essence, the CJEU, *en passant*, imposed a hitherto unknown general duty of information on companies regarding the effects of mandatory provisions in standard terms and, in particular, in respect of choice of law clauses, regarding the effects of Article 6(2) of the Rome I Regulation. The reasoning behind this decision is easy to understand. Given that ordinary consumers are unlikely to believe that they will retain the protection of the law of their home country if a choice of law clause contained in a consumer contract simply designates, as usual, the law of the business's domicile, the consumer will not rely on those protective provisions in the event of a dispute between the parties unless he takes legal advice.[155] By establishing a new information obligation relating to the effects of Article 6(2) Rome I Regulation, the Court seemingly seeks to ensure that the protective effect of the *Günstigkeitsprinzip* enshrined in that rule is not rendered meaningless in practice. Even though the Court's reasoning may seem reasonable, the *Amazon* decision raises several questions and serious doubts, which this author and several other scholars have already elaborated elsewhere.[156]

[150]*See* Case C-821/21, NM v. Club La Costa (UK) plc and Others, 84–88 (Sep. 14, 2023), https://curia.europa.eu/juris/document/document.jsf?docid=277408&doclang=EN.

[151]Case C-191/15, Verein für Konsumenteninformation v. Amazon EU Sàrl, 67 (July 28, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-191/15.

[152]*Id.* at 68.

[153]*Id.* at 69.

[154]*Id.* at 71.

[155]*See* Frederick Rieländer, *Verbraucherklagen gegen konzernzugehörige Gesellschaften: Internationale Zuständigkeit und anwendbares Recht* [*Consumer Claims Against Group Companies: International Jurisdiction and Applicable Law*], 1–2 Recht Der Internationalen Wirtschaft 1, 1, 6 (2024).

[156]*See* Peter Mankowski, *Verbandsklagen, AGB-Recht und Rechtswahlklauseln in Verbraucherverträgen [Collective Actions: General Terms and Conditions Law and Choice of Law Clauses in Consumer Contracts]*, 37 Neue Juristische Wochenschrift 2705, 2706–2709 (2016); Frederick Rieländer, *Die Inhalts- und Transparenzkontrolle von Rechtswahlklauseln im EU-Verbrauchervertragsrecht* [*The Content and Transparency Control of Choice of Law Clauses in*

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It suffices to point out the following. First, the judgment is unsatisfactory from a methodological point of view because it does not substantiate under which conflict of laws rule the Directive 93/13/EEC or, more precisely, the national implementing provisions should be applicable to a consumer contract such as the one in the main proceedings which led to the *Amazon* decision. Second, the CJEU does not clarify how the information to provide information concerning mandatory provisions specifying the effects of the respective standard terms must be fulfilled, namely whether it suffices to simply refer to those rules in the standard terms or whether further legal advice about their interpretation is required. Third, the CJEU ignores the risk that its ruling might lead to an "information overkill" because businesses will now per copy and paste include all mandatory provisions and not only Article 6(2) of the Rome I Regulation in international consumer contracts. Fourth, if a choice-of-law clause designating the law of the company's registered office or another third law is considered unfair because it misleads the consumer as to the effects of Article 6(2) of the Rome Regulation and is therefore considered void, this thwarts the comparison of favourable terms because it deprives the consumer of the possibility of choosing a more favourable law than that of his domicile. In fact, this negative effect of the *Amazon* ruling was only recently implicitly confirmed by the CJEU in the *Club La Costa* case.[157] There, the Court defied all criticism levelled at the *Amazon* ruling, firmly confirmed the existence of a duty of the business to provide information on the effects of Article 6(2) of the Rome I Regulation and furthermore clarified that a consumer contract that fulfilled the requirements set out in Article 6(1) of the Rome I Regulation was—in the absence of a valid choice-of-law agreement—governed by the law of the country of the consumer's habitual residence. It also held that both parties, including the business, may rely on that law, notwithstanding the fact that the law applicable to the contract in accordance with Articles 3 and 4 of the Rome I Regulation may be more favourable to the consumer. In light of this firmly established case law, it is vitally important for businesses to provide information in consumer contracts on mandatory provisions governing the contract under the objectively applicable law, in particular concerning the limited effects of dispute resolution clauses. This arguably not only includes the "*Günstigkeitsprinzip*" under Article 6(2) of the Rome I Regulation, but numerous other protective provisions including, notably, Article 5, 7, 8 and 9 of the Rome I Regulation, if applicable in the specific relationship, and furthermore the rules of Section 4 of the Brussels Ia Regulation on jurisdiction in consumer contracts.[158]

E. Final Remarks

The juxtaposition of the Directive 93/13/EEC and the U.S. Consumer Contracts Restatement illustrates that the creation of a balanced and coherent regulatory regime for standard contract terms is a challenging task, especially in view of the rapidly changing nature of contracts in the digital age. Although the European and U.S. regimes for monitoring contract terms are both characterized by a number of shortcomings and inconsistencies, the above comparison also highlights some prospects for reform of—consumer—contract law on both sides of the Atlantic. In the present context, only a few basic points can be touched upon.

EU Conflict of Law], 1 RECHT DER INTERNATIONALEN WIRTSCHAFT 28, 32–38 (2017); Wulf-Henning Roth, *Datenschutz, Verbandsklage, Rechtswahlklauseln in Verbraucherverträgen: Unionsrechtliche Vorgaben für das Kollisionsrecht* [*Data Protection, Collective Action, Choice of Law Clauses in Consumer Contracts: EU Law Requirements for Conflict of Laws*], 5 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 449, 455–460 (2017); Giesela Rühl, *The Unfairness of Choice-of-Law Clauses, Or: The (Unclear) Relationship Between Article 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive*, 55 COMMON MKT. L. REV. 201, 207–222 (2018).

[157]*See* Case C-821/21, NM v. Club La Costa (UK) plc and Others, 84–88 (Sep. 14, 2023), https://curia.europa.eu/juris/document/document.jsf?docid=277408&doclang=EN.

[158]*See* Rieländer, *supra* note 154, at 37–38.

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I. Scope of Application

As noted above, the limited scope of the Directive 93/13/EEC is certainly not without its problems.[159] Indeed, the traditional twofold justification for subjecting standard terms or—other—terms not individually negotiated to judicial review does not apply only or specifically to consumer transactions. First, due to the equally common use of standard terms in commercial transactions, such contracts are frequently characterized by similar information asymmetries as consumer contracts. Of course, in mergers and acquisitions and other large–scale commercial transactions, each party can be expected to scrutinise and renegotiate the terms. In day-to-day transactions, however, there is no significant difference as regards the asymmetric distribution of information between consumer contracts on the one hand and commercial contracts on the other hand. This is because it would also be irrational for a commercial party to rigorously scrutinise and (re)negotiate non-core standard terms imposed by the other party, as the effort would in most cases be disproportionate to the value of the contract. Second, power imbalances similar to those in consumer contracts are often found in commercial transactions, particularly in the relationships between large corporations and small and medium-sized enterprises that have become characteristic of today's increasingly digital marketplace. This is, in fact, openly acknowledged by the Reporters of the U.S. Restatement of Consumer Contracts, who suggest that the consumer contract law principles set out in that Restatement may be appropriate for and reflect rules applied by courts to contracts other than consumer contracts, such as contracts between small businesses and large corporations.[160]

In contrast, under EU law, the peculiar asymmetries of power and information in commercial transactions have already been selectively addressed by the Data Act,[161] the so-called P2B–Regulation,[162] the Payment Service Directive 2015/2366,[163] and the Digital Services Act.[164] However, the existence of such sector specific rules does not remove the need to comprehensively and coherently address the use of standard contract terms in all kinds of contractual relations if it is really intended to fully exploit the alleged market efficiencies of standard form contracting and to prevent the abovementioned risk of a "race to the bottom."[165] In fact, the basic rationale of the Directive 93/13/EEC that a uniform regime of judicial review of standard terms would strengthen the confidence of purchasers and diminish the risk of distortions of competition applies as much to private customers as it does to professional customers. Given that, it is well justifiable to draw a distinction between business to business contracts and business to consumer contracts with respect to the requirements for the incorporation of terms and the yardstick by which properly adopted terms are monitored. In fact, it seems sensible to take a more permissive approach concerning the inclusion of pre-formulated terms in commercial transactions than in consumer contracts and thus to intervene in the contractual risk allocations only under considerably higher requirements. This is also reflected in the US case law according to which it is—in assessing whether a contractual term or the contract is unconscionable—imperative to examine whether there is a significant imbalance of bargaining power between the parties, which the US courts are generally very reluctant to

[159]Jansen, *supra* note 6, at 88.

[160]Restatement of the Law of Consumer Contracts § 1 (Am. L. Inst., Tentative Draft No. 2, 2022).

[161]Commission Regulation 2023/2854 of Dec. 13, 2023, On Harmonised Rules on Fair Access to and Use of Data and Amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), 2023 O.J. (L 2854).

[162]Commission Regulation 2019/1150 of June 20, 2019, On Promoting Fairness and Transparency for Business Users of Online Intermediation Services, 2019 O.J. (L 186) 57–79.

[163]Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, 2015 O.J. (L 337) 35.

[164]Commission Regulation 2022/2065 of Oct. 19 2022, On a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

[165]*See supra* Part I (describing the "race to the bottom" risk).

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assume in business to business contracts.[166] In this context, inspiration can also be drawn from the Draft Common Frame of Reference (DCFR)[167] which provides for a special provision relating to the policing of standard terms in business to business contracts according to which—in contrast to the review of consumer contract terms under Article II.-9:403 of the DCFR and terms in contracts between non-business parties, or "consumer to consumer contracts", under Article II.-9:4040 of the DCFR—terms and conditions are only considered to be unfair in so far as they deviate from "good commercial practice."[168] Against this background, it should seriously be considered to include a similar rule in a recast Directive 93/13/EEC with an extended scope of application which should cover those business to business contracts which are typically marked by similar information asymmetries as consumer contracts. In this respect, a specific contract value could be used as a reference value for identifying those contracts where such information asymmetries can be presumed—not—to exist.[169]

II. Need for Specific Adoption Rules?

Even though the Directive 93/13/EEC does not explicitly provide for notice requirements for the incorporation of consumer contract terms, the Restatement does contain such rules, and the Reporters consider them to be of limited importance, claiming that consumers would not pay attention to the fine print anyway.[170] Although this view is widespread also among European scholars, it is by no means beyond criticism.[171] Proponents of clear and strict rules regarding the adoption of terms and their transparency requirements emphasize that these rules better enable intermediaries such as consumer organisations to take action against potentially unfair terms as it prevents businesses from subsequently modifying or removing the disputed terms from contracts and thus withdrawing them from the unfairness test by the courts.[172] In any event, it seems questionable to fully exclude rules concerning the adoption of standard terms from the scope of the Directive given that it potentially runs counter to the main objective of this instrument, namely its market integration function. Clearly, for businesses it would be useful if they would only have to adapt to a uniform European standard for validly adopting standard terms in consumer contracts and not to a variety of different national rules the application of which is often not beyond doubt. Accordingly, it should be seriously considered to include such rules in a recast Directive. In this context, the CJEU judicature on the transparency requirement, which essentially serves as a replacement for the lacking written rules concerning the notification of the consumers,[173] could be consolidated and codified.

III. Review of Dispute Resolution Clauses

The Article has shown that there is still some uncertainty regarding the review of dispute resolution clauses under both the Directive 93/13/EEC and the US common law of consumer,

[166]Restatement of the Law of Consumer Contracts § 1 (Am. L. Inst., Tentative Draft No. 2, 2022).

[167]C. von Bar, E. Clive and H. Schulte-Nölke, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR): Outline Edition (2009).

[168]Draft Common Frame of Reference, II. 9:4040 (2009).

[169]Lehmann & Busch, *supra* note 10, at 1187–88.

[170]Restatement of the Law of Consumer Contracts § 2 (Am. L. Inst., Tentative Draft No. 2, 2022).

[171]*See* S. Grundmann, *A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control*, 15 Eur. Rev. of Cont. L. 148, 162–76 (2019) (providing a critical assessment of the Restatement).

[172]*Id.* at 171.

[173]*See* Case C-92/11, RWE Vertrieb v. Verbraucherzentrale Nordrhein-Westfalen e. V., 44 (Mar. 21, 2013), https://curia.europa.eu/juris/liste.jsf?num=C-92/11; Case C-26/13, Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt, 70 (Apr. 30, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-26/13; Case C-154/15, Gutiérrez Naranjo et al. v. Cajasur Banco et al., 50 (Dec. 21, 2016), https://curia.europa.eu/juris/liste.jsf?num=C-154/15; Case C-125/18, Marc Gómez del Moral Guasch v. Bankia SA, 49 (Mar. 3, 2020), https://curia.europa.eu/juris/liste.jsf?num=C-125/18&language=EN.

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contracts. In particular, the relationship between the relevant rules of private international law and substantive consumer law needs further clarification.

What can be said with certainty, however, is that choice of forum clauses conferring exclusive jurisdiction on the court of the business's registered office are unlikely to be found enforceable against consumers by European courts if the costs associated with bringing proceedings against the business or defending an action brought by the company in its home court could have a deterrent effect. The Reporters of the U.S. Restatement of Consumer Contracts seem to suggest that US courts may follow the same path, noting that such clauses are covered by Section 5(3)(c) of the Restatement, which provides that terms that "unreasonably restrict the consumer's ability to pursue or make a complaint or seek an appropriate remedy for a violation of a legal right" satisfy the substantive prong of unconscionability.[174] Moreover, the Directive does not allow businesses to disguise the limited effects of choice-of-law clauses in international consumer contracts, in particular by misleading consumers as to the application of the mandatory rules of the consumer's country of habitual residence. The question arises, however, whether choice-of-law clauses can also be considered unfair for reasons other than lack of transparency, or if they choose a law other than the one that would otherwise be applicable according to the relevant conflict-of-laws rules, which is particularly relevant in cases where consumer contracts are not covered by the special protective regimes of Article 6(1) and (2) or even Articles 5, 7 or 8 of the Rome I Regulation, or the applicable law is determined solely by reference to Articles 3 and 4 of the Rome I Regulation.

In the author's view, the regulatory control of choice-of-law rules is primarily a matter of private international law, which in fact allows and provides for the enforcement of EU consumer law, including the national provisions implementing Directive 93/13/EEC, under the conditions of Article 6(2) of the Directive 93/13/EEC as overriding mandatory provisions within the meaning of Article 9(1) of the Rome I Regulation. However, it is doubtful whether the protection of consumers against the use of unfair terms in international consumer contracts by traditional techniques of private international law, such as overriding mandatory provisions and the public policy rule is sufficient.[175] Against this background, a comprehensive revision of both Directive 93/13/EEC and the Rome I Regulation should soon be on the European legislator's agenda.

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Author Biographical Information. Professor of Law (Full); Chair of Private Law, Private International Law, and Comparative Law; Director of the Centre of European Law and Politics, University of Bremen; https://orcid.org/0000-0002-8280-9166.

[174]Restatement of the Law of Consumer Contracts § 2 (Am. L. Inst., Tentative Draft No. 2, 2022).

[175]Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 21, 2008 O.J. (L 177).

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