REGULATING STANDARD FORM CONTRACTS:

DESIGNING AN OPTIMAL REGULATORY RESPONSE TO THE ISSUES OF IMPOSITION AND UNFAIRNESS IN CONTRACTS OF ADHESION

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ABSTRACT

Standard form contracts, in the sense of 'contracts of adhesion' (or 'boilerplate,' to use a term currently fashionable in North America), have long been a subject of legal controversy. One reason is that, beyond a few terms which are negotiated, the remaining standard form terms are seen as imposed, in tension with the basic idea of Contract as the law of voluntary obligation. Another reason is the common perception that these terms tend to include drafter-favouring 'unfair' terms. Yet, adhesion contracts are also viewed as indispensable in contemporary society, due to the important socio-economic functions they serve. The question, then, is how can the concerns about imposition and unfairness be addressed whilst still permitting adhesion contracts?

Private Law doctrine of longstanding precedent is unsuited to address these concerns. Regulation therefore exists in several common law jurisdictions. However, reviews, reforms, and academic commentary reveal continuing concerns. Meanwhile, other jurisdictions like Canada and the United States have not been persuaded to follow any existing model of comprehensive regulation. With these issues recently of renewed prominence, ideas on new potential solutions are much-needed.

This work proposes a distinct doctrinal framework for standard form terms, operating in parallel with the existing regime for negotiated terms. Under it, drafters would be legally authorised to unilaterally decide standard form terms, subject to a duty to make them fair. Drafter self-regulation in compliance with this duty would be incentivised by restitution-based liability, pursued via private class actions. Drafters could also apply, at their expense, for pre-approval of terms. A specialised tribunal, with a mixed bench of experts in law and in the underlying context, would decide cases, based on the terms' substantive proportionality. An administrative body would perform other regulatory functions, including supplying parties with tailored information based on their needs and roles in the self-regulatory network.

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Chapter 1. Introduction

I. General Introduction

Adhesion contracts have long been a subject of legal controversy.[1] One reason for this is that, beyond a few terms which are negotiated, the remaining standard form terms are widely-seen as imposed, in tension with the basic idea of Contract Law as the law of voluntary obligation.[2] A second source of controversy is the common perception that the standard form terms tend to include drafter-favouring 'unfair' terms.[3] Yet, there is also a pervasive view that adhesion contracts are indispensable in contemporary society, due to the important socio-economic functions they serve.[4] And indeed, they have generally been enforced by courts across the common law world. The question, then, is how can the concerns about imposition and unfairness in adhesion contracts be addressed, whilst still permitting their use?

The present work endeavours to identify what would make for optimal regulation of the issues of imposition and unfairness in adhesion contracts. These issues have persisted for over 150 years,[5] without satisfactory resolution, as underscored again recently by the widespread attention drawn to them by Margaret Radin's critique, *Boilerplate: The Fine Print, Vanishing Rights and The Rule of Law.*[6] Indeed, their impact has been spreading, as privatisation and globalisation have led 'governance by contract' to effectively overwrite default legal rules across many fields.[7] With adhesion contracts predominant—said to

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[1] See §2-II-A, 2-III-A.
[2] Discussed in §2-II.
[3] Discussed in §2-III.
[4] Discussed in §2-I.
[5] Text to n 141.
[6] (Princeton 2014).
[7] See eg Peer Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14(2) IndJGlobal Legal Studies 191.

embody more than 99 % of contacts now made[8]—their associated issues of imposition and unfairness bear far-reaching implications.

Regulation at least partly addressed to these issues exists in several jurisdictions.[9] Such regulation varies, even among common law jurisdictions. However, as Chapter 2 notes, concerns persist. In places that have regulation, there has been underenforcement,[10] as well as wider questioning of whether it is fit-for-purpose.[11] For example, in Europe (including, at the time of this writing, the UK), a recent regulatory 'Fitness Check' found that only 17 % 'considerably' benefited.[12] A broadly similar regulatory model[13] is used in Australia and now New Zealand.[14] Currently, Canada and the US lack comprehensive regulation in this area, although the American Law Institute ('ALI') is re-examining the issue as part of a

[8] W David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84(3) HarvLRev 529; John Burke, 'Contracts as a Commodity: A Nonfiction Approach' (2000) 24 Seton Hall Legis J 285, 290; Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 UChiLRev 1203.

[9] Karl-Heinz Neumayer, 'Contracting Subject to Standard Terms and Conditions' in AT von Mehren (ed), *International Encyclopedia of Comparative Law*, vol VII (Martinus Nijhoff 2008) ch 12.

[10] Law Commission, *Unfair Terms in Consumer Contracts: Advice to Government* (2013) para 2.28; Competition & Markets Authority ('CMA'), *Unfair Contract Terms Guidance: Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015* (CMA 37, 2015) (*Guidance*) s 6.2; CMA, *Prioritisation Principles for the CMA* (CMA 16, 2014) ss 1.4–1.5; Stephen Weatherill and others, 'Position Paper on the Fitness Check of EU Consumer Law' (2018) 26(5) ERPL 703, 704–705; Commission, 'Review of EU Consumer Law - New Deal for Consumers' <https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en> accessed 13 September 2019. See also (n 328).

[11] Commission, 'Report of the Fitness Check on Consumer and Marketing Law' SWD (2017) 209 final; Commission, 'New Deal' (n 10); see also eg Hugh Collins, 'The Freedom to Circulate Documents: Regulating Contracts in Europe' (2004) 10 ELJ 787, 793–794.

[12] Commission, 'Fitness Check' (n 11) 34.

[13] References to the EU regulatory model in this work are primarily concerned with Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29 (UCTD). Ireland's regulation is also reflective of the general EU 'model': European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 27/1995 (Ireland) (Irish UTCCRs). At the time of this writing, steps are being taken to amend the EU regime: Commission, 'Proposal for a Directive as regards better enforcement and modernisation of EU consumer protection rules' COM (2018) 185 final. These come too late to be considered in any detail in this work, although as will be noted at certain points, some of the key changes would propose to move the EU regime in the direction of elements of the scheme recommended in this work.

[14] That is not to say there aren't significant differences. For example, the Australian Consumer Law's unfair terms protections cover small-business, whereas those of the UK's Consumer Rights Act 2015 do not.

Restatement that is underway.[15] It is unknown what regulation, if any, the UK will employ to deal with these issues in the event of Brexit.

Together, these facts suggest that the time is ripe for new ideas on how to address the longstanding and persistent issues of imposition and unfairness in adhesion contracts. The present paper recognises the significant practical problem these pose, and the formidable theoretical challenge they have presented for generations of scholars and regulators.[16]

II. Outline & Methodology

From a methodological standpoint, this work employs a law-in-context approach,[17] seeking to understand what characterizes the challenge in social terms and what distinguishes it for the legal system.

This begins in Chapter 2 which looks at the social benefits and outstanding issues of adhesion contracting. The chapter first surveys the practice's social utility (§I), in order to later help identify regulatory responses supportive of this, consistent with the earlier conclusion that adhesion contracts should be permitted, but regulated. Then it looks at the issues of imposition (§2) and unfairness (§3), highlighting the central role in each of the inoperativeness in the adhesion context of Contract Law's requirement of consent to terms. This paper's search for new solutions starts from the premise that because the law serves social functions, legal doctrines do not exist in isolation, but rather represent the form that a given function should take in order to be realised in a particular social context. Hence, in a sufficiently different context, a modified doctrine may be needed in order to give effect to the same function. Chapter 3 thus argues that, whilst consent to terms is suited to negotiation, the

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[15] American Law Institute ('ALI'), 'Consumer Contracts' <www.ali.org/projects/show/consumer-contracts/> accessed 8 September 2019 (ALI Restatement Project).
[16] Omri Ben-Shahar, 'Foreword' (2006) 104(5) MichLRev 821.
[17] As in the 'Law in Context' series founded by William Twining and Robert Stevens in 1971, published by Cambridge University Press. See eg Hugh Collins, *The Law of Contract* (4th edn, CUP 2003) 35.

distinctive features of the adhesion context call for a modified doctrine suited to that context. The ensuing chapters (4-7) elaborate how that doctrine might best be put into practice to attain the social objective of cleansing the market of unfair terms, considering the full context, and still mindful of the rationales for adhesion contracting. Chapter 8 compares the resulting model regulation to the EU scheme of unfair terms regulation,[18] in order to bring out the original and distinctive features of the model here.

This work's assessment of what regulatory responses will best address the issues in adhesion contracts stays conscious throughout that effectiveness is not the only factor. Other considerations are also important to the law's function as a tool of governance of social issues.[19] Accordingly, in chapters that pursue solutions, the analysis is presented in two steps. What would constitute an effective means of dealing with the issue is analysed first, as a threshold consideration. The broader suitability of the means identified is then secondarily evaluated in light of other common criteria of good governance. Suggested criteria vary.[20] This work will use criteria adapted—with modifications—from those used by the EU for regulatory evaluation, according to its Better Regulation Guidelines.[21] The additional governance factors that will be considered in this work are: the integrity of the legal system; efficiency; and other significant collateral social effects of the potential legal response.[22]

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[18] As represented by UCTD (n 13).
[19] Commission, 'Better Regulation Guidelines' SWD (2015) 111 final s 3.3.
[20] See eg Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, OUP 2012) 26ff; Lester Salamon, *The Tools of Government: A Guide to the New Governance* (OUP 2002) 23–24. However, this work does not adopt a strict 'tools of governance' approach in which regulatory proposals are chosen from a canon of options, nor does it follow a comparative approach. The analysis here attempts to work backwards from the contextual landscape surrounding the problem, with the possibility of shaping options based on the context-driven socio-legal analysis of the issue to be resolved.
[21] Commission, 'Better Regulation Guidelines' (n 19).
[22] ibid 29, 19. The EU's 'coherence' criterion is replaced here by the factor of the 'integrity of the legal system', meant in a more holistic and multi-faceted sense than the EU's use of coherence: ibid 29. See Stephen Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" Has (Largely) Failed' (2012) 49 CMLR 1279. The final criterion here, collateral social effects, is meant to reflect the broader question of social impacts that the Guidelines suggest should be assessed, in relation to possible regulation, in addition to the effectiveness and efficiency impacts: Commission, 'Better Regulation Guidelines' (n 19) 19.

III. Specifications

A few words are perhaps needed in order to clarify terminological usage and specify the scope of the work.

A. Terminological Usage

Although less frequently used in the UK, the term 'adhesion contract,' more common in America (imported from Europe), is the one most often used in this work.[23] This is to avoid confusion with the term 'standard form contract,' which is sometimes used broadly to refer to any mode of contracting on standard terms—that is, not only via adhesion, but in other cases via mandatory terms, collectively bargained terms, etc. As used here, 'adhesion contract' refers to a contract that, but for a few 'core' terms negotiated by the parties, comprises terms which are: pre-formulated in advance; unilaterally decided by the drafting party; presented *en bloc* (i.e. as a 'form'); required on a take-or-leave basis as part of acceptance of the offer to contract; and standardised for use in many alike contracts made with a mass of adherents. The 'form terms' of such a contract refer to the terms which are not negotiated, but included in the pre-printed 'form' whose incorporation into the contract is required by the drafter. The 'drafter' is meant to refer to the party which offers the adhesion contract, not to the legal professional who may have actually authored the terms as the drafter's agent. 'Adherents' refers to contractual counterparts of the drafter, treated by courts as having agreed the form terms, even though they do not engage the form terms, but merely 'adhere' to them. For purposes of this work, adherents are not limited to consumers (or any other class).

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[23] Edwin Patterson, 'The Delivery of a Life-Insurance Policy' (1919) 33 HarvLRev 198, 222; Raymond Saleilles, *De la déclaration de la volonté* (Pichon 1901) 229.

Apart from where clear from the context that the word is being used in the narrow sense of two parties discussing possible terms, the word ‘negotiation’ is used in this work as it often is in the adhesion contracting literature, as meaning negotiated on the market. This might include shopping terms on the market, or bargaining them (negotiation *sensu stricto*) with one or more possible contracting parties.

Except where the context of discussion suggests otherwise, the use of the term ‘regulation’ is not necessarily confined to the output of public administrative agencies, but refers more broadly to any system of governing a social issue.[24] Besides statutory instruments and/or discretion conferred under them, this could include, for example, Private Law, self-regulation, market regulation, deregulation, etc.

B. Scope

This work is addressed to imposition and unfairness in adhesion contracting as generalised issues, not focused on any particular jurisdiction. Nevertheless, at a broader level, the work is restricted to these issues as they arise in the socio-legal, cultural and historical context of the common law of Contract, thus mostly excluding overlapping issues in jurisdictions governed by civilian or other legal systems.

IV. Contribution to the Field

Whereas other recent and prominent reflections on imposition and unfairness in adhesion contracting, such as Radin’s *Boilerplate*, are notable for tracing through the extent and gravity of these issues’ implications, and the urgency of dealing with them, the focus of my research is not on the problem, but on identifying new potential solutions.

[24] Hugh Collins, *Regulating Contracts* (OUP 1999) 7–9.

The aim is to provide useful insight and analysis regarding new ways of dealing with these issues. For nations like Canada and the United States that have thus far declined to follow any existing scheme of comprehensive regulation of these issues,[25] it will offer an alternate model of regulation to consider. The ongoing ALI project[26] and the broader attention re-drawn to the issue by Radin, make this a real possibility.[27] For other common law jurisdictions which have existing regulation, the investigation here may reveal opportunities for improvement as part of future updates. For the UK in the event of Brexit, either use is possible.

Methodologically, the work is significant in illustrating how alternate approaches to the dominant rights-based and economic analyses[28] may be useful in revealing new paths forward out of what have been longstanding or intractable problems in Private Law.

[25] Both countries do have some limited legislative and court measures which can sometimes be used in this area.
[26] (n 15).
[27] (n 6). On Canada specifically, see Stephen Waddams, 'Review Essay: The Problem of Standard Form Contracts—A Retreat to Formalism' (2012) 53 Can Bus LJ 475, 478.
[28] Peter Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25(2) OJLS 203; Steve Hedley, 'Is Private Law Meaningless?' (2011) 64(1) CLP 89.

Chapter 2. Adhesion Contracting's Social Benefits & Outstanding Issues

Introduction

The previous chapter suggested that despite longstanding and wide-ranging concern about imposition and unfairness in adhesion contracting, the practice should not be barred but rather should be permitted and regulated, given the commonly-perceived need for it in modern society.

In this chapter, §I surveys the rationales for adhesion contracting, which underlie its perceived need. This will allow later chapters to identify options for regulating imposition and unfairness that would respect these rationales, rather than undermining them, consistent with the intent to permit adhesion.

Following that, §II and §III frame the issues of imposition and unfairness, to aid later chapters' exploration of what would be suitable means of addressing these.

I. The Rationales for Adhesion Contracting

A. The Social Utility of Adhesion Contracting

Adhesion contracts are a staple of life in modern society. First developed in insurance, banking, and transport, they have long since spread to almost all areas of exchange.[29] Indeed, as noted in Chapter 1, they have become predominant, whilst negotiated contracts, although still conceived by Contract doctrine as the norm of contractual exchange, are now mostly reserved for special applications.[30] Further, in the adhesion era, the reach of contracts is

[29] Friedrich Kessler, 'Contracts of Adhesion—Some Thoughts about Freedom of Contract' (1943) 43 ColumLRev 629, 631; Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1985).
[30] Slawson (n 8).

unprecedented and increasing.[31] What rationales underlie this development? Adhesion contracts serve several crucial legal, economic, and social needs in modern society. These are surveyed below.

i. Transactional

The social utility most frequently recognized as furthered by adhesion contracts is to expediently fill out a contract around a few core negotiated terms, without the burden of bargaining all of the supplemental terms.[32] Mindy Chen-Wishart argues that in modern society, parties that adhere could not do without this.[33] Their interest in the form terms is typically limited, and they must preserve finite resources of time, expense, effort, attention, aggravation, and contention for other matters of greater interest to them. Meanwhile, for the drafting firm, investing in a standard form it can use to make many contracts reduces overall transaction costs per contract, as opposed to negotiating every term of every contract.[34] Moreover, for the low incremental cost per term of drafting, versus negotiating, it can add terms covering many of its interests.[35] As Friedrich Kessler noted, these efficiencies for firms are shared in part with adherents: 'insofar as the reduction of costs…thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts. And there can be no doubt that this has been the case to a considerable extent.'[36] In sum, adhesion facilitates exchange by reducing transaction costs, streamlining the contracting process, and reducing contention that could scuttle deals.

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[31] Radin (n 6).
[32] Collins, *Law of Contract* (n 17) 119.
[33] Mindy Chen-Wishart, 'Regulating Unfair Terms' in Louise Gullifer and Stefan Vogenauer (eds), *European Perspectives on Contract and Commercial Law* (Hart 2015) 110.
[34] Todd Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' [1983] HarvLRev 1173, 1221.
[35] Slawson (n 8) 530.
[36] Kessler (n 29) 631, citing OW Holmes.

ii. Structural

Beyond facilitating transactions, adhesion contracting is intertwined with important structural features of the economy. Modern society entails and benefits from an economy marked by a highly specialised division of labour, complex firms, and economies of scale—each of which have developed in synch with adhesion contracting.

a. Division of Labour

Standard terms allow for the fixing of economic variables.[37] For example, a computer hardware or software maker could face quite uncertain consequential damages if a purchaser's data was lost as a result of a product malfunction. However, a form term limiting its liability to a fixed maximum of say £2,500 may suffice to allow the firm to pin down its liability exposure, so that it knows what product pricing it can offer.

This ability to fix economic variables facilitates a general allocation of responsibilities and risks. For instance, in recreational football, the responsibility and risk of participants' medical fitness to participate may be allocated to participants through a form term in which they certify this, rather than having local clubs conduct exhaustive medical exams of each. Assuming the activity should only be permitted if those for whom it is unsafe can affordably be pre-screened, the form term helps enable a market that otherwise might not exist.[38]

The ability to effect a general allocation of risks and responsibilities invites, across the wider economy, economic arrangements involving complex interrelationships. Form terms let firms regulate, in this way, external relationships with clients, suppliers, creditors, insurers etc.—thus helping plan broader private economic structures. Within these, the firm's role is sharply-defined, and it can concentrate its activity on a few key fronts on which it excels, tied

[37] Rakoff (n 34) 1221–1222.

[38] Or, as in the computing example, making it affordable by obviating a need for insurance coverage of rare but costly contingencies: ibid 1221.

to the particular niche it occupies in the market.[39] This permits the very fine division of labour characteristic of the modern economy, with its high degree of specialisation and corresponding interdependence.[40]

The sharp division of labour, in turn, enhances the divergence of the parties' interest-levels in the form terms. For any given transaction-type, the drafting party typically has a special interest in them, reflected in its investment in drafting the form, and in its take-or-leave stance to the contract incorporating those form terms.[41] Meanwhile, the adherent has a limited interest in them, evident in letting the drafter unilaterally determine them.[42] Terms which are of significant interest to both parties are typically still negotiated, as the 'core' terms of an adhesion contract.[43]

Specialisation associated with the fine division of labour means that the parties also possess divergent expertise with respect to the subject-matter of the form terms.[44] Typically, a party invests in drafting a form and refuses to contract except on those terms where the transaction-type is vital to its business. Part of knowing its own business is knowing also, through market-research and industry experience, the interests of the class it foresees adhering to its offer.[45] Meanwhile, a party adheres where the subject-matter is remote from its preoccupation. The parties' asymmetric expertise is therefore mirrored in the division of labour by which the form terms are themselves made. The drafting firm, which, among the parties, possesses the relevant expertise, unilaterally decides them.

Standard contracts are possible without adhesion: courts and legislatures can, and in some areas (e.g. utilities) do, supply the supplemental terms required for comprehensive

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39 ibid; Atiyah (n 29) 723–724.
40 Collins, *Regulating Contracts* (n 24) 3.
41 Rakoff (n 34) 1221–1224.
42 ibid 1226.
43 Chen-Wishart, 'Unfair Terms' (n 33).
44 Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown 1960).
45 Rakoff (n 34) 1204, summarising Llewellyn.

agreement.[46] But as noted in Chapter 1, adhesion contracting predominates. In a highly specialised economy, Karl Llewellyn saw expertise as adhesion's key advantage: public bodies' 'crude misfitting' and 'inflexible' arrangements[47] could not 'approach in speed and sanity of readaptation the machinery of [adhesion] forms…for a line of trade, built to meet the particular needs of that trade.'[48] As Kessler summarised: '[state] law cannot possibly anticipate the content of an infinite number of atypical transactions into which members of the community may need to enter. Society, therefore, has to give the parties freedom of contract,'[49] even if that means only one of them decides the form terms.

The modern economy's fine division of labour also requires many contracts—multiplying the transaction cost savings detailed in the previous section.[50] Indeed, the average person makes numerous contracts per day—riding the bus, purchasing food, accessing emails, surfing the internet. As Hugh Collins states, 'life would become almost impossible if we had to ponder and inspect the risks every time we made a contract.'[51] And if we hired a lawyer to negotiate every term, transaction costs would be greater than the whole value at stake in many contracts. In an economy requiring constant contracting, total transaction costs would become astronomical.

b. Economy of Scale

Another structural feature of the modern economy intertwined with adhesion contracting is the development of an economy of scale. Leveraging technologies like mass production and mass distribution, firms achieve important efficiencies by multiplying the number of outputs from which they earn a return on fixed input costs. Adhesion contracts

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[46] Collins, *Regulating Contracts* (n 24) 306–307, referring to gas, electricity, and water.
[47] Llewellyn, *Common Law Tradition* (n 44) 362.
[48] Karl Llewellyn, 'Book Review' (1939) 52 HarvLRev 700, 701.
[49] Kessler (n 29) 629.
[50] Slawson (n 8) 532.
[51] Collins, *Regulating Contracts* (n 24) 3.

serve a parallel function for transactions: drafted once but used repeatedly in contracts for the good in question, they are an essential, 'inevitable'[52] and 'integral'[53] part of the economy of scale, drawing on the same qualities of standardisation and automation. Within the mass market business model typical of the modern economy, they enable 'mass contracting' as a transactional 'counterpart' to mass production and distribution.[54] This model's advantages of low cost and high convenience, as compared to goods which are made-to-order, are embodied in adhesion contracts by form terms.[55] Otherwise, having to individually negotiate each term of each contract would increase cost and reduce convenience, undercutting the advantages upon which the modern economy has built its mass market business model.

As mass contract terms must be pre-formulated before the transactions are made, the drafter alone decides them. Those who will become adherents to a given form cannot identify themselves at the time of its drafting, because nothing is yet on the market: the subject-matter, and the sphere of distribution in which it is available, only materialise on the market simultaneously with the terms, pre-formulated by then, as an all-or-nothing take-or-leave mass market offer. This leaves the drafter as the only party in the picture that can be identified and involved in drafting the form. However, what a firm places on the market reflects its ability, based on its market-research and business experience, to anticipate a class with certain characteristics from which it can expect demand and to whose interests it can cater. Presently, the extent to which it does so in the form terms is limited by the absence of legal restraints on its self-interest, due to the false suggestion by courts that the form terms were agreed by the parties (discussed further in §II).

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[52] Kessler (n 29) 631.
[53] Slawson (n 8) 530. Indeed, it has been argued that form terms should be seen as part of the product: Arthur Leff, 'Contract As Thing' (1970) 19(2) AULR 131.
[54] Llewellyn, 'Book Review' (n 48) 701.
[55] Karl Llewellyn, 'What Price Contract? An Essay in Perspective' (1931) 40 Yale LJ 704, 731.

Mass contracting is possible without a drafting party deciding the terms. In some areas, for example, they result from collective bargaining[56] or come from industry bodies.[57] However, as approaches to contracting generally throughout the economy as a whole, these would stifle the experimentation and innovation which induce society to rely on market ordering in the first place. Since form terms are, as mentioned, tailored to a good and its distribution, barriers to changing the form terms work against experimentation and innovation in goods and their distribution too. Dynamism, marked by constant evolution and growth, is integral to the idea of markets. To innovate, firms need to be able to adapt terms as expediently as the goods and distribution strategies they are designed to support.

c. Complex Organizations

Another structural feature of the modern economy has been the emergence of organisationally complex business firms, and the substitution of managerial coordination for open-market ordering on matters governed within the firm.[58] As Ronald Coase explained, this is consistent with a market-system,[59] reflecting the transaction costs and uncertainties of procuring business inputs on the open-market.[60] Input cost and uncertainty can sometimes be reduced via vertical integration, internal administration, and managerial coordination within a firm.[61] The development and management of such complex organisations has been facilitated by adhesion contracting. Standardised external transaction terms enable internal firm administration to be bureaucratised based on an internal division of labour and on economies of scale in the routinised processing of transaction-related information by different

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[56] Labour contracts, for instance may be collectively bargained.
[57] For example ISDA master agreements supply the terms of derivatives: Hugh Collins, 'Flipping Wreck: Lex Mercatoria on the Shoals of Ius Cogens' in Stefan Grundmann, Florian Moslein and Karl Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (OUP 2015).
[58] Rakoff (n 34) 1220.
[59] Ronald Coase, 'The Nature of the Firm' (1937) 4 Economica 386.
[60] Atiyah (n 29) 723–724.
[61] Rakoff (n 34) 1222–1224.

departments.[62] The task of regulating the internal bureaucracy is thereby greatly simplified, and amenable to efficient managerial control of an extensive downward-branching hierarchy. Moreover, the expertise of executives (and advisors) in assessing optimal terms for key transaction-types can be projected through front-line transactional personnel,[63] in lieu of costly training, through their adherence to the form terms as required in all transactions.[64] By contrast, individually-negotiated contracts generate particular arrangements that would be enormously costly to informationally administer, operationally accommodate, and managerially supervise—hence undercutting the associated rationales for the complex organisations that typify modern business.[65] This is also true of markets constructed through meta-coordination among multiple firms sharing standard terms, such as securities trading, although where such terms are set by a neutral third-party such as a stock exchange, the issues are different than for adhesion contracts.[66]

Although form terms with such functions indirectly benefit adherents through the efficiency and stability they contribute to the economic structure of modern society, they may be hardly relevant to the parties' exchange itself, and of little value to adherents to familiarise themselves with. Only the firm, which knows its organisation and the implications of investing in or departing from the fixing of certain variables through standardised terms in key contracts, is well-situated to determine those terms.

iii. Legal

A third key aspect of the social utility served by adhesion contracting is the extensive legal ordering it does, as a supplement to, and complementing, the rules promulgated by the

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[62] ibid.
[63] Llewellyn, 'What Price Contract?' (n 55) 731.
[64] Rakoff (n 34) 1223.
[65] ibid.
[66] Collins, *Regulating Contracts* (n 24) ch 9.

state. Society sees less occasion for dispute among citizens, and parties benefit from detailed information on how to plan and conduct their affairs, in abiding by terms that will be enforced by the Law of Contract.[67]

Whilst all contracts serve these functions, the particularity of negotiated contracts limits this effect to individual parties—thus a personal ordering. Conversely, adhesion contracts, as standard contracts, affect the rights of many persons: not the whole public, but a mass of adherents. Drawing on law firms' experience[68] and the 'lawyer's ethos'[69] in the drafting process, standard contracts are typically expansive in anticipating and addressing possible contingencies. Whilst this is also true of other standard contract-types (including those mentioned in §ii-b) these are limited to special areas, whereas adhesion contracts are used pervasively, as noted.

Many more contracts, with many more terms, involving many more parties makes for much more extensive legal ordering via adhesion. Adhesion contracts' form terms provide mass private ordering going well beyond individually-negotiated contract terms, achieving significant generality, though falling short of the universality of state law.

The quality of this private ordering is also enhanced, as normative consistency facilitates clear expectations, which reinforces stability and order.[70] Adhesion contracts are said to do remarkably well in avoiding litigation.[71] Arguably, this is self-reinforcing, as the unpredictability of adjudication (and settlements) could expand uncertainties, increasing disputes.[72]

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[67] ibid 10–13.
[68] Collins, *Law of Contract* (n 17) 3.
[69] Rakoff (n 34) 1242.
[70] Slawson (n 8) 530.
[71] Karl Llewellyn, 'On Warranty of Quality, and Society: II' (1937) 37 ColumLRev 341, 396.
[72] Llewellyn, *Common Law Tradition* (n 44) 362–363; Kessler (n 29) 631.

a. Contextualisation of Existing Legal Rules

One way in which adhesion contracts further legal ordering is by supplementing general rules of state law to make them sensitive to context and responsive to party needs, so that they are more functional.

1. Contextual Application of Legal Rules (Certainty)

Adhesion contracting supplements state law by specifying how general rules apply in the concrete context pertaining to a given standard form contract. For instance, Property Law may allow a commercial lessor to evict a lessee in the event of a sufficiently serious breach. In turn, the form leases of an arena may contain terms listing which events (e.g. horseplay, damaging the ice, failure to wear protective equipment for ice hockey, etc.) qualify as sufficiently serious to allow eviction. Such terms help clarify how the general legal rule on commercial lease eviction will apply in the context of arena leases, thus supplying useful legal certainty. This applies, at a minimum, to the class of lessees of that arena. In light of common issues, imitation, and lack of competition since adherents do not shop form terms, other arenas may use similar terms, enhancing certainty industry-wide.

2. Contextual Adaptation of Legal Rules (Flexibility)

Adhesion contracting also supplements state law by adapting default legal rules to the circumstances that define the general context of a standard form contract. Take, for example, a website which publishes health tips from exercise or nutritional practitioners. Suppose the articles are not written and edited by the website's own staff, but by third parties and unedited. Suppose further that they are not restricted to clients who purchase memberships to access advice, but are simply made freely available to the public as general information. The publisher may employ form terms which adapt default Tort rules to make the reliability of the tips and accuracy of the information at users' own risk. The terms help adjust default legal rules to a context of publishers whose business prioritises open access to information, rather than professional advice. Using form terms to adapt legal rules to varying contexts enhances the law's flexibility, needed in order to support market differentiation (and innovation). If competitors within the same general context also do so, this useful private re-ordering extends further.

b. Complementation with Additional 'Rules'

Besides helping contextualise state law, adhesion contracts also complement it, by newly allocating rights and responsibilities not already covered by public rules. For instance, in an airline contract, the form terms may allocate to passengers the risk of cancelling reservations due to their own schedules, but the opportunity of compensation if the airline cancels their reservations due to their flight being oversold. State law's omission to regulate every conceivable eventuality within formal social interaction is often not a matter of inadvertence.[73] Rather, as David Slawson notes, liberal society is founded on beliefs in limited government and private ordering, namely: 'that at least some lawmaking is better accomplished in a decentralized manner. We therefore prefer that the economy be controlled privately to a large extent, and private control today means control largely by standard form.'[74]

After all, because standard forms enable additional terms at limited marginal cost and contention, as compared to negotiated contracts (as noted in §i), they can go much further in regulating matters with a nexus to the parties' exchange and not already resolved by state

[73] Slawson (n 8) 530.
[74] ibid.

law.[75] Since the highly specialised modern economy requires many contracts, this proliferation of private regulation of risks and responsibilities is needed. In adhesion, unlike other modes of standard contracting, this ordering is done via discretion exercised by the drafter. Yet, at one level, overwhelming recourse to adhesion suggests that this division of labour represents a broad social consensus, versus pursuing party agreement on every term. And at another level, it reflects the will of the parties in self-selecting roles for any given transaction-type, based on their interest-level and expertise, as observed in §ii-a. Longstanding and wide concern specifically with the subset of terms seen as 'unfair' signals an expectation that this arrangement has limits (discussed in §III). That aside, adhesion gives the parties a say in what ordering takes place, and in what role they will play in it, on matters that primarily affect them, not the public-at-large.

Altogether, the mass character of adhesion contracts means that the private ordering they provide, as a complement to state law, covers vast areas of social and economic life. This is especially so where parallelism among standard forms enhances normative integrity across given fields. Thus, in modern society, adhesion contracts are a major source of useful legal ordering.

B. Conclusion

Society relies enormously on adhesion contracting. It facilitates exchange, is intertwined with key structures of the modern economy, and furthers a liberal legal order. This utility helps explain how it has become, as John McCamus describes, 'a pervasive and

[75] ibid.

indispensable feature of modern commercial life.'[76] But ultimately, as Slawson suggests, 'the predominance of standard forms is the best evidence of their necessity.'[77]

II. The Issue of Imposition

As mentioned in Chapter 1, one of the major issues in adhesion contracting to be addressed in this work is that their standard form terms are perceived to be imposed, rather than agreed, as called for by the Law of Contract.

This leads to two problems. First, the integrity of the law is damaged by the double-standard just noted, compounded by courts' denial of it on what seems to ordinary citizens as much as to Contract scholars an obviously false pretence: that the reason the adherent is bound by the terms is because she agreed to them. This damage is multiplied on a mass scale by adhesion contracting's ubiquitous use, which leads form terms to represent a major portion of the overall legal obligations that citizens are subject to.[78] Consider, for instance, that when I served as law clerk to the Chief Justice of Canada, the Supreme Court made law 65 times in a year,[79] whereas Internet-users are bound by the terms of use of Google alone 40,000 times per second.[80] Because adhesion contracts govern so much of modern formal social interaction, and constitute a high proportion of citizens' regular engagement with 'the law,' the associated loss of legal integrity detracts from public confidence in the Rule of Law more broadly.

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[76] John McCamus (ed), *The Law of Contracts* (2nd edn, Irwin Law 2012) 185.
[77] Slawson (n 8) 530.
[78] ibid.
[79] Marcus Moore, 'Introduction' in Marcus Moore and Daniel Jutras (eds), *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership* (LexisNexis 2018).
[80] Or 3.5 billion times per day. See Internet Live Stats, 'Google Search Statistics' (*InternetLiveStats*) <www.internetlivestats.com/google-search-statistics/> accessed 16 May 2016.

Imposition creates a second problem, to be detailed in §III, in that the ability to impose terms is what invites drafters to include among the form terms self-servingly imbalanced unfair terms.

As a result, the issue of imposition is one which the law must address. That issue is outlined in the present section.

A. The Concern About Standard Form Terms' Imposition

Contract Law is often said to be defined by legal obligations whose source lies in voluntariness. A contract between two parties is a legally enforceable agreement made by them through its exercise. Per *Anson's Law of Contract*:

> 'A basic principle of the common law of contract… is that the parties are free to determine for themselves what primary obligations they will accept.' It may be objected that the general principles of contract law therefore present an inadequate, if not distorted, picture of modern economic life. This may be so, but it is nevertheless the fact that the law does still rest on the assumption of freedom of choice, and where a relationship is entered into in which there is no choice, a Court may hold that it is not contractual.[81]

Adhesion contracts have long been perceived as poorly conforming to this foundational idea of contractual obligations as voluntary. The term 'adhesion' was first used in common law writing by Edwin Patterson in the *Harvard Law Review* in 1919. Already then, he noted that '"freedom of contract" rarely exists in these cases.' Speaking of insurance contracts, he observed that '[t]he contract is drawn up by the insurer, and the insured, who merely "adheres" to it, has little choice as to its terms.'[82] Friedrich Kessler, in his well-known early reflection on the subject, described the tension between Contract principle and adhesion practice by saying that the adherent's 'contractual intention is but a subjection' with 'terms dictated by the stronger party, terms whose consequences are often understood only in a

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[81] Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29th edn, OUP 2010) 6.
[82] (n 23) 222.

vague way, if at all… [T]hey are à *prendre ou à laisser*.'[83] Karl Llewellyn, who wrestled with adhesion for three decades,[84] wrote that the adherent consents to a few core terms, while '[t]he rest descends upon him: to leave or to take, in block—and, commonly, to take without knowledge.'[85]

Similar statements have been made by judges. For instance, in *Suisse Atlantique*, Lord Reid described a marked absence of consent to standard form terms, stating that:

> In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.[86]

Todd Rakoff's later compendious study of the topic, and of preceding literature on it, likewise reckoned form terms' imposition inconsistent with Contract's consensual basis: '[B]ecause contract law is rationalized in large part on the voluntary assumption of obligation—or on the reasonable appearance thereof—it cannot be applied in an automatic and straightforward manner to contracts of adhesion'.[87]

Recent appraisals reprise such views. Andrew Robertson writes that 'contractual obligations undertaken in these circumstances are clearly not best understood as voluntary obligations.'[88] And Margaret Radin declares:

> Contract is a voluntary transaction, a consensual exchange. Indeed, contract law is itself based on the idea of free exchanges between willing parties. "Freedom of contract" is a revered ideal. Boilerplate doesn't fit the theory, the rationale, of contract law…
>
> [C]ourts most often treat boilerplate as if it were a contract. One task of [my] book is to think again about whether boilerplate should be considered contractual. Indeed, I want to urge that it should not'.[89]

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[83] (n 29) 632.
[84] 'The Effect of Legal Institutions Upon Economics' (1925) 15(4) AmEcRev 665.
[85] 'Book Review' (n 48) 700–701.
[86] *Suisse Atlantique v Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) 406.
[87] (n 34) 1180.
[88] 'The Limits of Voluntariness in Contract' (2005) 29 MULR 179, 202.

Modern textbooks likewise convey unease with the fact that form terms are 'imposed,' in conflict with Contract Law's foundational idea of consent. *Treitel's Law of Contract*, for instance, notes that '[t]his practice of contracting on standard terms is now very common; and it is arguable that a customer who contracts on such standard terms has them imposed on him, and does not really "agree" to them at all.'[90] Hugh Collins' *Law of Contract* notes how 'doubt has been expressed about the validity of such standard forms to count as contracts. The process often resembles an imposition of will rather than mutual consent to an agreement'.[91] Lord Justice Beatson, Andrew Burrows, and John Cartwright go so far as to conclude that 'in some respects, therefore, it would be more correct to regard the relationship which arises [from adhesion] not as one of contract at all, but as one of status.'[92]

In the United States, *Farnsworth* also describes standard forms as an 'imposition' on the notion of Contract: '[s]tandardization …affords a means by which one party may impose terms on another unwitting or even unwilling party.'[93] In the leading Canadian texts, Stephen Waddams' *The Law of Contracts* casts it as 'a problem';[94] and John McCamus' tome concludes:

> The classic model of *consensus ad idem* is lacking. The terms are simply drafted by one party, without any effective involvement of the other party. The very voluntariness of the agreement is undermined…[95]

The preceding survey of authoritative commentary on adhesion contracts illustrates how concern about form terms' imposition exists throughout the common law, and dates back to their rise to prominence.

[89] (n 6) 21–22.
[90] Edwin Peel and GH Treitel, *Treitel's Law of Contract* (14th edn, Sweet & Maxwell 2015) s 1.005.
[91] (n 17) 117–119.
[92] *Anson's* (n 81) 171.
[93] E Allan Farnsworth, *Contracts* (4th edn, Aspen 2004) ¶4.26.
[94] (6th edn, Canada Law Book 2010) s 1.8.
[95] (n 76) 185–186.

B. The Absence of Consent to Terms in Adhesion Contracting

The concept of consent inherently involves three features relevant here. First, the person must be free to give it. This is reflected, for instance, in that Contract Law does not recognise the 'consent' of a party constrained by duress or undue influence. Second, as Robertson notes, '[k]nowledge of the obligation to be assumed is a prerequisite of the voluntary assumption of obligation;[96] and so is an understanding of the terms (though not necessarily their full implications[97]). This is evinced by how Contract Law does not bind a party by its apparent consent in cases of mistake, misrepresentation, or incapacity. Third, for consent to be received, the party must in some manner communicate agreement to its counterpart.

In Contract Law, consent to a term means consent to its content, which defines the obligation assumed, and which becomes enforceable by law.[98]

Within Contract Law's doctrinal system of rules, the test for consent is qualified by operational necessity: because one cannot read a party's mind, and because a party's conduct may cause others to variously interpret its state of mind, the law employs an objective test for whether a party consented, based on whether a party 'so conducts himself that a reasonable man would believe that he is assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him.'[99]

Applied to adhesion contracting, the question then is: would a reasonable observer in the drafter's position interpret an adherent's conduct as consent to the form terms?

[96] (n 88) 191.
[97] The latter is captured by the notion of 'informed consent', required for example in Medical Law, but not ordinarily in Contract Law. The prefix 'informed' refers to the potential *consequences* (such as the prospects of success and risks of a medical procedure).
[98] Stephen Smith, *Contract Theory* (OUP 2004) 44.
[99] *Smith v Hughes* (1871) LR 6 QB 597 (QB).

In some adhesion cases, such as where terms are 'hidden' on the back of receipts or in shrink-wrapped packaging, adherents are unaware of them when making the contract. But even where adherents know there are form terms, their content remains unknown, as they are typically not discussed or read.[100] As Lord Denning observed, 'no customer in a thousand ever read the conditions.'[101] Doing so is hardly encouraged by the terms often being numerous, the contracting process hasty, and adherents pressured by social norms not to review them precisely because doing so is unusual.[102] When terms are read, they are seldom understood, due to their obscure drafting.[103] The rare adherent who does read and understand the terms is confronted with the contract offer being to 'take-or-leave,' with leaving it likely just meaning having to take a competitor's similar form.[104] Mindy Chen-Wishart appraises the barriers to exercising freedom over the form terms as 'simply insurmountable,' and notes that: 'A person today who refused to contract [in this fashion] would deny herself of most means of living in a modern society'.[105]

These realities typical of adhesion contracting are sufficiently well-known that a reasonable observer ought to be aware of them. And taking account of them, the observer would *not* reasonably conclude that the terms were consented to.[106] In eccentric cases, there might be evidence that some offeree *really did* consent to the terms: was aware of them, understood them, and voluntarily agreed to them. But such cases would be the exceptions, not the rule.

Courts' routine conclusion that adherents consented to the form terms therefore runs counter to facts well-known from anecdotal experience (and confirmed by empirical studies)

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[100] Chen-Wishart, 'Unfair Terms' (n 33) 109.
[101] *Thornton v Shoe Lane Parking* [1971] 2 QB 163 (CA) 169.
[102] Rakoff (n 34) 1226–1229; Chen-Wishart, 'Unfair Terms' (n 33) 109; Robertson (n 88) 187–192.
[103] Chen-Wishart, 'Unfair Terms' (n 33) 109.
[104] *Suisse Atlantique* (n 86) 406.
[105] Chen-Wishart, 'Unfair Terms' (n 33) 109–110.
[106] *Suisse Atlantique* (n 86) 406; Robertson (n 88) 202; Radin (n 6) 22.

to be typical in adhesion contracting.[107] *In form*, contractual they do appear: associated with a private exchange, accompanying other (core) terms which *are* negotiated in a typical contractual manner; often, the document listing the terms is also titled 'contract' or 'agreement'. But consent to terms is absent in the adhesion *process*.

Adherents do communicate a consent. But *to what* is that consent reasonably interpreted as being in relation to? That question is examined in Chapter 3.

For present purposes, what matters is that misinterpreting this as consent to the terms themselves is the likely cause of the concern about terms being imposed, because it does not fit with Contract doctrine and the concept of consent, as discussed.

C. Court Precedent's Reliance on Assumptions of Questionable Application to Adhesion Contracting

Adhesion contracting is typically treated by courts as falling within one of two broader scenarios where courts, in applying Contract Law's objective test of consent, rely on shortcuts of reasoning enabled by the key facts being common within each scenario.[108] Thus, where an adherent signs a form, it is treated under the 'signature rule'; and where an adherent passively accepts a form, having been provided notice that it contains terms, it is treated under the 'notice rule'. Both scenarios enforce terms, as having been agreed, even if they have not been read. It is instructive to more closely examine each scenario, in order to see why this is so, and why it is problematic to apply these to adhesion contracts.

The signature rule stems from the leading case *L'Estrange v Graucob*, where Scrutton LJ stated*:*

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[107] Rakoff (n 34) 1226; Eyal Zamir and Yuval Farkash, 'Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship—Comments on Florencia Marotta-Wurgler's Studies' (2015) 12 Jerusalem Rev Leg Stud 137, 145–146.

[108] John Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (OUP 1991) 48, 50–51.

> In *Parker v South Eastern Railway*, Mellish LJ laid down in a few sentences the law which is applicable to this case. He there said: 'In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents.'… When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.[109]

Parker v South Eastern Railway provided the notice rule, set out by Mellish LJ as follows:

> if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are.[110]

The recipient's knowledge that there are terms is again judged objectively, by whether the offeror provided sufficient notice of this.[111]

For each of these, the facts from the leading cases themselves illustrate the problems with applying them to adhesion contracts.

Concerning the scenario of signed documents, *L'Estrange w*as itself a case of adhesion. The parties orally discussed and agreed a contract for the instalment purchase of a cigarette vending machine. A pre-printed form titled 'Sales Agreement,' containing blanks filled in with the terms orally agreed, plus a block of fine print, was then presented for the buyer's signature, which was given. The machine never worked. The buyer sued for breach of implied warranty of fitness-for-purpose. The seller pointed to a disclaimer, and

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[109] *L'Estrange v Graucob* [1934] 2 KB 394 (CA) 402–403.
[110] *Parker v South Eastern Railway* [1877] 2 CPD 416 (CA) 421.
[111] ibid 423.

counterclaimed the remaining purchase price based on an acceleration clause, both contained in the fine print. The court ruled in favour of the defendant because the document was signed, stating (as quoted earlier), that 'agreement is proved by proving [the party's] signature.'[112]

However, the facts of *L'Estrange* depict a typical instance of adhesion contracting as described in §B, where it was unreasonable to conclude that there was consent to terms: The clauses at issue were unmentioned, hidden in fine print, which the buyer had not read, and was unaware of their content when she signed the form. Indeed, it is not as if the signed form was received by mail; representatives of the seller witnessed those facts. Since instalment sales exist for buyers to avoid paying all at once, it also seems dubious that the buyer would intend to agree to the acceleration clause, whether or not she signed a form on which it was printed. It is moreover implausible that a buyer would agree to a clause disclaiming the fitness-for-purpose of an expensive item. Nor did the seller's agents hear any objections or questions from the buyer, as they might have reasonably expected before they might persuade a buyer to accept such terms. Finally, since the clauses were pre-printed and not open for negotiation, it would be difficult to conclude reliably that there was consent to those, even if the buyer had read and objected before signing.[113]

This analysis of the facts of *L'Estrange* suggests two possibilities. One is that the factual assumptions underlying the signature rule do not fit the realities of adhesion contracting, so that using it to resolve adhesion cases distorts rather than implements the objective test of consent, as it is meant to do. On these lines, Cartwright invokes the Canadian case *Tilden Rent-a-Car v Clendenning,*[114] which held that for 'transaction[s] of a

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[112] *L'Estrange* (n 109).
[113] ibid.
[114] *Tilden Rent-A-Car Co v Clendenning* (1978) 83 DLR (3d) 400 (ONCA).

kind…invariably carried out in a hurried, informal manner', the objective test's correct application is that signature does *not* mean consent to the terms.[115]

Alternatively, one can read Scrutton LJ's speech which finds the signature rule as assuming pre-existing (oral) agreement on the terms, with the signature's significance being proof of intent to make the prior agreement legally binding. This would explain it quoting a tract from *Parker* which referred to an *agreement* that is subsequently signed. It would also explain the stated exception for fraud/misrepresentation, whose mention is otherwise puzzling. Of note, adhesion contracting presents an opposite scenario: the intent to make a binding contract seems clear; the question is what the agreement includes—that is, whether the form terms are incorporated.

Turning to the scenario of unsigned documents, *Parker* was also a typical case of adhesion contracting. Rail passengers paid to check bags in a station cloakroom, and were handed tickets. The bags were later lost or stolen, and the passengers sought to recover the value. The railway resisted, based on a limitation of liability clause contained in terms printed on the back of the tickets. The court stated (as quoted earlier) that, provided adequate notice that a ticket contains terms, if customers receive and keep the ticket, this should be taken as consent to the terms.[116]

However, the facts in *Parker* lend little support to this proposition. The passengers had to retain the tickets in order to reclaim their bags. This is a reasonable and sufficient explanation for that conduct. By contrast, Mellish LJ's interpretation is unexplained, and contrary to Contract doctrine that silence or inaction ordinarily is not acceptance.[117] Most likely, as Lord Denning said a century later:

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[115] ibid.
[116] *Parker* (n 110).
[117] *Felthouse v Bindley* (1862) 142 ER 1037.

> the theory [was] that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.[118]

Indeed, in *Parker*, the porter saw that the passengers did not read the conditions when the contract was formed. Even if they had been read, the conditions were pre-printed and the porter unauthorised to negotiate them. Further, the passengers had to relieve themselves of the bags and board the train. Thus, they may not have genuinely agreed to the terms, but neither had any alternative. In short, their retention of the tickets establishes little that would reliably support the inference that they consented to the terms.[119]

This analysis of the facts of *Parker* suggests again two possibilities. One is that the notice rule's factual presuppositions fail to correspond with circumstances typical in adhesion contracting, causing it to misapply the objective test of consent in adhesion cases. *Parker*'s lack of time to read, and inability to negotiate or realistically decline the contract, are only some of the reasons, summarised in §B, why parties passively receive ('adhere' to) form terms without in fact knowing or agreeing to them.

Alternatively, Mellish LJ's speech articulating the notice rule can be read as assuming a pre-existing oral agreement, with the document's role being evidential, *viz.* to authoritatively record it. Since such terms would already be known, passive receipt of the document would suggest trust that the document is an honest record of the terms previously agreed. To expect the party to read the document, suspecting fraud, would be unreasonable, and hence explains the stated exception for fraud, which is otherwise curious. This reading is supported by Mellish LJ prefacing the quoted passage with the phrase 'there must be *evidence independently* of the *agreement itself to prove* that the defendant has assented to

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[118] *Thornton* (n 101) 169.
[119] *Parker* (n 110).

it,'[120] and by the passage's subsequent reference to the case where 'the parties…reduce their agreement into writing, so that the writing constitutes…evidence of the agreement.'[121] Crucially, adhesion form terms embody an opposite scenario: they have not been previously discussed, let alone agreed; nor is their purpose to record the negotiated terms agreed prior to presenting the form, but rather is to add to those.

This review of the leading cases on the signature and notice rules demonstrates how courts' treatment of form terms as validly agreed is based on authority which relies on contrasting factual presuppositions than typify the adhesion scenario. Subsequent caselaw has not distanced itself from this authority and its flaws; it has repeatedly reinforced it: 'The case of *Parker v South Eastern Railway*…has been approved in every case since its date'.[122]

The disconnect has been noted by scholars. As Llewellyn summarised:

> The rule that a man is presumed to have agreed to what he signs… runs at flat variance with the facts of life and with the facts of [adhesion]. A legal presumption which rests on a presumption of fact before it comes to be a presumption of policy, and which facts proceed to negate, and policy proceeds to negate also: that is a bad presumption for law to maintain.[123]

Chen-Wishart similarly appraises that 'neither the notice nor the signature rule would satisfy the objective test of intention,' as courts suggest.[124] And David Slawson concludes that form terms 'are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered.'[125]

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[120] Author's emphasis.
[121] *Parker* (n 110).
[122] *Thornton* (n 101) 171 (Megaw LJ).
[123] Karl Llewellyn, 'Common-Law Reform of Consideration: Are There Measures?' (1941) 41 ColumLRev 863, 870.
[124] 'Unfair Terms' (n 33) 114.
[125] (n 8) 530.

D. Practical Efforts to 'Strengthen' Consent to Form Terms

Can concern about form terms' imposition be alleviated by practical efforts to provide adherents easier access to them and demand a clearer consent from them?

Such efforts are apparent. For example, some IT companies now put terms in a pop-up window, and require adherents to mouse over them before clicking 'I agree' or to actively uncheck a 'No' box and check a 'Yes' box in reply to the question of whether they read, understood, and agree to the terms.

Such efforts might marginally alleviate the extent to which form terms are imposed. However, they take time and add nuisance for adherents simply wanting to complete a transaction whose terms they cannot change or realistically refuse anyway. This saps efficiency, which is embedded importantly in many of the rationales of adhesion contracting, discussed in §I.

Little more appears achievable through efforts to tighten the practice of adhesion contracting into closer conformity with Contract doctrine requiring consent to terms. After all, tightening the practice sufficiently into conformity would effectively turn adhesion contracting back into negotiated contracting.[126] Yet, adhesion embodies freedom *not* to have to consent to every term; freedom to instead allocate transactional resources and responsibilities based on variable and asymmetric interest-levels and expertise, as noted in §I. Inherent in that is parties' desire to be able to choose the priority differently for terms of different interest-levels, in balancing the opportunity to consent to a particular obligation within a set, versus the transaction cost of doing so measured as a fraction of the term's value to the party. The dominance of adhesion reflects these wishes as a broad social consensus. Thus, forcing parties to negotiate would be a perverse way of alleviating contractual

[126] ibid.

imposition. As Slawson underlines, it is simply 'unrealistic to try to make the law of contract…legitimate by insisting that a standard form, to be enforceable, must be an uncoerced, informed agreement.'[127]

Hence, whatever their extent, practical efforts to strengthen consent to form terms result in adding burdens on adherents, yet are unable to avoid the issue of imposition.

E. Theoretical Efforts to 'Weaken' What Constitutes Consent to Terms

From the opposite side of the gap between theory and practice, can concern about form terms' imposition be dismissed on the basis of theoretical efforts to weaken what constitutes consent to terms, such that adhesion meets the test?

Various imaginative such theories have been advanced, purporting the existence of a 'weak' or 'thin' consent to terms present in adhesion contracting.

The start-point for many such theories was the idea that the adherent gives an implied 'blanket' consent to the form terms, although unaware of the specifics of them.[128] This idea of consent to the existence of terms sufficing in lieu of consent to the terms did fit with court enforcement, but not with Contract doctrine (including as it was typically stated by courts), which still maintained that the basis for enforcement was agreement to the terms. Thus, subsequent theories sought to include the unknown content of the form terms within something that *was* specifically consented to. Arthur Leff's famous claim that, in a mass market economy, standard terms are part of the standard 'product' that is the agreed subject-matter of the transaction, inspired some of these.[129] However, despite the surface allure of the analogy, terms, unlike product details, don't just have a practical impact; they create legal

[127] ibid 532.
[128] Llewellyn, *Common Law Tradition* (n 44) 370.
[129] (n 54) 144–147.

obligations. Where terms truly are product features, such as with options or reinsurance, Contract doctrine requires consent to them as with other contract terms. Rather than include consent to terms in consent to the product, Randy Barnett sees it 'nested' within the intent to be legally bound, which he claims is all that Contract Law requires.[130] He gives the example of a soldier committing to obey a superior's commands, which are (as yet) unknown to the soldier.[131] However, that commitment is not enforceable under Contract Law; it is enforceable under Military Law—and without the soldier's consent. Barnett's other example, of agreeing to whatever the other party specifies in a sealed envelope, shows how consent to be legally bound is a blank cheque (or worse) that Contract Law does not accept as encompassing consent to terms.

Another theory implies that concern about imposition can be dismissed if the adherent waives the right to consent to the terms. Hence, in *Hood v Anchor Line*, Viscount Haldane said '[t]he real question is whether he deliberately took the risk of there being conditions in the face of a warning sufficiently conveyed' that there were.[132] If so, he is estopped from asserting his right to consent: 'he certainly could not have been heard to say that he was not bound.'[133] But this too fails to correspond to Contract doctrine, as consent to the terms is not merely a personal right, it is the formation process by which contractual obligations come into being.[134]

Yet another suggestion was that an 'informed minority' does consent to the terms, and that their consent suffices for all adherents to a given form.[135] The empirical premise of this

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[130] Randy Barnett, 'Consenting to Form Contracts' (2002) 71 Fordham Law Review 627, 636.
[131] ibid.
[132] *Hood v Anchor Line* [1918] AC 837 (HL) 845.
[133] ibid.
[134] Smith (n 98) 56.
[135] Jason Scott Johnston, 'The Return of the Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers' (2006) 104 MichLRev 857, 863–864.

theory has been significantly debunked.[136] But beyond that, Contract Law does not normally permit the consent of third parties to bind a person. Nor do these circumstances meet the requirements of an implied agency, by the informed minority, for the others.

Presently, with courts enforcing form terms as validly agreed, and with existing regulation focused mainly on terms which are unfair, theories such as those surveyed here evidently somewhat mute their subscribers' disturbance by the 'remarkable dissonance between contract theory and practice.'[137] But for others, they do not. A central aim of Radin's *Boilerplate*, for instance—argued over the course of its first six chapters—is that even as such theories ultimately fail, they contribute to the 'normative degradation' of consent as a core ideal of Contract Law.[138]

A different approach to restoring the integrity of Contract Law, whilst addressing the issue of imposition, will be pursued in Chapter 3 of the present work.

F. Conclusion

Wide concern about form terms' imposition has existed since adhesion contracts' rise to prominence. The incongruence between Contract doctrine and court practice shows that concern to be well-founded. Efforts to strengthen consent on the ground, or to re-theorise consent to terms in a way that the adhesion process satisfies, are unable to resolve the concern. This is an issue which the law must address, as imposition damages the law's integrity, and invites inclusion of unfair terms among the form terms. Chapter 3 will address this issue, thus helping restore the law's integrity, and better supporting legal solutions to

136 Zamir and Farkash (n 107) 147.
137 Barnett (n 130) 627.
138 (n 6).

unfair terms, which are presently complicated and undermined by form terms' treatment by courts as validly agreed.[139]

III. The Issue of Unfairness

As noted in Chapter 1, the second major issue of adhesion contracting to be addressed in this work is unfairness. Concern has been widespread and longstanding that at least some of the form terms tend to be 'unfair'. This section outlines that issue.

A. The Longstanding, Ongoing Concern with Unfair Terms

Concern about unfair terms in adhesion contracts dates at least to their first mention in the common law in 1919. Discussing life insurance contracts, Edwin Patterson noted the unfairness of form terms which stipulate that insurance will not take effect until the policy's delivery to the applicant, whereas the premium is charged from the date of application.[140] Stephen Waddams traces the concern back considerably farther, noting how Sir Frederick Pollock, as plaintiff-counsel in *Parker*,[141] presciently pleaded that if courts were to enforce form terms, wholly unreasonable terms could be included.[142]

By the mid-20th century, such terms were indeed so common that Lord Denning sought to distinguish their degree of unfairness:

> the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.[143]

[139] Rakoff (n 34); Slawson (n 8).
[140] (n 23) 221–222.
[141] *Parker* (n 110).
[142] (n 27) 479.
[143] *Spurling v Bradshaw* [1956] WLR 461 (CA) 466.

Within the academy, Karl Llewellyn, who carried out the most extensive study of adhesion at that time, echoed that 'among those terms which plainly are in fact assented to only one time in a thousand there are…clauses of oppression or outrage.'[144]

Llewellyn in fact hoped to combat unfair terms by providing in the Uniform Commercial Code ('UCC') for judicial non-enforcement of 'unconscionable' terms.[145] Statutory control of unfair terms was later instituted in some other common law jurisdictions. Notably, the UK crafted the Unfair Contract Terms Act 1977 ('UCTA'). Subsequent to the EU Unfair Terms Directive ('UCTD'),[146] the UK enacted additional legislation, now contained in its Consumer Rights Act 2015 ('CRA'). The Australian Consumer Law ('ACL') provides a non-European common law example of unfair terms regulation.

However, as alluded to in Chapter 1, concerns remain. Margaret Radin's recent book *Boilerplate* has brought the issue of unfair terms to renewed prominence, and stoked broad debate about it, including in Canada where a conference on it was held at the University of Toronto.[147] The EU, which repeatedly sought but failed[148] to reform areas of law that underlie UK regulation, made them the subject of a 2015-2017 Fitness Check of the law's suitability. As noted earlier, it showed considerable room for improvement.[149] In the UK itself, the Law Commission has twice recently been tasked with work on unfair terms,[150] and thus far not all of its major recommendations have been implemented.[151] Meanwhile, New Zealand has

[144] *Common Law Tradition* (n 44) 366.
[145] Uniform Commercial Code (USA) (UCC) §2-302.
[146] UCTD (n 13).
[147] Jennifer Millson and Simon Stern, 'Mini-Symposium on Contract Boilerplate: Introduction' (2013) 54 Can Bus LJ 246. This followed an earlier conference on boilerplate at Michigan where Radin was a respondent: Ben-Shahar, 'Foreword' (n 16) 821.
[148] Weatherill, 'Consumer Rights Directive' (n 22) 1279–1290.
[149] §1-I.
[150] Law Commission, *Unfair Terms in Consumer Contracts* (n 10) s 1-4.
[151] For example, it recommended that protection be extended beyond consumers to small-business.

newly enacted unfair terms legislation, following Australia.[152] And the ALI is in the midst of a multi-year Restatement of American controls on unfair terms.[153]

In short, concerns about adhesion contracts' unfair terms are longstanding, and remain widespread, as evidenced by recent scholarly discussion and regulatory activity.

B. The Nature of the Unfairness of 'Unfair Terms'

Fairness is an open-ended concept of varied usage. Yet, the wide concerns about 'unfair' terms in adhesion contracts seem not to be mere common use of the label 'unfair' in relation to fundamentally different concerns. On the contrary, they seem to represent a broadly-conceived but genuinely-shared concern. That concern seems to revolve around substantive disproportion in the terms of the exchange.

Existing unfair terms regulations in common law jurisdictions evince this. Hence, definitions of unfair terms in both British and Australian legislation refer to 'significant imbalance in the parties' rights and obligations under the contract'.[154] In the United States, the Official Comment to UCC §2-302 explains that the issue is whether the 'clauses involved are so one-sided as to be unconscionable'.[155]

Scholarly views have been consistent with this. Llewellyn, for instance, cited terms which are 'terrifyingly one-sided' or 'run far beyond any… need or excuse.'[156] Mindy Chen-Wishart describes terms which are 'highly disproportionate'.[157] And Hugh Collins refers to 'imbalance between the performances required by each party.'[158]

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[152] Fair Trading Amendment Act 2013 (NZ).
[153] ALI Restatement Project (n 15).
[154] Consumer Rights Act 2015 (CRA) s 62(4); Australian Consumer Law (Competition and Consumer Act 2010 (Cth) sch 2) (ACL) s 24(1)(a).
[155] Comment 1.
[156] *Common Law Tradition* (n 44).
[157] 'Unfair Terms' (n 33) 105, 110.
[158] *Regulating Contracts* (n 24) 11.

Substantive disproportion can manifest itself in many different ways. This is apparent from the table below (Table 2-III-B), which overviews examples of term-types listed as unfair by British and Australian legislation:[159]

Examples of Types of Term Which May be Unfair	***UK CRA, Sch. 2(1)***	***ACL, s.25(1)***
permits drafter to avoid or limit performance of the contract, but not the adherent	3, 18	a
permits drafter to terminate the contract, but not the adherent	7, 8	b
penalises adherent for breach or termination of the contract	4, 5, 6	c
permits drafter at its sole discretion to vary the terms of the contract	11	d
permits drafter to control or alter the duration of the contract	8, 9	e
permits drafter to decide or change the price without the adherent having the right to terminate the contract	14, 15	f
permits the drafter to decide or substitute the property or services which it is to supply under the contract	12, 13	g
gives the drafter the sole discretion to determine whether the contract has been breached or to interpret its meaning	16	h
limits the drafter's vicarious liability for the acts of its agents	17	i
permits the drafter to assign the contract to the detriment of the adherent without the adherent's consent	19	j
limits the adherent's rights of legal redress based on substantive legal rights it would have but for the term	1, 2, 4, 7, CR s. 65	k
excludes or hinders the consumer’s right to legal redress through an arbitration clause, or by altering default rules of procedure or evidence	20	l, m
which the adherent had no real opportunity of becoming acquainted before the conclusion of the contract	10	

The table also reveals substantially-shared concerns even at the more detailed level of sample term-types. Yet, neither statute’s list is presented as exhaustive of terms which may be unfair in the sense described.[160]

Term-types like those listed in the table can be found throughout the extensive academic literature referring to unfair terms, along with other important manifestations of

159 CRA (n 154); ACL (n 154). The table’s right-hand columns reference where each term-type is included in these regulations.
160 CRA (n 154) s 63(1); ACL (n 154) s 25(1).

unfair substantive disproportion. Todd Rakoff, for instance, makes note of terms which alter background legal rules that are designed to be fairly-balanced.[161] Chen-Wishart emphasises terms which undermine one party's expectations arising from terms presumed to be fair because they were ones the parties actually bargained.[162] Radin is preoccupied with terms that 'delete' one party's ability to exercise basic legal entitlements such as human rights or access to justice.[163] Collins highlights the unfair creation of 'a power relation' through terms whose real purpose is to 'increase the bargaining power of the business against the [adherent] in post-breach negotiations.'[164] Drafters may also overreach into the adherent's autonomy outside the contract, as Friedrich Kessler observed, through terms of disproportionately little relevance relative to their purpose.[165]

It may be added that, although discussions sometimes speak of *an* unfair term, it is widely-recognized that the unfairness may result from its combination with other terms.[166] Most existing regulations consider the rest of the contract in appraising terms' fairness.[167]

How substantive disproportion should be *measured* is a different matter. Under EU Law, for instance, the test for 'significant imbalance' was specified in *Aziz* as follows:

> the concept of 'significant imbalance'…must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force…[168]

Arguably, this approach risks subverting its aim, by tying both ends of the scale to an impartial but inexpert baseline. Further, as later chapters discuss, it undermines the rationales

[161] (n 34) 1183.
[162] 'Unfair Terms'(n 33) 106, 114–115.
[163] (n 6).
[164] *Regulating Contracts* (n 24) 228–229.
[165] (n 29) 640.
[166] The initial cases cited by Patterson are an example: the term making the insurance effective only upon delivery of the policy was unfair because of another term which made the premium due upon application.
[167] See eg UCTD (n 13) art 4(1); CRA (n 154) s 62(5)(b); ACL (n 154) s 24(2)(b).
[168] Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] 3 CMLR 5, para 76.

for the drafter's pivotal role in adhesion contracting, and is especially unsuited to the common law which lacks a civil code containing books on nominate contracts containing legislated default terms for most common transactions. For present purposes, however, its intent is consistent with the wide concerns over substantive disproportion within the form terms.

C. The Focus of Unfair Terms Concerns on Standard Form Terms

Unfairness is not unique to adhesion contracts. In negotiated contracts, for instance, cases of unconscionable bargains and cases where undue influence is presumed, start from a finding that the substance of the bargain 'calls for explanation.'[169] For certain contract-types, special legislation serves partly to combat particular fairness concerns. Examples include a minimum wage in employment contracts, rent controls in residential tenancies, and statutory warranties in contracts for the sale of goods.[170] In some jurisdictions, including the UK, consumer protection encompasses unfair terms even in contracts not in standard form.[171] However, in all these cases, concern is confined to their particular circumstances. Generalised concern about unfair terms in negotiated contracts has not been widespread, as it has been for adhesion contracts.

Accordingly, several existing unfair terms regulations are limited to standard form contracts. This is the case for Australia's ACL,[172] the EU's UCTD,[173] the Irish UTCCRs,[174] and ss. 3/17 of the UK's UCTA. Scholarly concern has been similarly preoccupied with

[169] *Evans v Lloyd* [2013] EWHC 1725 (Ch); *Alec Lobb v Total Oil GB* [1983] 1 WLR 87 (Ch).
[170] Collins, *Regulating Contracts* (n 24).
[171] CRA (n 154) s 61.
[172] ACL (n 154) s 23(1)(b).
[173] UCTD (n 13) art 3.
[174] (n 13) s 3(1).

adhesion contracts. As Rakoff sums up, 'many terms that might be enforceable if included in negotiated agreements should not be enforced if imposed through contracts of adhesion.'[175]

Why is this? Concern about unfair terms in adhesion contracts stems from the related issue of imposition, discussed in §II. The interrelation of these two issues is evinced by how scholarly commentary on unfair terms usually highlights the fact that they were not truly agreed, but imposed.[176] In negotiated contracts (or terms), parties strive to protect themselves from unfairness through bargaining or by shopping terms among competitors.[177] But the form terms of adhesion contracts are unilaterally 'dictated' by the drafter.[178] As noted in §II, the adherent is typically unaware of their content, and in any case, realistically unable to alter them, as they are presented on a take-or-leave basis, with leave likely meaning just taking a similar form from a competitor. Thus, as Chen-Wishart summarises, '[w]hatever protection against unfairness a process of negotiation might give, standard form contracting gives no such protection.'[179]

Meanwhile, since the form terms are treated by courts as agreed by the parties, control by other means seems unjustified. Occasionally, one perceives judicial recourse to 'covert' devices such as holding that an unfair term is too surprising to be incorporated, or interpreting its meaning in a way that renders it fair.[180] Apart from this, there is—without unfair terms regulation—no operative fairness control at all.[181] The drafter's self-interest, unrestrained by any operative fairness control, then induces it to make unfair terms. Lawyers employed by the drafter are incentivised to exacerbate this, as including more terms favouring their client in

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[175] Rakoff (n 34) 1266.
[176] See eg Rakoff (n 34); Slawson (n 8); Chen-Wishart, 'Unfair Terms' (n 33); Llewellyn, *Common Law Tradition* (n 44).
[177] See eg *Macaulay v Schroeder Music Publishing* [1974] 1 WLR 1308 (HL) 1316 (Lord Diplock).
[178] Kessler (n 29).
[179] 'Unfair Terms' (n 33) 110.
[180] Llewellyn, 'Book Review' (n 48) 702–703.
[181] *Williams v Walker-Thomas Furniture* 350 F2d 445 (DC Cir 1965).

every contingency reduces their professional liability, whilst taking more billable hours to draft.[182] Not every form term is unfair; but adhesion contracting does, for these reasons, invite unfair terms' inclusion among the form terms. As John McCamus explains: 'if the contract is drafted in an even-handed fashion, this will perhaps occasion little concern…But the risk is that they contain terms that are unfairly harsh or oppressive'.[183] The risk of unfairness is therefore heightened in comparison to negotiated contracts.

Hence, whilst the concern about unfair terms lies in the unfairness of substantively disproportionate terms, this general concern about contract terms' fairness is restricted to terms also made by an unfair process, in the sense of being deprived of an operative fairness control. The leading US case on unconscionable clauses confirms the relevance of procedural unfairness in that sense:

> Unconscionability has generally been recognized to include an absence of meaningful choice…[W]hen a party of…little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms…the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[184]

Whilst the above passage initially speaks of 'choice,' the court's response to the scenario where choice is absent, of ordering court scrutiny of terms' fairness instead, shows that the broader issue is of an operative fairness control over private exchange terms requesting state enforcement.

That element excludes from the general concern about unfair terms even the terms that parties negotiate as part of adhesion contracting. This is reflected in several existing unfair terms regulations: The UCTD does not control adhesion contracts' negotiated terms.[185]

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[182] Rakoff (n 34) 1222.
[183] McCamus (n 76) 186.
[184] *Williams* (n 181).
[185] (n 13) art 3

The ACL excludes from control subject-matter and price,[186] which it presumes to be negotiated.[187] So does the CRA,[188] but only if the particular case facts show that these terms were, practically-speaking, subject to negotiation.[189] Scholarly concern has likewise been focused on form terms, as summarised in §A.

The issue of imposition, discussed in §II, is therefore related to, and precedes, the issue of unfairness in adhesion contracting, outlined here.

D. Conclusion

Concerns about unfair terms in adhesion contracts are longstanding and ongoing. These concerns centre on terms whose substance disproportionately favours drafters. The concerns are generally restricted to unfairness among adhesion contracts' form terms, due to their lack of an operative fairness control, unlike the negotiated terms which parties may bargain or shop in order to protect their interests. The issue of unfairness in adhesion contracting is therefore linked to the issue of imposition. The implications for unfair terms regulation of addressing the issue of imposition are considered in Chapter 3. Following this, measures to address the issue of unfairness are examined in Chapters 4-7. Chapter 8 compares these to the EU's existing unfair terms regulation.

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[186] (n 154) s 26(1).
[187] ibid s 27(2)(d).
[188] ibid s 64(1).
[189] ibid s 64(2)–(4).

Chapter 3. Dealing with the Issue of Imposition: Upholding Contract as the Law of Voluntary Obligation & Justifying Distinct Control of Unfair Terms

Introduction

A. Issue Addressed in this Chapter

This chapter addresses how to deal with the issue of imposition in adhesion contracts. As detailed in §2-II, the facts typical of adhesion contracting show standard form terms to be imposed by drafters on adherents. Yet, courts enforce them as having been agreed, in satisfaction of the requirement of consent to terms. This disjuncture damages the integrity of the legal system. Meanwhile, because Contract doctrine relies on consent to confirm that the parties negotiated mutually-acceptable terms, the conclusion that the form terms were agreed also deprives courts of a justification for interfering with the parties' supposed bargain in order to control terms' fairness. As explained in §2-III, the resulting absence of any operative fairness control invites drafters to include among the form terms they impose the one-sided self-favouring terms widely-derided as 'unfair'.

A suitable response to the issue of imposition therefore helps restore the law's integrity, and strengthens justification of distinct control of unfair terms.[190] This chapter pursues that objective.

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[190] As noted in Chapter 1, unfair terms regulation has not been adopted in some jurisdictions, and in others is underenforced or facing question of its fitness-for-purpose. As discussed in Chapter 4, these difficulties reflect in significant part limitations and doubts flowing from the fact that they are justified on bases which conflict with core precepts underlying Contract Law.

B. Structure of the Analysis

In this chapter, §I examines the functions served by the doctrine of consent to terms in the negotiation context in which it arose. It goes on to analyse what the differences in context between adhesion and negotiation imply as far as features that a modified doctrine should incorporate if it is to fulfil these functions in the adhesion context.

Next, §II looks at some means of dealing with the issue of imposition that have been contemplated but have not successfully resolved it, highlighting how they ignore certain insights from §I, and how that might contribute to their failure to resolve the issue.

Then, §III draws on the conclusions from §I, supported by the evidence from §II, to propose a doctrine that would fulfil in the adhesion context the functions served by consent to terms in the negotiation context. This new doctrine re-establishes adhesion contracting on grounds that do not sacrifice the law's integrity or invite unfair terms.

Lastly, §IV takes this proposal, representing what the preceding analysis concluded would be an *effective* response to the issue of imposition, and assesses whether it is supported by other important governance considerations, per the evaluative framework outlined in Chapter 1.

I. Contextual Differences Between Adhesion and Negotiation Relevant to Dealing with the Issue of Imposition

A. The Functions of the Doctrine of Consent to Terms

When courts enforce adhesion contracts, they do not endorse imposition, but say rather that they enforce the terms because they were agreed. As discussed in Chapter 3, this is because Contract doctrine provides that a term is valid on the basis of consent to the content of the obligation it embodies.

Given the analytical premise expressed in Chapter 1 that legal doctrines are contextually-contingent formulations designed to give effect in their context to certain functions, it is important to identify the pivotal functions served by Contract's doctrine of consent to terms.

i. Voluntary Obligation

First, the party consent it requires serves to *implement the foundational idea of Contract as the law of voluntary obligation*. Contractual obligations are fundamentally conceived of as legal obligations which arise by voluntary assumption. One way of implementing this notion is to make consent to terms a condition of terms' validity as legal obligations of the consenting parties. In that case, as Stephen Smith describes, the contractual obligation 'is created by expressing the requisite intention is to do the very thing that is promised.'[191]

ii. Fairness Control

Second, by confirming that negotiations resulted in mutually-acceptable terms, consent to terms *meets the legal system's need for assurance that private exchange that it is asked to sanction was subject to an operative fairness control*.[192] This is apparent from the discussion in *Williams v Walker-Thomas*, quoted earlier.[193] One way the state can draw assurance that fairness control was operative is through the parties' consent to terms, provided the parties had a choice and could therefore be expected to withhold consent unless/until a fair result was reached through shopping or bargaining. Hence, if the parties had no choice, due for instance to duress or undue influence, the terms are unenforceable. In fact, if a contract is made in circumstances of merely a known risk that a party's ability to

[191] Smith (n 98) 57.
[192] Collins, *Law of Contract* (n 17) 23–24.
[193] §4-III-C.

bargain was compromised, as in cases of presumed undue influence or unconscionability, the law demands positive proof that negotiation (or some other fairness control mechanism) was operative; failing this, court scrutiny serves as a secondary fairness control, and if the contract substantively 'calls for explanation,' it is unenforceable.[194] Yet, this fairness control occurs still within the doctrinal frame of consent to terms: if the contract passes court scrutiny, the claimed excuse is simply not made out, and there was valid consent to terms; if it fails court scrutiny, the consent of the vulnerable party is said to be 'vitiated,' and each party is left to pursue its private exchange needs anew, subject as usual to consent to terms.[195]

B. Related Features Inherent to Contract, Not Dependent on Context

Before examining consent to terms' capacity to fulfil these functions in different contexts, two features of contractual obligations should be noted that inhere in our understanding of their basic nature, as opposed to arising from particular contexts to give context-dependent forms to underlying functions. These features should hence be respected in all contexts, whilst other features may change with context.

i. Private Ordering

First, as used in Contract Law, the term 'obligation' implies a source in a private relationship. This contrasts with the idea of public obligation, stemming from the relationship between a private party and a public authority carrying out its public function. Contractual obligation therefore results from *private ordering*.[196] This distinguishes it from obligations which arise from public ordering, even though those may also be voluntary in the sense of

[194] *Evans* (n 169); *Alec Lobb* (n 169).
[195] For further discussion, see Marcus Moore, 'Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability' (2018) 134 LQR 257.
[196] VP Goldberg, 'The Enforcement of Contracts and Private Ordering' in Claude Ménard and Mary Shirley (eds), *Handbook of New Institutional Economics* (Springer 2008); Radin (n 6) 19.

being an exercise of democratic governance, and may have a fairness control exercised by a public authority.[197]

ii. Personal Obligation & Party Sovereignty

Second, the term 'obligation' in Contract Law contemplates a *personal obligation,* whose legal effect is directed to the interests of the parties to it,[198] as the doctrine of privity of contract reinforces.[199] This again differentiates it from a public obligation, which legally affects the state, representing the wider public interest.[200] As a personal obligation, a contractual obligation is understood to be 'voluntary' because its terms are governed by *party sovereignty* of those whose interests the obligation affects.[201] This is in contradistinction to state sovereignty over matters of public interest, notwithstanding that there may be a voluntary aspect to public decision-making in the sense of it being democratic expression.[202] Likewise, in assessing the fairness of a personal obligation, generally the positions that primarily matter are those of the parties affected, and who are most intimately familiar with their own interests, as envisaged by party sovereignty.[203] This again contrasts with public

197 Discussed in §II-C.
198 See eg Peter Birks, *Unjust Enrichment* (2nd edn, Clarendon 2005) 28–30.
199 See eg Mindy Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 167.
200 See §II-C.
201 See eg Melvin Eisenberg, *Foundational Principles of Contract Law* (OUP 2018); Alan Schwartz and Robert Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale LJ 541. I use the term similarly to the more commonly used 'party autonomy': see eg Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (deGruyter 2001). To avoid the latter term's frequent association with debates as to the *degree* of autonomy, I have preferred the 'sovereignty' terminology, which emphasises the parties constituting an entity with a distinct, exclusive, and special authority over the terms, whatever its exact scope might be. The term's use should not be taken as suggesting my agreement with Schwartz and Scott's further claims as to the relative scope of that authority, for the same reason I avoid the autonomy terminology: see Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (CUP 2017) 54.
202 Discussed in §II-C.
203 Dagan and Heller (n 201) 54: 'the epistemological' thesis. By 'generally', I exclude any matters where there is an overriding public interest, as might be presently regulated, for example, by special legislation or terms implied-in-law.

obligations where the sovereignty of state organs may be the appropriate primary safeguard of fairness in matters of public interest.[204]

C. Contracting Contexts' Implications for Functionally-Effective Doctrinal Forms

i. The Context in which the Traditional Doctrine Arose: Negotiation

Consent to terms arose in a context which assumed and was centred around negotiation as the social process of private exchange to be governed by the doctrine.[205]

Negotiation entails discussion with the aim of agreement on the terms of a transaction.[206] As specified in Chapter 1, it might encompass shopping or bargaining terms with different possible counterparts.

The nature of negotiation is reflected in the content of contracts it produces. For example, the number of terms is typically limited, since few terms are worth the time and expense of bargaining or shopping, and the risk of a deal being scuttled by associated contention or delay.[207] Terms also tend to focus on matters vital to the transaction, for the same reason, and also because individually-negotiated terms dealing with any subject-matter vary and thus will not help with standardising business operations or pegging risk profiles.[208] Negotiation also puts an onus on terms that are readily intelligible, since complex terms may necessitate explanation or legal advice, at additional cost, delay, and contention.[209]

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[204] See §II-C.
[205] Collins, *Law of Contract* (n 17) 6–7; Chen-Wishart, 'Unfair Terms' (n 33) 107.
[206] Oxford Dictionaries, 'Negotiation' <https://en.oxforddictionaries.com/definition/negotiation> accessed 2 November 2017. See also Chen-Wishart, 'Unfair Terms' (n 33).
[207] Collins, *Regulating Contracts* (n 24) 3.
[208] Rakoff (n 34).
[209] Discussed in §II-B.

In this context, how apt is the doctrine of consent to terms to fulfilling its contemplated functions, outlined in §A?

a. Voluntary Obligation

In this, its original context, consent to terms was seen as well-suited to fulfil the function of implementing the foundational idea of Contract as the law of voluntary obligation.

Parties would be aware of what terms they were negotiating. And the limited number of terms makes that easier. If a party communicated agreement, it is thus reasonable to assume the party knew the terms it agreed to. To negotiate terms, parties would also have to understand their meaning (though not their implications). In discussing terms, they would not be expected to purport agreement to terms they don't understand. Consent, then, suggests understanding. And readily intelligible terms facilitate that. The parties can also consider different term options. The negotiated terms' aim is not a standardisation of business operations or risks that would be disrupted. Consent is thus reasonably suggestive of choice. For these reasons, negotiating parties could be expected to know, understand, and potentially alter terms. Making consent to terms a condition of Contract was therefore a feasible way of implementing its conception as the law of voluntary obligation.

It was also a desirable means: The terms concern matters that the parties chose to negotiate. And they define the obligations contracted. Hence, the will of the parties is well-reflected in a requirement of consent to the terms.

Consent to terms also implements voluntariness in a way that respects the fundamental understandings of the nature of contractual obligations described in §B: It places the main condition of terms' validity in private hands, consistent with parties' will to pursue the subject-matter of the exchange via private ordering. Consent to terms also respects the desire for party sovereignty over obligations that are personal and mutual.

In sum, the doctrine seems well-suited to implement in the negotiation context the idea of Contract as the law of voluntary obligation.

b. Fairness Control

In that context, consent to terms was also seen as apt to fulfil the function of assuring the state that a fairness control was operative over private exchange terms it is asked to sanction.

Parties could protect themselves from unfairness by bargaining or shopping terms, consenting only once they were satisfied. With terms limited in number, intelligible, and focused on the exchange (being of interest to both), it was feasible to undertake this for each term, not just a core subset of terms having those qualities. In cases where one party's ability to protect itself was compromised (discussed in §B-ii), courts could order a procedural 'reset,' returning the parties to their original positions, and to control of any future contract by consent to terms. This response could work for negotiated contracts, because the scenarios where a party lacked the ability to self-protect were seen as exceptional, and unlikely to routinely recur after a 'reset.' In the negotiation context, consent to terms was thus a feasible means of assuring operative fairness control.

It was also a desirable means: with the terms being limited in number, intelligible, and focused on the exchange, parties' knowledge of their own business best-placed them to protect their interests.

Consent to terms also controls fairness in a way that respects the fundamental understandings of the nature of contractual obligations from §B: Consonant with Contract as private ordering, it leaves the task of guiding opposing self-interested negotiations to fair outcomes to the market's 'invisible hand'.[210] Respecting contract terms being personal obligations governed by party sovereignty, the doctrine defers to the affected parties' calculations of what terms are appropriate.[211]

Hence, consent to terms was apt to assure control of terms' fairness in the negotiation context.

ii. The Context in which the Problem of Imposition Exists: Adhesion

The issue of imposition occurs in the context of a different social practice of private exchange—adhesion—than the negotiation context just considered.

The characteristic elements of the practice of adhesion were detailed in Chapter 1, along with the fact that it is now the predominant mode of contracting. As §2-II added, a given transaction-type might only be possible through adhesion, there being no market for negotiation.[212] And §2-I further noted that the context is one where the broader structure, organisation, and processes of modern society have evolved around adhesion contracting.

Adhesion in turn influences the content of contracts made by that process.

Adhesion contracts tend to boast a vaster set of terms. There are good and bad reasons for this, as discussed in §2-I and §2-III respectively. They also include terms remote from the transaction, there for broader business and/or market organising purposes, as noted in §2-I. And as mentioned in §2-II, the terms are often drafted in 'legalese', since they are not meant for discussion.

How do the distinguishing features of this context, versus the original context of negotiation, affect what doctrine would be apt to fulfil the functions from §A?

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[210] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, MetaLibri 2007) 349.
[211] Collins, *Law of Contract* (n 17) 24.
[212] Chen-Wishart, 'Unfair Terms' (n 33) 110–111.

a. Voluntary Obligation

Several problems afflict the suitability of consent to terms to implement in the adhesion context Contract's idea of voluntariness. As detailed in §2-II, adherents typically do not know, understand, or participate in choosing the form terms. Indeed, as discussed in §2-I, it is not realistic that they could do so for every term of every adhesion contract needed in modern society. Nor would drafters be receptive to this, for as also noted in Chapter 2, they themselves need to adhere to standard terms that they have incorporated not only in the transaction-type but into their overall business model and niche.[213] To nonetheless require consent to terms would then turn the contracting process back into negotiation, and as explained in §2-II, thereby override parties' desire to participate in deciding only those terms they have a significant interest in, a perspective which the prevalence of adhesion shows to be itself a wide social consensus. In short, requiring consent to terms would re-impose negotiation on society, which had chosen to limit it only to select terms or transactions of sufficient interest.

This imposition would be compounded by consent to terms' application to contracts whose content is geared to adhesion: Their vast number of terms would multiply transaction costs and sources of contention which could scuttle the deal. Terms focused not on the exchange but on general business regulation of the offering firm would be of no interest to offerees to familiarise themselves with. The legalistic drafting may force offerees to hire lawyers to negotiate, further increasing cost and conflict.

Although consent to terms, is for these reasons, inapt to give effect to voluntariness in the adhesion context, voluntariness *is* nonetheless evident in the conduct of parties to adhesion contracts. Where is voluntariness evident, if not to the terms?

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[213] Kessler (n 29) 632.

From the drafter, evident firstly is an intent to contract, in offering to do so, and treating the consent received from the adherent as sufficient and valid to execute the contract. Second, its wish to incorporate supplemental standard terms is apparent from its offer to contract using a form. Third, the drafter's desire to decide the form terms is apparent from its investment in pre-formulating them, and presenting them as part of a take-or-leave contract offer. Fourth, it leaves out a few 'core' terms that it agrees to negotiate, implying that the form terms should not be construed to conflict with those terms expressly negotiated.

From the adherent, the first three of the same consents can reasonably be inferred from the agreement that the adherent communicates to the drafter (that courts misconstrue as consent to the terms). The adherent's intent to contract is buttressed by treating its 'agreement' as establishing a valid contract, as well as subsequent execution of the contract. Its wish to do so via a form boasting ready-made supplemental terms is underpinned by its need to not expend finite resources negotiating terms of limited interest (i.e. those other than the few 'core' terms it negotiates). Its consent to the offering firm crafting the form terms reflects its belief that, since the drafter has a special interest and expertise in their subject-matter for that transaction-type (including adherents' interests), the drafter is best-positioned to decide them. Since the adherent expressly negotiates the core terms, it is also reasonable to infer that it agrees that the form terms it leaves the drafter to determine shall not undermine the core terms.

These four assents by parties in adhesion contracting are therefore *ad idem*, and represent significant voluntariness with respect to the obligations described in the form terms.

Meanwhile, despite adhesion being such a different context, it does *not* alter the fundamental understandings of contractual obligations from §B: Parties to adhesion contracts choose to pursue the subject-matter via private ordering, and to exercise party sovereignty by making arrangements among themselves that operate to create the contract's personal obligations.

A modified doctrine should therefore draw on the relevant elements of voluntariness noted above, which *are* present in the adhesion context.

b. Fairness Control

As detailed in §2-III, consent to terms is inoperative as a fairness control in the adhesion context.

Existing doctrine *does* contemplate scenarios where one party's ability to protect itself from unfairness was at risk of compromise (e.g. cases of presumed undue influence or unconscionability where the other party cannot prove that a fairness control was operative), and there ordains court scrutiny as a secondary control.[214] But as discussed, the result of failing court scrutiny is a procedural reset, so that parties' exchange needs would require new contracts, whose policing is still left to consent to terms. Since the risk of adherents being unable to protect themselves is not exceptional, but typical of adhesion contracting,[215] a procedural reset would only cause the same problem to recur. Voiding just one instance of one standard contract also gives drafters little incentive to make terms fair. Thus, even if adhesion was accepted among scenarios of potentially compromised ability to self-protect, meriting this alternative treatment, the doctrine cannot supply a fairness control operative in that context.

To make consent to terms operative would require reverting to a negotiation contracting process. But the parties' disparate interest-levels in the terms make it unfair not to be able to employ a division of labour in the contracting process itself: For adherents, having to participate in deciding form terms of little interest to them is unfair, when they could

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[214] §I-A-ii.
[215] Chen-Wishart, 'Unfair Terms' (n 33) 108.

instead contract on ready-made expert-informed terms, and preserve resources for other matters of greater interest to them.[216] Likewise, it is unfair to expect a firm to individually negotiate changes to this-and-that form term in various contractual-instances of a transaction-type in which it has a special interest, and has organised its business and role in the market around the terms of its standard form, as the structure of the modern economy dictates, as discussed in §2-I.

For contracts typical of adhesion, the unfairness of using consent to terms would be amplified: In a specialised economy, the many contracts, and many terms per contract, in which one's interest is limited, would multiply the unfairness of having to negotiate. For terms remote from the exchange, there to regulate the drafter's business, there is no justification for adherents having to police. Legalistic terms lie outside the adherent's expertise to negotiate, and having to hire a lawyer as a 'translator' could exceed the adherent's entire interest in the transaction.

For the few terms of adhesion contracts that parties do negotiate, consent to terms remains able to fulfil the fairness control function as it does for wholly-negotiated contracts. But for the reasons just outlined, it is inapt to do so for the form terms.

Nonetheless, the conduct of parties to adhesion contracts does have implications for what fairness control of form terms would be appropriate. In particular, the parties' variable participation in making the terms reflects their variable situations in regards to the terms.

The parties' conduct of mutually negotiating certain terms reflects the matters they deal with (e.g. subject-matter, price, etc.) being at the 'core' of the exchange—of significant

[216] This could include another contract in which the person has a special interest (eg employment)—and need not be in the contract's making, but could as well be its procurement or its performance, for example.

interest to both parties, and familiar enough for them to be suited to assess their fairness.[217] By contrast, the asymmetry of the adhesion process reflects the asymmetry of the parties' positions in relation to the form terms.

This includes asymmetric interest-levels: the drafter has a special interest, and the adherent a limited interest, in the form terms, as noted in §2-I. Letting/leaving the party with the special interest to make them evinces a conviction that calculations of fairness should take account of transaction costs—including, in conditions of finite resources, the opportunity cost of lost opportunity to protect oneself from unfairness in other matters of greater interest.

Their expertise to assess the form terms' fairness is also asymmetric: The drafter knows its own business, whilst the adherent has only superficial familiarity with it. Hence, the drafter is best-placed to assess the form terms' impact on this. Through its market-research, the drafter is also well-placed to know the relevant interests of the class it foresees adhering. Over time, the industry experience the drafter accumulates, dealing repeatedly in similar transaction-types with similarly-situated adherents, continuously improves its expertise in assessing terms' impact on them (including what matters adherents have sufficient interest in for the firm to negotiate, and indeed market).[218] The division of labour of the adhesion process thus also reflects the drafter being the only entity in the picture with the expertise to assess terms' impact on the interests of both parties, and hence their fairness, weighing these impacts relatively.[219]

The parties are also asymmetrically-placed with regards to when and where the fairness control is needed: The time and place to control form terms' fairness is in the

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[217] Chen-Wishart, 'Unfair Terms' (n 33). To the extent this differentiation may be subverted, the risk of that is addressed in Chapter 4.
[218] Llewellyn, *Common Law Tradition* (n 44) 362.
[219] I mean to refer here to the understanding of fairness detailed for purposes of this work in §2-III, in addressing the wide concern with unfair terms in adhesion contracts, of a proportionate accommodation of the parties' conflicting interests (besides appropriate pursuit of their common interests) in the transaction.

drafting process, for in order for them to be standardised for repeat-use, they must be pre-formulated, and then not changed. At that time, alone the drafter is involved. The adherent cannot yet self-identify, because *nothing* is yet on the market, and when the subject-matter *does* reach the market, it comes bundled with its pre-made standard form terms. However, the class of future adherents is substantially defined by what the drafter decides it will place on the market, which reflects, in turn, its ability to identify (from market-research and industry experience) a class with certain characteristics and interests from which it can expect demand. The adhesion process thus corresponds to the drafter being the only party identified and involved at the time and place when the form terms' fairness should be controlled; yet the drafter is also able to identify the other parties, as a class whose interests it can, as noted previously, expertly consider, and weigh against its own interests, in assessing potential terms' fairness.[220]

The asymmetry of adhesion thus reveals the asymmetric positions of the parties with respect to the ability to contribute to control of form terms' fairness.

But although the drafter is the entity in the picture best-placed to identify fair terms, it lacks an incentive to do so because courts (falsely) treat form terms as valid, on the basis of consent to terms. Thus lacking an operative fairness control, the terms are made unfair by the drafter, wherever this serves the drafter's self-interest.[221]

Conceivably, fairness could be controlled by an outside entity.[222] However, the conduct of parties to adhesion contracts notably does *not* involve such a change to the contractual picture from §B. If anything, adhesion's sweeping use suggests deepened conviction that society members' exchange interests are served by private ordering. It

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[220] Llewellyn, *Common Law Tradition* (n 44) 362–363.
[221] ibid.
[222] Discussed in §II-C.

suggests too that fair accommodation of the personal interests primarily affected by contractual obligations is best-accomplished via party sovereignty—sometimes directed to the terms, sometimes to which party should decide them, and decide them on what basis.

A modified doctrine seeking to assure an operative fairness control over standard form terms should therefore take account of these features of the adhesion context relevant to controlling fairness.

D. Conclusion: Features to Incorporated in a New Doctrine Functionally-Faithful to Contract Principles but Adapted to the Modern Context of Adhesion Contracting

The preceding analysis of contextual differences between adhesion and negotiation, relevant to a doctrine's aptness to fulfil the functions of implementing voluntariness and controlling terms' fairness, revealed several features that a new doctrine adapted to adhesion should incorporate in order to execute those functions in that context. They are summarised as follows:

i. Voluntary Obligation

c.1. ***Functionally-Infeasible; Inability to Consent to Terms***: For adhesion contracts' form terms, the traditional doctrine of consent to terms cannot implement the foundational idea of Contract as the law of voluntary obligation. Adherents are unable to consent to terms, as they realistically will not know, understand, and be able to change the content of the terms.

c.2. ***Functionally-Undesirable; Reversion to Negotiation:*** For adhesion contracts' form terms, the traditional doctrine of consent to terms would also be an undesirable way to try to implement voluntariness. To whatever extent it were truly attempted, it would preclude adhesion, and re-impose negotiation as a required contracting process. This would erase the social utility gained from adhesion, which modern society has evolved around, as detailed in §2-I. It would be particularly undesirable to negotiate contracts whose content is typical of adhesion instruments, including: (i) numerous terms; (ii) terms remote from the parties' exchange, there rather to regulate the offering firm's general business operations and risks; and (iii) terms drafted in obscure legalistic language.

c.3. ***Social Consensus; Distinct Doctrine; Dual Stream***: At a societal level, effect should be given to Contract as the law of voluntary obligation by respecting the collective will to contract by adhesion rather than negotiation in many situations. This requires a dual-stream doctrinal framework for assessing voluntariness. For adhesion contracts' negotiated terms, as for wholly-negotiated contracts, consent to terms is apt. For form terms, a distinct doctrine is needed that assesses party voluntariness in a way that is adapted to the adhesion context, represented by the other features summarised here.

c.4. ***Consent to Adhere:*** At the level of any particular adhesion contract, where a drafting firm presents a form, and an adherent communicates consent, this can be taken as genuinely representing mutual consents: (i) to make a contract (*Consent to Contract*); (ii) to do so via a standard form containing terms supplemental to the 'core' terms negotiated by the parties (*Contract via a Form; Terms Supplemental*); (iii) to the drafter unilaterally deciding the terms of that form (*Drafter Decide*); and (iv) that the form's terms do not undermine the terms expressly negotiated (*No Conflict with Negotiated Terms*).

c.5. ***Private Ordering; Personal Obligations; Party Sovereignty:*** The parties, in choosing to deal privately and personally in the subject-matter of the exchange, can be taken as remaining committed to fundamental understandings of contractual obligations as: (i) private ordering; and (ii) personal obligations to be governed by party sovereignty, extending in this context to who among the parties should decide which terms (subject to any other legal conditions).

ii. Fairness Control

c.6. ***Functionally-Infeasible***: For adhesion contracts' form terms, it is not feasible to control fairness through the traditional doctrine of consent to terms. Adherents are realistically unable to shop or bargain form terms, so as to protect themselves from unfairness before consenting.

c.7. ***Functionally-Undesirable; Reversion to Negotiation:*** For adhesion contracts' form terms, it would also be undesirable to try to control fairness via consent to terms. Requiring this would turn the adhesion process back into negotiation, with the undesirable consequences previously mentioned in Conclusion 2.

c.8. ***Societal Conviction; Variability; Dual Stream***: Society's evident conviction that calculations of fairness should account for transaction costs should be respected by supporting variable levels of responsibility for policing terms of variable importance and relevance to the parties. Supporting that innovation requires a dual-stream doctrinal framework for fairness control. Matters of significant interest to both sides (the 'core' terms of the exchange), each will be familiar with, and there will be a market to negotiate them, making consent to terms apt to control their fairness. For other matters (the form terms), a distinct doctrine is needed which reflects the asymmetry of the parties' positions, as follows.

c.9. ***Asymmetric Interest (Special vs Limited):*** The drafter has a special interest, and the adherent a limited interest, in the form terms. A fairness control adapted to this context should: (i) Not expect the adherent to expend finite resources to participate in deciding the form terms, being of limited interest, at the cost of reduced attention to other matters of greater interest; and (ii) Allow the drafter to play a primary role in deciding the form terms, given its special interest in them, motivating its sunk-cost investment in, and in reliance on, fixing terms in transaction-types important to its overall business, and its business' place in the economy.

c.10. ***Asymmetric Involvement; Self-Identifiability:*** Primary control of form terms' fairness is needed when and where the terms are pre-formulated, after which they become standards not easily changed. Such a control should further recognise the fact that at that time and place, alone the drafter is involved and identified. The adherent can only self-identify once the subject-matter reaches the market—accompanied by terms already-made. However, the drafter anticipates the adherent-class and knows its interests through the market-research that precedes its offer. Thus, the drafter is well-placed to assess the fairness of potential terms.

c.11. ***Asymmetric Expertise:*** The drafter knows its own business, and through market-research and industry experience, the interests of adherents as a class. By contrast, adherents typically have little familiarity with the matters covered by form terms, especially the many remote from the exchange, there for the purpose of regulating general business operations of the drafting firm. An apt fairness control in this context should thus appreciate the drafter's expertise, which enables it to ascertain terms' impact on each party, and thus their fairness, weighing the impacts relatively.

c.12. ***Best-Placed to Control Fairness; Lack of Incentive to Make Fair Terms:*** Although drafters, for the preceding reasons, are best-placed to control form terms' fairness, they lack an incentive to choose fair terms, because form terms are not presently subject to any operative fairness control, yet are enforced by courts as if they had been subject to, and received, the adherent's consent to the terms. Consequently, self-interest motivates drafters to exploit their unilateral discretion to choose unfair self-favouring terms.

c.13. ***Private Ordering; Personal Obligations; Party Sovereignty:*** In the adhesion era, society members' unprecedented and increasing reliance on contract to pursue their interests evinces sustained belief in fundamental understandings of contractual obligations as: (i) private ordering; and (ii) personal obligations governed by party sovereignty—directed sometimes to the terms themselves, but in other cases to who should specify them. A new doctrine for controlling fairness in the adhesion context should respect these abiding understandings.

c.14. ***Precedent for State Secondary Control of Fairness:*** There is precedent in existing doctrine in scenarios where the state lacks assurance that the primary fairness control (self-protection) was operative (due to a risk that a party's negotiating ability was compromised). for secondary fairness control via state scrutiny. The necessary assurance is also missing in the adhesion scenario, where the stated risk is inherent in the process.

c.15. ***Unhelpfulness of a State-Mandated Procedural Reset:*** Under existing doctrine, however, the result of failing state scrutiny in those scenarios is a 'procedural reset'—cancelling the contract, and relying anew on consent to terms to police any subsequent one. This response is unhelpful in the adhesion context, where the relevant risk is not exceptional but characteristic, so that the same pattern would recur, and merely voiding one instance of a standard contract would provide the drafter little incentive to make fair terms.

II. What the Contextual Analysis Suggests About the

Effectiveness of Proposed Means of Dealing with the Issue of Imposition

The observations from the preceding contextual analysis help in evaluating the potential effectiveness of ways that have been contemplated of how to deal with imposition in adhesion contracts. Four such ways are considered in this section.

A. Treating Standard Form Terms like Negotiated Terms Agreed

To begin with, the analysis from §I shows that the customary way (embodied by courts) of dealing with form terms, which *caused* the issue of imposition, stemmed from inattention to the context.

i. Description of this Approach

From the perspective of §I's contextual analysis, the customary treatment of form terms, exhibited by courts, consists in treating form terms as if they were *negotiated* terms that were agreed. Courts' interpretation of the consent communicated by adherents as being consent to terms would be reasonable (and is the typical) interpretation of consent by an offeree in negotiated contracting. But as noted in §I-C-i-a, that is because in that context, consent suggested that an offeree first acquainted himself with, understood, and participated in choosing the terms.

ii. Evaluation

The same assumption does not hold in the adhesion context, where adherents are Unable to Consent to Terms (c.1). Court enforcement of the terms thus created the issue of imposition. Continuing to pretend that they are agreed, so that there is no issue to address, then damages the law's integrity and deprives Contract Law of justification for alternate control of the fairness of unfair terms that were purported to have been agreed.

iii. Inattention to the Change in Context

This has happened due to under-attention to the change in context in and around exchange processes.[223] In the earliest stages of adhesion contracting, the change may not have been sufficiently appreciated to attract distinct legal treatment.[224] By the time the change was obvious, path-dependence on a long line of precedents was present, and there was a perception that standard form terms needed to be enforced to support mass-scale socio-economic modernisation.[225] Blindness to whether the facts supported the conclusion that the terms were agreed thus became wilful blindness. Form terms could then have been upheld on a new basis, but as explained by Friedrich Kessler, Contract Law had become a cultural icon associated with liberal society, so that there was a felt need to preserve its doctrine.[226]

Kessler noted the perverse results of employing the same doctrinal rule in different contexts, famously comparing the power that form-drafters thus acquired over adherents to that of feudal lords—which Contract had been celebrated for helping abolish: 'Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.'[227] He counselled that 'freedom of contract must mean different things for different types of contracts.'[228] And he called for the Law of Contract to evolve a new rule giving effect to this: 'in the development of the common law, the ideal tends constantly to become the practice.'[229]

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[223] Collins, *Law of Contract* (n 17) 35.
[224] See discussion in §2-II, including key cases making use of authorities which referred to oral contracts subsequently recorded in writing, eg *Parker* (n 110) 421 which in turn became the foundation for *L'Estrange* (n 109) 402–403.
[225] Radin (n 6); Atiyah (n 29).
[226] Kessler (n 29).
[227] ibid 640.
[228] ibid 642.
[229] ibid 638.

However, in calling for a 'multiple system of contract law,' he failed to simultaneously note that such a system might still maintain doctrinal integrity at a functional level, if the multiple rules for different contexts respected the same functions that the traditional doctrine of consent to terms did for negotiated contracts.[230] This could have offered reassurance that key principles—like freedom of contract, as he mentioned—would be preserved and given effect through functionally-consistent rules adapted to the adhesion context.[231] To instead dismiss judges' 'emotional attitude' about freedom of contract as an obstacle to change would only amplify concern that philosophical ideals would be threatened by change, rather than potentially given new life and force by it—surely an improvement over a status quo in which the ideals' satisfaction was merely 'apparent' and a 'pious myth'.[232]

Thus, Kessler's great contribution that ignoring the context was distorting rules' function was only half of the necessary picture: it left the field still ignorant of how the rules could be adapted to preserve key functional principles in the new context of adhesion. This may help explain why, despite Kessler's valuable insights, the negotiation-context rule of consent to terms is still applied to form terms, for which it is Functionally-Undesirable (cc.2, 7), and the issue of imposition remains unresolved.

iv. Conclusion

Inattention to the changed exchange context, which led to the customary treatment of form terms that crated the issue of imposition, was pointed out long ago by Kessler. Yet, it continues, in that there still has not been an attempt to consider how the new context can give effect to fundamental principles of Contract Law that underlay traditional doctrine.

[230] ibid 634.
[231] ibid 637.
[232] ibid 633–634.

B. Treating Standard Form Terms like Negotiated Terms Not Agreed

Under existing doctrine, the alternative to court practice is to treat the form terms as failing to satisfy the requirement of consent to terms: stronger evidence of such would be needed for courts to accept that they really were agreed.

i. Description of this Approach

By this approach, the typical conduct of parties in adhesion contracting would not suffice to conclude that adherents consent to terms. If the matter simply ended there, it would prevent imposition, but also prevent adhesion contracting altogether. Short of requiring negotiation, an intermediate tack is enhanced informational duties.[233] Historically, these have been popular with traditional Contract scholars, for the reasons Kessler alluded to: they appear to uphold and restore the rule of consent to terms. Although more recently challenged by findings from behavioural economics, they have also historically been popular with traditional law & economics scholars of Private Law, on the theory that they should correct for the supposed market-failure for form terms. Consequently, information duties are frequently found in actual or suggested legal responses to the issues of adhesion contracting, including imposition.

For example, in the UCTD,[234] besides art 3 which details the circumstances in which an unnegotiated term will be considered unfair, art 5 creates a blanket obligation that all written terms 'must always be drafted in plain, intelligible language.' In conjunction with this idea, the preceding recitals state that: 'the consumer should actually be given an opportunity

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[233] Some of these are addressed only to the issue of unfairness, but even there see eg the UK's CRA (n 154) sch (2)(1)(10), which lists among terms which may be unfair any term which the adherent had no real opportunity of becoming acquainted.
[234] (n 13).

to examine all the terms'.[235] There is thus an informational duty on drafters, meant to help avoid terms' imposition. If it is breached, the terms are subject to interpretation *contra proferentem*, which it is hoped may induce compliance.[236] Québec law—which supplies another example of informational duties—is more direct in rendering the term invalid where the duty is not observed. Hence, separate from the doctrine of 'abusive clauses' which essentially correlate to unfair terms,[237] a form term is 'null' if incorporated by reference and 'not expressly brought to the attention of the…adhering party',[238] or if it is 'illegible or incomprehensible to a reasonable person' and the adhering party suffered injury from it.[239]

Informational duties come in these and many other variations with a common object of affording the adherent greater awareness, understanding, and exercise of choice in relation to form terms. As such, the enhanced information is meant to result in terms which are negotiated in some measure. In that case, a consent otherwise similar to one which would typically be communicated by an adherent could satisfy the rule of consent to terms.

ii. Evaluation

This alternative to the way form terms are customarily treated by courts does not represent an effective way of dealing with the issue of imposition in adhesion contracts. To the extent it would alleviate imposition, it would do so by turning adhesion contracting back into negotiated contracting, contrary to the utility of adhesion contracting detailed in §2-I. But empirical studies have shown that even when adherents have notice, an opportunity to be informed, and the terms are transparent, they are typically still not read.[240] Thus, if despite a drafter's compliance with enhanced informational duties such as those discussed, adherents

[235] ibid preamble, recital 20.
[236] ibid art 5.
[237] Civil Code of Québec CQLR c CCQ-1991 (CCQ) art 1437.
[238] ibid art 1435(2).
[239] ibid art 1436.
[240] Zamir and Farkash (n 107) 145–146.

nevertheless remain ignorant of the form terms' content, the terms still are not consented to, but imposed. All that has changed is that the adherent is—seemingly—more at fault for their imposition.[241] Imposition itself is only alleviated if the adherent consents to the terms, entailing as discussed in §2-II that she is free *not* to consent to them, and undertakes the *burden* in time and other resources of acquainting herself with and understanding the terms, which defeats the rationales for adhesion contracting, and might at most be only slightly less onerous as a result of the drafter's enhanced informational duties.

Hence, this approach seeks to avoid imposing terms, which violates the rule of consent to terms, at the cost of being an unsuitable way of pursuing the functions of consent to terms in scenarios where adhesion contracting is attractive to parties based on its rationales.

Why information duties would be unsuited to fulfil these functions is further detailed below.

a. Voluntary Obligation

Enhanced informational duties are a Functionally-Undesirable (c.2) means of implementing Contract as the law of voluntary obligation because they counter the logic of adhesion as a contracting process that *limits* information rights/duties for the sake of socio-economic gains, as noted earlier. Additional duties would subvert the choice of priorities implicit in adhesion only pursuing consent for core terms, and prioritising socio-economic advantages over the right/duty to consent to form terms.

As a result, enhanced information duties would give poor effect to voluntariness as represented in the Social Consensus (c.3) to be free to contract by adhesion, with its limited information requirements. Adhesion contracting reflects' parties *desire not* to have to supply

[241] The word 'seemingly' is because the assumption remains that the adherent *should* read the terms—an assumption negatived by the conclusions from §I-E, as discussed below (and §2-I).

consent to every term of every contract in a specialised economy which requires numerous contracts of limited interest. Arguably, enhanced information duties *exacerbate* imposition versus the *status quo*, by more strenuously enforcing the requirement of consent to terms, despite the social consensus that this requirement is only occasionally wanted. Adhering parties' wishes are reflected in the Consent to Adhere, wherein for all but the core terms, the adherent's will is not to be informed and consent but to defer, and the drafter's will is not to inform and negotiate but to dictate (c.4).

Further, as the predominance of adhesion demonstrates, the nature of contractual obligations as Private Ordering governed by Party Sovereignty (c.5) should be seen as encompassing how much information about and participation in choosing terms the parties wish to have on subjects falling into different categories of importance and relevance to them.

For these reasons, enhanced informational duties would not be a suitable way of implementing voluntariness in the adhesion context.

b. Fairness Control

Enhanced information duties would also be Functionally-Undesirable as a means of controlling fairness (c.7), as they undercut adhesion's strategy of pursuing socio-economic gains attainable through minimising bilateral fairness control to only those terms of significant interest to both parties. In turn, this would ignore the societal conviction evident in the predominance of adhesion that transaction costs should be factored into calculations of fairness, through adhesion's permission of Variable levels of party responsibility for controlling terms of Variable importance and relevance to each (c.8). For adherents, having to be informed and participate in controlling the fairness of form terms, which are of little interest to them, unfairly depletes their finite attention. This is particularly costly, in modern society which is plagued by information overload, and thus puts a premium on the resource of attention. It is also unfair to drafters, in that the goal of the enhanced information is to equip adherents to exercise more choice over the terms, whereas drafters have a Special Interest in the form terms of the transaction-types they invest in drafting them for, and use to organise their general internal and external business (c.9).

This also reveals how, given the parties' Asymmetric Involvement and Self-Identifiability when and where the terms are drafted, if enhanced information is to serve any purpose, control by individual adherents must come via a secondary subsequent process, compromising the pre-formulation needed by the modern mass-market business model (c.10). With this and other structures of modern economic life having evolved around adhesion contracting, impediments such as information duties would undo some of the social progress these have together achieved. The parties' Asymmetric Expertise poses an additional complication, for adherents' limited expertise in the matters covered by form terms means that, even informed of them, adherents may lack the background to make useful fairness assessments (c.11). Indeed, presently, form terms' obscure legalistic drafting permits more sophisticated legal arrangements, of general advantage, without raising transaction costs since they are neither read nor negotiable.[242] Requiring the terms to be more transparent and intelligible would undo these gains.

For these reasons, enhanced information duties are an unsuitable method of controlling fairness in the adhesion context.

iii. Conclusion

Information duties are a conceivable alternative to courts' practice of treating form terms as agreed. And they permit adhesion contracts to still be made.

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[242] Rakoff (n 34) 1226–1229.

However, they are commonly-found among existing attempts to deal with the issues of adhesion contracting, and their ineffectiveness in dealing with imposition is one reason the issue persists.

An effective response to that issue requires escape from the rule of consent to terms, which contemplated a negotiation context, and is ill-suited to the distinct exchange context of adhesion.

C. Treating Standard Terms as Insupportable Based on Private Consent, But Supportable on a Different Basis

Other proposed ways of dealing with the issue of imposition have given up entirely on the prospect that form terms are supportable based on private consent, and thus have sought to re-establish their validity on Public Law bases, which claim consensual legitimation through the democratic process. Two notable such efforts from the scholarly literature are assessed below.

i. Treating Form Terms as Motions to Vary Court-Implied Terms

One such proposal is to treat form terms as motions to vary court-implied terms, which would serve as the default supplemental terms of a standard contract, beyond the core terms actually negotiated. This is the suggestion of Todd Rakoff, based on his important study of contracts of adhesion, and especially the issue of imposition.[243]

a. Description of this Approach

Rakoff rejects that adhesion satisfies the rule of consent to terms: 'What the courts should say is that enforcing boilerplate terms trenches on the freedom of the adhering

[243] Rakoff (n 34).

party.'[244] Given standard contracts' indispensability in modern society, he suggests they be permitted, but with the unnegotiated supplemental terms implied by courts, not decided by drafters: 'The argument from necessity completely misconceives…contract law…[C]ourts in fact require the parties to provide very few terms…All the other obligations that arise out of a simple agreement will routinely be specified by a court.'[245]

The standard terms would be derived by courts from 'background' law, and implied-in-law. Examples include terms from sector-specific legislation, sale of goods, and default rules of Tort, Contract, and Civil Procedure: 'However they are labelled, these implied terms are standardized. They spring not from an indication of the parties' particular intentions, but rather from a set of background rules.'[246] For any matter covered by a form term, a court could 'construct the implied term applicable to [that] particular facet of a given type of transaction. Case law principles, statutory and administrative sources, and appropriate custom and practice furnish the building materials.'[247]

Firms could still draft form terms. However, they would not be treated as part of the contract offered to the adherent, but rather as a court motion seeking to vary the implied terms in the way envisaged by the drafter: the form terms 'should be presumed unenforceable; to justify enforcing them, one must show cause…[Then] the legal system must decide whether and to what extent to enforce the drafter's form terms rather than continue to use the terms implied by law.'[248] The onus would lie on 'the drafting party [who] tries to show that a [form] term should be upheld.'[249] In examining that, the court would be responsible for 'determining how the case would come out absent the form clause;…The

[244] ibid 1237.
[245] ibid 1181.
[246] ibid 1181–1182.
[247] ibid 1258.
[248] ibid 1262, 1255.
[249] ibid 1258.

degree of deviance from the background rule as well as the reasons supporting both the background and form terms would appear always to be relevant.'[250] Rakoff suggests that deciding the motion 'can be approached first as a matter of the creation of economic utility and the appropriate distribution of the social product, and second as an issue of the ordering of power and freedom in society.'[251] More specifically, the question is: whether, by supporting 'business as a social force independent of governmental control,' the form term in issue furthers the 'maintenance of civic freedom.'[252]

To the extent that this describes an imprecise test, it should be noted that Rakoff envisages it as being rare that the drafter's terms would be approved. Decrying imposition's 'inherently abrasive effect on the popular ethos of individual freedom,' he says of the type of case that a drafter must establish for its terms to be approved that 'such a showing will not routinely be available.'[253] In fact, he goes so far as to say that 'indeed, the argument supporting enforcement may ultimately prove to be empirically indefensible, or of so little weight as not to be worth the institutional resources needed to consider it. Present analysis cannot go so far,' but 'there is no reason to think [the drafter's argument] will routinely be true.'[254] Hence, approval seems to be reserved for exceptional circumstances.

b. Evaluation

This too is an ineffective way of dealing with the issue of imposition in adhesion contracts. Indeed, arguably, it would increase imposition by replacing, in routine cases, terms imposed by one party on the other with terms imposed by the state on both parties. Further, courts' deficiency of expertise in the countless matters covered by form terms may often

[250] ibid.
[251] ibid 1255.
[252] ibid 1242.
[253] ibid.
[254] ibid 1247.

result in terms unfair to both parties. These make this approach unsuited to fulfilling the same functions that consent to terms does for negotiated contracts, of implementing Contract as the law of voluntary obligation and of controlling fairness.

1. Voluntary Obligation

Unlike courts' response, this proposal *does* avoid letting drafters impose terms on adherents on the false basis of consent to terms. Also, the proposal does not insist on consent to terms, and thereby in some measure cause adhesion contracts' Reversion to Negotiation (c.2).

Recognising standard contracts' importance in modern society, the proposal allows them to be made, but using court-implied terms in lieu of the drafter's terms (unless the drafter's terms are approved by the court). Accordingly, this gives meaningful effect to the Social Consensus to contract with the aid of ready-made terms (c.3). At the level of the parties, it gives effect to their Consent to Contract (c.4(i)), and to Contract via a Form comprising standard Terms Supplemental to the negotiated core terms (c.4(ii)), notwithstanding the adherent's Inability to Consent to Terms of the standard form (c.1).

However, crucially, the proposal does not respect the fundamental understandings of contractual obligations as Private Ordering and as Personal Obligations governed by Party Sovereignty (c.5). In the routine case, only the few core terms actually negotiated by the parties (perhaps price and quantity, Rakoff suggests) are Private Ordering governed by Party Sovereignty. All the other standard terms implied-in-law comprise public ordering decided by judges as the designates of the state's sovereignty. That increases imposition: not only are the contract's standard terms imposed on adherents, they are imposed on 'drafters' as well. This is contrary to the will of the parties that the Drafter Decide the terms (c.4(iii)). Imposition on the drafter is of particularly acute concern, given the reasons for adhesion's division of labour, within which parties voluntarily assume respective roles as drafter and adherent (c.4).

It may be that some terms implied-in-law essentially record and standardise tacitly-agreed terms that would typically otherwise be implied-in-fact (e.g. certain provisions regarding the sale of goods). For purposes of the present analysis, any such terms should be seen as among the negotiated terms, rather than standard terms. Also, some implied terms might be framed as mere defaults, which the parties could have agreed to exclude. But the status of the standard terms in general is that there be No Conflict with Negotiated Terms (c.4(iv)); and they exist because the parties do not wish to negotiate those matters but to Contract via a Form (c.4(ii)). Thus, neither of the above possibilities threatens the conclusion that the standard terms do not comprise terms agreed by the parties. And meanwhile, many terms implied-by-law arise for reasons of public policy, rather than anything between the parties, as Rakoff emphasised.[255]

The proposal is at least upfront about imposing implied terms. Thus, it would avoid the current situation's phoniness about imposed terms being 'agreed,' which harms the integrity of the legal system. However, it would create a similar—and arguably larger—problem, at the level of Contract Law as a whole being understood as the law of voluntary obligation, if all but a few core terms would not be the choice of either party, nor even the product of Private Ordering, but imposed on both parties by the state.

Rakoff seems willing to accept that these would not be contractual obligations at all, writing that 'from the private law point of view, one finds no ground of obligation to support the enforcement of form terms; from the public law standpoint, one perceives no reason not

[255] Text to n 246.

to employ rules created by the legal system instead of by the draftsman.'[256] But this fails to consider the possibility, as discussed, that grounds of private obligation supporting the enforcement of form terms might indeed be found by understanding the grounds in functional terms, and identifying how different contexts influence what rules can give effect to those functions. Instead, Rakoff suggests that terms 'should be enforced only to achieve particular social purposes, and not as a matter of general right.'[257] These propositions go much further than is necessary to address the issue of imposition; they abandon fundamental understandings of Contract Law—if not the field altogether—in order to 'reconstruct' a new field whose policy proposals in truth address a related-but-far-broader set of themes such as economic utility, social distribution, power relationships, and freedom. The imperative of dealing with imposed terms cannot justify all this.

In cases under Rakoff's proposal where a drafter's terms are approved by a court, effect would be given to the parties' intention that the Drafter Decide (c.4(iii)), and more respect shown for fundamental understandings of Contract as Private Ordering governed by Party Sovereignty (c.5).

However, as mentioned, such cases are envisioned as rare.[258] Further, the test for drafter terms' approval revolves around whether they would create a relationship of power between the drafter and adherents.[259] In Rakoff's view, Contract as Private Ordering is unjustified where it avoids the domination of the state-subject relation only to permit the worse domination of one private party over another. This concern about relationships of subjugation—first raised by Kessler, as quoted earlier[260]—could be exacerbated by abuse of form terms. However, in a specialised economy with frequent transactions of limited

[256] Rakoff (n 34) 1215.
[257] ibid 1255.
[258] Text to n 253-254.
[259] Text to n 252.
[260] Text to n 227.

individual significance—and an economy where many contracts' 'disposable' subject-matter results in short-lived contractual relationships—form terms are not so potent a tool for this purpose. Unlike Rakoff, I agree with Kessler that subjugation arises *primarily* from unequal bargaining power in a highly consolidated modern economy.[261] Where a firm's control of a market puts it in position to dominate relationships, it can do so even by negotiated terms, or without using contracts at all, leveraging its superiority in bargaining power.[262] The explosion of Consumer Law in the modern economy (including of negotiated terms) supports this conclusion.[263] The issue of subjugation is thus much broader than that of form terms' imposition, and should be seen as a distinct issue to be dealt with by fields such as Competition Law and Consumer Law. Rakoff's proposed test for standard form terms' approval therefore does not accurately track the concerns raised by imposed terms in adhesion contracts.

For these reasons, this suggested way of dealing with standard terms is ill-suited to implementing Contract as the law of voluntary obligation.

2. Fairness Control

Unlike courts' conclusion that there is consent to terms, Rakoff's approach does not misleadingly imply that there is in the conduct of parties in adhesion contracting an operative fairness control. Nor does it rely on consent to terms to control fairness, which would to some degree cause standard contracts' Reversion to Negotiation (c.7). Rather, his proposal recognises standard terms' distinctness from negotiated terms, and employs a Dual-Stream approach to dealing with them: the core terms to be negotiated by the parties; and the

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[261] Kessler (n 29). It is also true that form terms support a consolidated economy: §2-I. However, this does not mean that the downsides of a consolidated economy can or should be dealt with as an issue of adhesion contracting or of Contract Law.
[262] Rakoff (n 34) 1215–1220.
[263] Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Bloomsbury 2012) 627.

standard terms in routine cases implied by judges (c.8). This approach also takes note of the Asymmetry of the parties' situations, with the drafter having greater Interest (c.9), Expertise (c.11), and Involvement with the terms than the adherent (c.10). Rakoff appreciates that 'the drafting party has greater knowledge of the industry and a greater stake in the validity of the form.'[264] Accordingly, the proposal allows drafters, but not adherents, an opportunity to submit terms for consideration by courts in lieu of the terms the courts will otherwise imply. Rakoff also perceives form drafters' Lack of Incentive to Make Fair Terms, observing of his suggestion of replacing form terms with court-implied terms that 'compared…to the drafters of forms, judges…are impartial'[265] (c.12).

However, once again, the proposal critically fails to respect the fundamental understandings of contractual obligations as Private Ordering and Personal Obligations governed by Party Sovereignty (c.13).

Starting with Private Ordering, it is unrealistic that the judiciary could shoulder the primary burden of making standard terms, which are the vast majority of terms in the vast majority of contracts. The proposal is that courts do this 'point-by-point' for every term.[266] Across the range of transaction-types, markets, and industries in a highly specialised economy, this would be an enormous task for courts. Further, the dynamic character and frequent fast-paced changes in modern markets would make it very challenging for courts to keep up with revising all the implied terms, so as not to stifle the adaptation and innovation that attract society to use Private Ordering in the first place.[267] Rakoff cites similar difficulties in arguing that legislation cannot make the terms:

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[264] Rakoff (n 34) 1259.
[265] ibid 1238.
[266] ibid 1256.
[267] Llewellyn, 'Book Review' (n 48) 701.

> Any scheme sufficiently sophisticated to be workable in modern commercial life is likely to require so many defined 'lines of business' that it will introduce, at least to some degree… problems of application. Finally, any such mandatory scheme, if applied generally, would greatly reduce the latitude for independent business initiative in the formation of new lines of business or new practices for existing trades.[268]

With respect to his proposal of court-implied terms, he further acknowledges:

> For purposes of economy of thought, not to mention the particular needs of the judicial process, the many items needed to fill out any set of terms will necessarily be grouped in more or less integral packages. To recognize only a few such packages would be grossly inadequate to the many lines of trade and types of interchange in which contracts of adhesion are used. To recognize many packages immediately raises the problem of which one to employ in a particular case.[269]

I agree. The task seems well beyond the capacity of courts to play the primary role. Contract *is* Private Ordering as much for reasons of institutional necessity as for rationales of ideology or interest. Nor is the problem alleviated by how the proposal allows for a drafter's terms to be used if approved by the court: the court must still go through the same process (set out earlier), regardless of whether it ends up using its own terms or those of the drafter. Indeed, the opposite possibility is the one seen by Rakoff—that resource limitations could preclude courts from entertaining drafters' submissions.[270]

Turning to Party Sovereignty, it seems doubtful that courts (even if they *could* make the terms) are in a suitable position to assess the fairness of the terms in each case. This would require them to be familiar with the interests of the parties (in adherents' case, as a class, as discussed earlier), in order to be able to assess the terms' impact on their interests. Across the range of transaction-types, markets, and industries of a specialised economy—and a modern economy where these often rapidly evolve—courts cannot be expected to have that

[268] Rakoff (n 34) 1257.
[269] ibid 1255.
[270] Text to n 254.

expertise.[271] Further, in any particular adhesion contract, given that the drafter is motivated by its Special Interest in the transaction to draft very specific terms important to its overall business, often concerning matters remote from the parties' exchange but that help regulate its business operations or risks (c.9), a court is poorly-placed to appreciate vital details. As Karl Llewellyn observed, to rely on terms that courts think are fair would result in 'crude misfitting hand-me-down' rules incapable of fairly governing 'the particular detailed working needs of each line of business.'[272] Meanwhile, drafters' research and experience in a line of business make them most familiar with the interests of the corresponding class of adherents as well (c.11 (Asymmetric Expertise)). Hence, unlike Rakoff, I agree with Llewellyn that the expertise of the drafter is the indispensable ingredient needed to assess terms' fairness, not the impartiality of courts. So long as fair terms can be accurately identified, there are many conceivable ways for the law to address the drafter's Lack of Incentive to Make Fair Terms, and hence induce their selection (c.12). By contrast, what would be accomplished by eliminating bias as a motive for making unfair terms, only to be left not knowing what terms would be fair? In these circumstances, impartiality offers only some procedural assurance of equal *unfairness* to both parties. Such concerns are reflected in Party Sovereignty being a fundamental precept (c.13).

Rakoff counters that since form terms are drafted by lawyers, not firms, the expertise claim is mistaken. But if this were true, firms wouldn't continue to invest in drafting forms. To the contrary, one finds that adhesion contracts' reach is overwhelming and increasing.[273]

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[271] Llewellyn, *Common Law Tradition* (n 44) 362.
[272] ibid.
[273] Radin (n 6).

Rakoff's proposal does allow drafters to submit terms for court approval. But it remains the courts who decide. And as mentioned, in routine cases, court-implied terms would prevail.

For these reasons, this approach to dealing with standard terms is ill-suited to controlling their fairness.

c. Conclusion

Using court-implied terms in lieu of drafters' terms, except in rare cases where drafters persuade courts to use their terms. would cease enforcing standard terms on the pretence that they were agreed, and avoid unfairness that results from the drafter's partiality.

However, these court-implied terms would be imposed on *both* parties, doubling the imposition, whilst stripping the standard terms of the expertise needed to make them fair to *either* party, which would otherwise be present in the form of Party Sovereignty.

A near-wholesale replacement of Private Ordering with state-ordering also overshoots the issue of imposition, challenging basic understanding of Contract, and necessitating vast institutional resources that courts do not possess. These facts may help explain why this proposal was not pursued.

Responding effectively to the issue of imposition does not call for substituting vertical party-state relationships for the asymmetry of adhesion that Rakoff aptly perceived, but rather for implementing voluntariness and controlling fairness in a way that accept that asymmetry as advantageous and intended.

ii. Treating Form Terms as Administrative Regulation

Imposition of form terms has led to their sometimes being cast as private 'legislation.'[274] Taking seriously this idea, David Slawson argued for an 'Administrative Law of contracts', whereby drafter decisions on form terms would be treated as administrative lawmaking subject to judicial review.[275]

a. Description of this Approach

Slawson too rejects that adhesion contracting meets the requirement of consent to terms: 'contracts of adhesion gain no legitimacy from the supposed consent of the party for whom they are adhesive, since manifestations which are known to be the product of adhesion do not express consent.'[276]

As an integral part of modern society, form terms should be permitted, he proposes—however, not as contractual obligations, but as decision-making under delegated authority: 'A form, which is not a contract, can nevertheless be enforced, if its terms can be justified by reference to standards which do appear in the contract or to public standards imposed or approved judicially.'[277] Regardless of which standards are used, the source of drafters' decision-making power is public legislative authority, delegated to drafters, as for other administrative decision-makers.[278] By the logic of Administrative Law, judicial review is then necessary to ensure that this delegated lawmaking is 'consistent with the legislative intent and otherwise in the public interest.'[279]

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[274] See, notably, Kessler (n 29) 641.
[275] Slawson (n 8) 533.
[276] ibid 566.
[277] ibid.
[278] ibid 537.
[279] ibid 533.

Review would, as usual, be of 'compliance with standards in the public interest.'[280] This includes 'authoritative standards,' such as the terms the parties actually negotiated, or rules from sectoral legislation if applicable (e.g. statutes regulating consumer credit contracts), from both of which reasonable expectations would flow that the law should protect.[281] Where these are not applicable or determinative, review would come down to 'non-authoritative standards,' consisting in 'general principles and widely held values' relevant to a transaction, and directed to the public interest.[282]

Form terms which survive review, or for which review is not sought, would be enforceable by the drafter (though not on a contractual basis), whilst terms that fail review would be unenforceable.

b. Evaluation

From a practical perspective, this proposal is superior to the preceding one, which it recognises as unworkable:

> It would be equally unrealistic to confer on courts broad powers to rewrite standard forms. This alternative would destroy the essential order that forms create if courts were permitted to rewrite with a large scope of discretion, or it would replace it by a centrally controlled and inflexible order if their discretion were bounded by narrow rules of law.[283]

Judicial review of form terms is more modest, as it only applies where sought. Further, there is an attempt to address courts' lack of specialised expertise by the use of standards that are within the general competence of courts.[284]

Nevertheless, this proposal of treating form terms as administrative regulation does not constitute an effective way of dealing with the issue of imposition in adhesion contracts.

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[280] ibid 566.
[281] ibid 538. Taken up in ALI, *Restatement (Second) of Contracts* (ALI 1981) §211, but not followed by the courts: Radin (n 6) 84.
[282] Slawson (n 8) 535, 538.
[283] ibid 532.
[284] ibid 535–536.

The functions fulfilled by consent to terms in the negotiation context can be pursued in the adhesion context by other means adapted to that context. Abandoning the field altogether is unjustified. Further, as detailed in §I-B, the democratic consent which underpins state sovereignty differs from the consent in Party Sovereignty, embodied by Contract; and the public interest differs from the interest of parties to Personal Obligations, such as Contract's. Giving effect to themes of voluntariness and fairness, understood in a Public Law sense, does not implement the meaning they have, as reflected in principles of Contract.

This proposal's capacity to fulfil the relevant doctrinal functions is further examined below.

3. Voluntary Obligation

Slawson's proposal would end the current situation where drafters' terms are imposed on adherents on the false basis that they are agreed. It does not require consent to terms, causing to some degree standard forms' Reversion to Negotiation (c.2).

Given the need for standard forms in modern society, the proposal allows for their validity (albeit, not on a contractual basis), except where they fail judicial review according to standards in the public interest. The Social Consensus to transact by adhesion is thus given effect (c.3). At a party-level, effect is given to the will to transact, using a form, whose terms are decided by the drafter, and which do not conflict with terms negotiated by the parties, reflected in the Consent to Adhere (c.4).

The proposal is also consistent with parties' desire to transact via Private Ordering (c.5(i)). Slawson notes as one of the fundamental 'beliefs by which our society is organized…that at least some lawmaking is better accomplished in a decentralized manner.

We therefore prefer that the economy be controlled privately to a large extent.'[285] In his proposal, this is respected by letting drafters *prima facie* decide the form terms.

But then, he says, 'a different problem arises': 'when a law democratically promulgated by one group materially affects others who were not able to participate in its making…its application to others must then be justified by reference to standards'.[286] Through this:

> The individual who is subject to the obligations imposed by a standard form thus gains the assurance that the rules to which he is subject have received his consent either directly or through their conforming to higher public laws and standards made and enforced by the public institutions that legitimately govern him…Contracts of adhesion therefore gain whatever legitimacy they have from their capability of justification by reference to the same public standards as are needed to support [any law] which cannot be supported by reference to an actual contract. There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest.[287]

In Slawson's proposal, this is accomplished through review according to such standards: 'those who are subject to private laws without their consent need the protection which only judicial review can provide.'[288] In sum, having concluded that no private consent can support form terms, Slawson suggests they can be supported, as any other public obligation, by democratic consent to state sovereignty, exercised here by the courts through judicial review based on standards of public interest.

Despite their practical benefits, these conclusions are implausible. Standard form terms concern matters primarily of personal interest to contracting parties, consistent with the law's conclusion that they are Personal Obligations (c.5(ii)). Generally-speaking, a given term or even form does not sufficiently implicate the public interest to constitute a public obligation. If a particular one did, it could (and should already), as other terms raising public

[285] ibid 530.
[286] ibid 538.
[287] ibid 566.
[288] ibid 538.

interest concerns, be covered by sectoral regulation of contracts (e.g. concerning terms of employment, residential tenancies, etc.), by the doctrine of illegality, or by an exception to the doctrine of privity.[289] Where the legal system does not perceive an overriding public interest concern, it leaves persons a sphere of private autonomy within which to decide their own affairs.[290] Where this consists in a transaction between persons, whose terms do not unduly affect the affairs of third persons, that autonomy takes the form of Party Sovereignty (c.5(ii)). Democratic consent to the exercise of state sovereignty cannot substitute for Party Sovereignty, because incorporating the will of the public-at-large into the decision-making defies the exclusivity that distinguishes and thus defines Party Sovereignty.

It is true that, among the parties to an adhesion contract, the drafter alone and not the adherent, exercises Party Sovereignty in relation to the *content* of the form terms. However, the context in which form terms come to be made is (despite important differences) more similar to agency—in which one private party need at most consent to the authority of another to decide the actual terms by which the first party will be bound—than to the exercise of public legislative power delegated to a form drafter. Of the latter, there is no evidence of the supposed delegation, the state expresses no intention which the drafter could realistically be said to execute, and the drafter is not identifiable by the state except by having already exercised the authority which it is said to acquire by the delegation. Thus, the suggestion that the terms are made by the exercise of state sovereignty seems implausible. Rather, Party Sovereignty should be understood, in the adhesion context, to include *who* among the parties will decide supplemental terms (c.5(ii)). Hence, judicial review based on rationales of public interest does not correct errors made by the drafter acting out of self-interest rather than the

[289] See eg *London Drugs v Kuehne & Nagel International* [1992] 3 SCR 299 (SCC).
[290] Radin (n 6) 36.

legislative intent. On the contrary, it further intrudes into Party Sovereignty and the personal nature of the obligations contained in the terms.

The practical outcomes enabled by Slawson's proposal do not require the implausible conclusions above. Critically, his assumption of 'there being no private consent to support a contract of adhesion'[291] is mistaken, as the facts reveal several private consents: to make a contract, using a form, with terms decided by the drafter, which do not undermine the negotiated terms, as described by the Consent to Adhere (c.4). Whilst these consents do not satisfy the doctrine of consent to terms, the doctrine itself, as noted, reflects an assumption of negotiated contracts, and its function of implementing Contract as the law of voluntary obligation can and must be fulfilled differently in adhesion contracting where terms are not negotiated.

As a result, this proposal's drastic abandonment of Contract Law, and indeed all of Private Law, in search of a new basis for form terms' validity in Public Administrative Law, is unwarranted. Such a drastic course would seriously compound, rather than repair, existing damage to the integrity of the law created by courts' mode of handling adhesion contracts.

For these reasons, treating form terms as administrative regulation does not give suitable effect to the desire for a law of voluntary Personal Obligation.

4. Fairness Control

Slawson's proposal avoids the current implication, through the false claim of consent to terms, that fairness control was operative. Slawson is conscious that consent to terms cannot be used to control the fairness of form terms, as this would cause a Reversion to Negotiation in making them (c.7). He proposes a Dual-Stream approach which controls fairness differently for the distinct term-types: the core terms through negotiation; the form

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[291] Slawson (n 8) 566.

terms through granting adherents judicial review by which 'seemingly unfair terms which failed to conform to the actual contract or to standards shown to be in the public interest could be denied enforcement'[292] (c.8). Preserving the drafter's *prima facie* role in deciding the form terms makes the proposal sensitive to the parties' Asymmetric Interest, Expertise, and Involvement with the terms (cc.9-11). Meanwhile, judicial review recognises drafters' Lack of Incentive to Make Fair Terms, so that adherents require protection[293] (c.12). As judicial review is only a secondary measure, conducted upon application by the adherent, the fundamental interest in Private Ordering is reasonably respected (c.13(i)).

Despite these practical benefits, the proposal suffers from a serious problem of justification for the judicial review that it envisages. Far from a formality, the issue of justification is critical, otherwise courts would long ago have simply denied enforcement to unfair terms when so-inclined. Instead, holding the terms agreed by the parties, judges have been confined by the resultant lack of justification for judicial fairness control to marginal measures such as construing unfair terms in an implausible way that would render them fair.[294] Slawson justifies review on the basis that only its availability gives the terms the adherent's consent, required to make them enforceable—through the adherent's democratic consent to public authority, exercised here by the courts. As detailed in the previous subsection, this reasoning is flawed: democratic consent is no substitute for a need for private consent relative to the Personal Obligations that form terms comprise (c.13(ii)). As a result, the proposal does not offer an adequate justification for the judicial review that it envisions.

Further, the proposal seems to fall short of assuring an operative fairness control. For example, in every case where the adherent does not apply for judicial review, the control is

[292] ibid 563.
[293] Rakoff (n 34) 1238.
[294] Llewellyn, 'Book Review' (n 48) 702–703..

inoperative. It cannot be inferred that the adherent is thus satisfied that the terms are fair, because fundamental to the proposal is accepting the reality that adherents do not know the terms. Further, even if an adherent becomes aware of a potentially unfair term, she will often lack interest, means, or the will to litigate it.[295] If she does, and the term fails review, it will not be enforced. But that merely places the drafter in the same position as if it had not tried to make the unfair term in the first place: with a Lack of Incentive to Make Fair Terms, especially given the unlikelihood and uncertainty of litigation (c.12).[296] The absent incentive is compounded by the fact that the unfair term remains in force in all other instances of the standard form's use with other adherents.[297] Thus, continued routine making of unfair terms is to be expected, with only a few instances of a few terms of a few forms being reviewed and found unenforceable. This would not be sufficient to assure consistently operative fairness control of standard form terms.

Finally, since the standard of review is based on an understanding of fairness that encompasses—as emphasised—the public interest, rather than one focused on the personal interests of the contracting parties—it does not suitably respect the underlying fundamental interest in exchange governed by Party Sovereignty (c.13(ii)).

For these reasons, this approach to dealing with standard forms is unsuited to assuring control of terms' fairness.

c. Conclusion

This proposal is attuned to important results needed: offering to end the pretence that form terms are agreed, to respect drafters' expertise in deciding them, and to enforce them provided they are not unfair.

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[295] Radin (n 6) 122.
[296] ibid.
[297] Llewellyn, 'What Price Contract?' (n 55) 732.

However, the grounds for enforcing them—consent to democratic governance—is unsuitable for personal obligations which primarily affect the interests of contracting parties, not the public. Court scrutiny premised on this therefore lacks valid justification, and would not control fairness in relation to the contracting parties, but the wider public. The occasional nature of judicial review, which makes it institutionally feasible for courts, also makes it inadequate as a fairness control for routine exchange. And meanwhile, abandoning Contract and Private Law and reconceiving standard form terms as administrative regulation produced by legislative authority delegated to drafting firms, is a drastic and unwarranted step that in addressing the issue of imposition, would worsen rather than repair the damage to the law's integrity. This may help explain why this approach has not been followed.

An effective response to imposition must implement voluntariness and control fairness as understood in a context where the intent is still to create contractual relations, not by a different context that is of long-pedigree and has superficial similarities but which considered more profoundly is far-distant.

D. Conclusion on Approaches to Imposition Reviewed

This survey of four ways that have been contemplated of how to deal with the issue of imposition show the importance of an accurate appreciation of the context, as these failed on opposite sides: the first two did not respond to what distinguishes the adhesion context from negotiation; the last two exaggerated the distinction, losing sight of fundamental understandings that adhesion and negotiation have in common as modes of contracting.

III. A New Proposal Functionally-Faithful to Contract Principles but Adapted to the Modern Context of Adhesion Contracting

This section outlines a potential new approach that is responsive to the contextual observations from §I, and may offer a more effective way of dealing with imposition in adhesion contracts.

A. A Distinct Doctrine for Adhesion's Form Terms

As observed in §I, consent to terms is unsuited to fulfil in adhesion the functions it performs in negotiation, of implementing Contract as the law of voluntary obligation and of controlling terms' fairness (cc 1-2, 6-7). Instead of continuing the current practice of purporting to apply it anyway, and thereby licencing imposition and inviting inclusion of unfair terms, the law should rely on a Distinct Doctrine that *can* implement voluntariness and control fairness for the form terms of adhesion contracts. Consent to terms would continue to be relied on for the negotiated terms (cc.3, 8). The new doctrine would also not apply to traditional negotiated contracts, which would continue to be governed entirely by consent to terms.

On the whole, then, there would be a Dual-Stream for contract terms, operating in parallel, with which one is applicable depending on the mode of contracting by which those terms were made: the new doctrine applicable only to the form terms of adhesion contracts, whilst consent to terms continues to govern all negotiated terms and contracts (c.3).[298] It might be noted that, on its own, this suggestion is not new, having been called for by

[298] To the extent there might be concern that the existence of parallel regimes would lead to uncertainty as to which of them would apply to a term or a contract whose type was unclear, these concerns are addressed in Chapters 4 and 7.

Llewellyn[299] and Kessler,[300] as well as being implicit in proposals such as those of Rakoff and Slawson summarised earlier.

B. How to Give Effect to Contract as Voluntary Obligation in the Adhesion Context: Consent to Adhere

Based on the conclusions from §I, how could a doctrine give effect in the adhesion context to Contract as the law of voluntary obligation?

First, the law should expressly allow adhesion contracts to be validly-made notwithstanding the absence of consent to the form terms. This means that the law would *overtly* permit the adherent to be bound by terms of whose content it is unaware, does not understand, and cannot change. How would it resolve the issue of imposition to deliberately allow adherents to be bound by terms they did not agree? A Social Consensus is evident that consent to terms is an unwanted requirement, except for a few 'core' terms of sufficient importance to warrant negotiation (c.3). To these, consent to terms would still apply. But outside these, requiring it is difficult to reconcile with Contract as a law of voluntary obligation. In such a context, requiring consent to terms does not avoid imposition, but authors it. Obviating the need for it thus gives effect, at a societal level, to Contract as the law of voluntary obligation, by accommodating the desire to be free to contract by adhesion, rather than negotiation, in many situations.

Second, the law should continue to require, unlike in some other scholarly proposals, that the means by which the voluntariness of Contract is given effect primarily reside in private relationships, not a public relationship. Adhesion contracting sustains the fundamental

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[299] Llewellyn, *Common Law Tradition* (n 44) 366.
[300] Kessler (n 29) 634.

understanding of the nature of contractual obligations as Private Ordering (c.5(i)). And the unprecedented use and reach of contracts in the adhesion era reinforce this condition.

Third and relatedly, the law should continue to require, unlike in some other scholarly proposals, that the voluntariness given effect by Contract be that of the parties and directed to the contract, not of the general public to much broader governance instruments. Adhesion preserves contractual obligations' fundamental understanding as Personal Obligations governed by Party Sovereignty, indeed extended to who should play what role in deciding which terms (c.5(ii)). The remarkable frequency of contracting in the adhesion age buttresses this condition.

As observed in §I, the necessary private and personal consent of the contracting parties *can* be found in the adhesion context, in the Consent to Adhere (c.4): where a drafter presents a form, and an adherent communicates consent, they express genuine mutual agreement (i) to make a contract, (ii) to do so via a standard form containing terms supplemental to the 'core' terms they negotiated, (iii) to the drafter unilaterally deciding the terms of that form, and (iv) that the form terms do not undermine the terms expressly negotiated.

These consents do not amount to consent to terms, and would not be deemed to do so, since consent to terms, as mentioned, would not be required. Rather, the four consents enumerated as comprising the Consent to Adhere—being those which are feasible in the adhesion context and relevant to the voluntary assumption of obligation—would serve as the expressions of voluntariness needed as a condition of form terms' validity, to implement Contract as the law of voluntary obligation.

This means that the law would authorise drafters to unilaterally decide (form) terms that others (adherents) would be bound by. Thus, again it might asked, this time from the standpoint of the drafter, whether this does not resolve, but worsen, imposition? Such a view presumes that consent to terms is required, as it is under existing doctrine, but would not be under the proposal here. This proposal does more than 'solve the problem' by erasing a requirement, so that what was wrong is no longer wrong. The reason that imposition presently arises is because the idea of Contract as the law of voluntary obligation is implemented through a particular rule that the practice of adhesion does not genuinely satisfy. If Contract as the law of voluntary obligation is, within adhesion as a widely-used social process of exchange, implemented instead through a different rule of Consent to Adhere, which is geared to the voluntariness (understood in the same fundamental sense) that is possible and significant in that context, then the fact that the Drafter Decides unilaterally the form terms would not conflict with the consents required under that rule, but would help fulfil them, being one of the agreed arrangements within that practice (c.4(iii)).

Consent to Adhere is manifest in the same party conduct that courts currently falsely treat as consent to terms. Also, based on Contract's objective test of intention (discussed in §2-II), combined with the defining features of the adhesion context detailed in §I-C-ii, Consent to Adhere would be all-or-nothing, and would be treated as inherent in a party wilfully engaging in party conduct typical of the practice of adhesion contracting—regardless of whether a party otherwise communicates an intent contrary to one of the individual consents encompassed by the Consent to Adhere. In acting consistent with an intent to contract by adhesion, a drafter would not be able, for example, to exclude its agreement that the form terms have No Conflict with the Negotiated Terms, being matters that the parties expressly chose to negotiate rather than let the drafter decide as part of making the form terms (c.4(iv)). Likewise, a party whose conduct is typical of adherents is one who intends to Contract via a Form (c.4(ii)), and so would be unable to decline agreement to the form terms' incorporation. Similarly, an adherent could not disclaim its agreement that the Drafter Decide the form terms (c.4(iii)), since the adherent knows that adhesion contracting entails choosing roles of drafter and adherent that entail who will decide the form terms (c.5), and selected the role of adherent in that transaction.[301]

To the extent this might be conceptualised through notions of offer and acceptance, the terms of the offer and acceptance would be distinct from the terms of the contract itself. Specifically, the four elements of the Consent to Adhere would, besides the negotiated terms, comprise the terms of the offer and acceptance of the contract; and as just discussed, would all be treated as *essentialia negotii* in bringing the contract into force. Thus, the *offer* would *not* include the form terms themselves, since adherents are unable to accept form terms. However, the *contract* between the parties *would* include the form terms, by the parties' intent, through the Consent to Adhere.[302] The contract would not incorporate any terms listed on the form but inconsistent with the Consent to Adhere, notably any which are not Terms Supplemental to the negotiated terms (c.4(ii)), or which Conflict with the Negotiated Terms (c.4(iv)).

In sum, the idea of Contact as the law of voluntary obligation could be given suitable effect in the adhesion context by restricting to negotiated terms the requirement of having to consent to *what* terms, and employing a requirement of Consent to Adhere as the doctrine governing the form terms, with complementary self-selection of roles within that embodying a further mutual consent as to *who* will decide those terms (c.5).

The Consent to Adhere only implements the function of Contract as voluntary obligation, and not the function of assuring operative control of terms' fairness. Thus, beyond form terms which are not supplemental or which undermine the negotiated terms, other terms

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[301] However, the parties could of course negotiate any terms they wish, including matters that might otherwise have been covered by the form terms (and have been pre-printed on the form).
[302] And conversely, the terms of the Consent to Adhere, which are part of the offer and the acceptance, would *not* be part of the contract itself.

might be unenforceable based on how the fairness control function is implemented—discussed next.

C. How to Give Effect to Control of Fairness in the Adhesion Context: Duty of Fairness

Based on the conclusions from §I, how could a doctrine give effect in the adhesion context to assuring an operative control of form terms' fairness?

As mentioned in §A, consent to terms would continue to police the fairness of adhesion contracts' negotiated terms. However, it cannot do so for the form terms. This is so not only for the reasons discussed in §I (c.6. 7), but also because it would conflict with the Consent to Adhere proposed for implementing the voluntariness function, which includes agreement that the drafter alone will decide the form terms (c.4(iii)).

The Consent to Adhere itself contributes to fairness only in two modest ways: It excludes from the contract putative terms that Conflict with the Negotiated Terms (c.4(iv)), or are not Supplemental to the negotiated terms (c.4(ii)). This would cover terms often referred to as creating 'unfair surprise.'[303] An example of the first case would be a form term which purports to renew a fixed-term contract unless the adherent delivers notice to the contrary in prescribed manner.[304] An example of the second would be a form term which would allow the drafter to substitute the goods it negotiated to supply.[305] Besides the limited types of unfair terms it excludes, the Consent to Adhere is limited as a fairness control to providing as a consequence that the affected terms are not incorporated in the contract. With Consent to Adhere limited as a fairness control, a separate doctrinal element is needed as the principal control.

303 Chen-Wishart, 'Unfair Terms' (n 33) 111.
304 See eg CRA (n 154) sch (2)(1)(9); ACL (n 154) s 25(1)(e).
305 See eg CRA (n 154) sch (2)(1)(12-13); ACL (n 154) s 25(1)(g).

This fairness control should reside, unlike in some other scholarly proposals, primarily in private relationships, not a public relationship, given contractual obligations' fundamental understanding as Private Ordering—an understanding retained in adhesion contracting, and applied over an ever-increasing number of subjects in the adhesion age (c.13(i)).

The fairness control should also operate, unlike in other scholarly proposals, primarily within the activity of the parties, not of the state, so as to respect the fundamental understanding of contractual obligations as Personal Obligations governed by Party Sovereignty—an understanding reinforced by adhesion, where Party Sovereignty embraces not only the terms, but who plays what role in deciding them (c.13(ii)).

The fairness control must further reflect modern society's conviction that calculations of fairness should take account of transaction costs by permitting variable levels of party participation in policing the fairness of terms of variable important and relevance to them (c.8). Within the ubiquitous contract of adhesion, this means allocating asymmetric responsibility for policing the fairness of form terms, in regards to which the parties are in asymmetric positions: in these, the drafter has a Special-Interest, most Expertise, and is the only party able to Self-Identify at the time the form terms are made (cc.9-11). In that process, the drafter unilaterally pre-formulates standard terms that are not easily changeable later based on individual adherents' perceptions of fairness. Thus, the drafter is Best-Placed to Control the Fairness of the form terms, and the control mechanism should not rely on the adherent (c.12).

However, since the absence of bargaining or shopping of the form terms leaves the drafter with a Lack of Incentive to Make Fair Terms, self-interest leads it to employ unfair one-sided terms (c.12). Such an outcome is predictable, given that parties' interests vis-à-vis contract terms will often conflict, and yet the self-interest of the drafter is largely without restraint. The drafter's unilateral power to determine obligations affecting both itself and adherents, in a conflict-of-interest situation, calls for the drafter to be bound by a duty of fairness in exercising that power. The duty, which would be mandatory by operation of law, would require the drafter, in deciding the form terms, to make only fair terms.[306] The duty would be one of results, not of means: an unfair term constitutes a breach of the duty.

Beyond practical necessity, what could justify employ of this mechanism?

To begin with, there seems to be a wide sense that for form drafters to make unfair terms breaches at least a moral duty. After all, the broad consensus that unfair terms in adhesion contracts constitute a major concern that the law should address is not mirrored by any similar level of concern with unfair terms in negotiated contracts (or negotiated terms in adhesion contracts).[307] This suggests a sense that the drafter abuses the unilateral power it has over the form terms, and exploits the correlative powerlessness of the adherent that is inherent in the practice, when the drafter makes unfair terms. Such sentiment is supported by how the law treats other scenarios of some resemblance. For example, with the myth of consent to terms dispelled, and looking at the relationship between the parties situationally in terms of the roles inherent in adhesion contracting, arguably the drafter's conduct bears some similarities to what in certain relationships would be equitable fraud.

Likewise, the drafter's discretionary power, combined with the dependency and vulnerability of the adherent, again arising situationally from the roles inherent in adhesion contracting, bear some similarity to patterns that may give rise to a fiduciary duty constraining such discretion. Contract Law, dealing with obligations in which parties will often have conflicting interests, is an unlikely setting for that—particularly in the common

[306] (under the meaning of fairness set forth in §2-III)
[307] §2-III-C.

law, with its romanticised image of 'two-fisted bargaining'.[308] However, in a commercial context, situations can arise that in fact are not so remote, wherein a party's self-interest may conflict with a fiduciary duty it owes to another person or class, resulting in a duty to act fairly and even-handedly toward the holders of the conflicting interests.

Beyond moral underpinnings which overlap with these analogies, doctrinal support for an argument justifying the duty *can* be found in Contract doctrine. As discussed in §I, there is in existing doctrine Precedent for State Secondary Control of Fairness, supporting the primary responsibility which belongs to the parties, in scenarios where the state lacked the necessary assurance that a party's ability to self-protect was operative (c.14). Such assurance is also absent for the form terms of adhesion contracting, by the nature of the practice.

But as noted, in scenarios treated under existing doctrine, if the substance of the contract does not withstand state scrutiny, the result is a procedural 'reset'—relying anew on each party to protect itself from unfairness in any subsequent contract. In the adhesion scenario, the Unhelpfulness of a State-Mandated Procedural Reset is evident, as the same pattern would recur, since the pattern is not exceptional but characteristic of adhesion contracting (c.15). Also, the prospect of the state potentially cancelling one instance of a standardised mass contract gives a drafter little incentive to make fair terms.

Where, under law, one party has unilateral power to affect the interests of itself and another having opposing interests, that power must be constrained by a duty to exercise it in a manner fair and equitable as between the parties. Thus, in the adhesion context, a drafter's self-interest to exercise its unilateral power over the form terms to make one-sided terms in its favour is to be restrained not by the self-interest of adherents—which interest is to focus their attention on matters of greater importance to them outside the form terms of the

[308] Llewellyn, *Common Law Tradition* (n 44) 363.

transaction in question—but by a counterweight on the drafter, comprising a legal duty to make the terms fair.

As with existing doctrine in negotiated contracts (including the procedural reset in scenarios where party self-protection was inoperative), the proposed duty for controlling fairness in adhesion contracts leaves the primary responsibility for control to the parties, and triggers state involvement only secondarily, in order to ensure that the parties perform their primary roles.

This duty therefore incorporates the various features noted in §I as required in a modified doctrine apt to control fairness in the adhesion context in a way faithful to fundamental commitments of Contract Law.

Form terms that comply with it—fair terms—would therefore be deserving of state enforcement. By contrast, terms that breach the duty—unfair terms—would be unenforceable. Breach of a duty, unlike failure to meet a formative condition, means an unfair term would not render a whole form unincorporated, or a whole contract invalid. Such an outcome would itself be unfair to adherents, conflicting with their Consent to Adhere, and leaving them powerless to rectify the unfairness. As it concerns a duty of the drafter, rather than a right of an adherent, a term found to be in breach would be a finding applicable to all instances of a standard form's use throughout the market, not just one instance made with an individual adherent. As breach of a legal duty, an unfair term also calls for sanction, appropriate to the breach, rather than mere unenforceability due to failure to meet a formative condition. The sanction supplies an incentive to the drafter to make fair terms, rather than trying to get away with as much unfairness as it can, and being only in the same position as if it hadn't tried if the term is merely invalid and unenforced. Thus incentivised, drafters could be expected to do the primary work of controlling fairness, all the more consonant with the fundamental understandings of Contract as Private Ordering governed by Party Sovereignty.

Beyond this, details of how the duty should be framed and operate, are matters for succeeding chapters. For present purposes, what matters is that the duty is capable of assuring operative control of the fairness of form terms, and is justifiable by moral and legal precedent.

In the above discussion, unfairness refers broadly to the meaning from §2-III (details of its scope and measure again to be detailed in later chapters). However, a form term which conflicts with the Consent to Adhere should also be unfair *per se*. After all, it is unfair for the drafter to make form terms covering matters outside the sphere agreed.

In sum, control of fairness could be suitably assured in the adhesion context by restricting *mutual responsibility* to the negotiated terms, and having for the form terms instead *unilateral responsibility,* which corresponds to the form terms' unilateral determination by the drafter, and reflects the asymmetry of interest, expertise, and identifiability that underlie that division of labour in the contracting process.

D. The Need for Legislative Action to Implement these Doctrinal Developments

Given that imposition has been a concern for 150 years, and that courts presently continue to treat form terms as agreed per the doctrine of consent to terms, it must be expected that courts will not now reverse that mass of precedent and evolve the doctrines proposed above for use in the adhesion context. As a result, legislative action is needed in order to instigate this development of the law.[309]

[309] There are additional important reasons for preferring to introduce this development via legislation rather than by courts. These will become evident, in discussing details of the proposal's implementation over the course of succeeding chapters.

E. Effectiveness of the Approach Proposed

Combining the elements from §A-D of the way of dealing with the issue of imposition in adhesion contracts proposed here, how effective would this be in addressing the problems that issue has entailed, namely: damage to the law's integrity, and depriving the law of a basis to control unfair terms?

i. The Law's Integrity

The proposal of a distinct doctrine for form terms would enable their validity on a basis other than consent to the terms, whose claimed presence is not credible, and so harms the law's integrity. However, as Kessler commented, sceptics will worry that having more than one doctrine will itself dissolve the integrity of Contract Law. As he wrote, 'the basic issue is: can the unity of the Law of Contracts be maintained in the face of the increasing use of contracts of adhesion?'[310] The Dual-Stream proposed here *does* maintain the unity of the Law of Contract. Alternate doctrines for negotiated terms and form terms, operating in parallel, allow for the doctrines' underlying animating functional principles of Contract (voluntary obligation, fairness control) to be fulfilled in disparate contexts. This alleviates the problem Kessler noted of Contract's core ideals being undermined by the misguided application of formally equal rules to critically different contexts, and re-establishes unity at the higher order that is meaningful.[311] In this way, a Dual-Stream makes it possible to *restore* the integrity of Contract Law.

The suitability of Consent to Adhere to implement the function of voluntariness, and of the duty of fairness to assure operative fairness control for form terms, were argued earlier. By giving real effect to those doctrinal functions in the adhesion context (unlike consent to

[310] Kessler (n 29) 636.
[311] Text to n 227.

terms), these new doctrines enhance the integrity of Contract Law by restoring consistency between principle and practice—between what the law says and what the law does. In turn, this helps repair legal subjects' perception of the integrity of the legal system; and due to adhesion contracts being such a significant proportion of ordinary citizens' experience of law, strengthens confidence in the Rule of Law more broadly.

The new doctrines' furtherance of the law's integrity also flows from their fidelity to context-transcendent fundamental and unchanged understandings of the nature of Contract as Private Ordering and Personal Obligations governed by Party Sovereignty. This crucially separates the proposals here from other scholarly proposals that would reconstruct standard form terms as public obligations produced by public ordering directed to the public interest—which would profoundly disrupt the law's integrity, going far beyond what is necessary to address the issue of imposition in adhesion contracts.

ii. Justification for Controlling Unfair Terms

As the means proposed here for implementing Contract's idea of voluntariness in the adhesion context, the Consent to Adhere does not entail, as consent to terms did, the implication that form terms have been subject to an operative fairness control. Because it does not entail the adherent's consent to the terms themselves, it does not deprive Contract Law of justification for a fairness control other than self-protection through negotiation, which is inoperative with respect to adhesion's form terms.

On the contrary, because it legally recognises the unilateral discretionary power over the form terms that drafters already enjoy *de facto*, Consent to Adhere highlights the risk of that power's abuse, and hence the need for the law to fetter that power if fairness is to be controlled in such a context.

The proposed duty of fairness on drafters serves that purpose. Although that implies a role for the state in reviewing compliance with the duty to make fair terms, there existed precedent in existing doctrine in other situations where one party was at risk of being unable to protect itself, of a secondary role for the state in controlling fairness. In adhesion, that risk exists for the form terms, and inheres in the unilateralism of the process, so that a procedural reset will not resolve it. Only a mechanism that induces the drafter, in exercising its unilateral power, to protect the interests of adherents, with which its own self-interest conflicts, corresponds to that context. The proposed duty of fairness, which serves that purpose, is consistent with how the law deals with other situations in which one party has unilateral discretionary power over the conflicting interests of another party vulnerable to abuse of that power.

Meanwhile, the legal sanction by which such duties are enforced creates an incentive for drafters to make fair terms, rather than trying to get away with unfairness, losing nothing if a term is merely invalidly formed and unenforceable if found to be unfair. This, in turn, means that primary control of fairness rests with the drafter, only secondarily enforced by the state, thus respecting the fundamental understandings of Contract as Private Ordering governed by Party Sovereignty (including in the adhesion context, which party plays what role in deciding which terms). The duty is thus legitimate from the standpoint of these considerations as well, unlike other scholarly proposals that rely primarily on state control directed to the public interest.

F. Conclusion

This section's analysis reveals that the issue of imposition in adhesion contracts can be dealt with in a way that would effectively repair the damage to the law's integrity and justify operative control of unfair terms. This was achievable through modified doctrines which serve the same functions in the adhesion context as consent to terms in the negotiation context, yet remain faithful to fundamental understandings of the nature of Contract. These doctrines could be summarised as follows:

1. Adhesion contracts' form terms should be governed by a Distinct Doctrine, functionally consistent with consent to terms, but adapted to the adhesion context. This doctrine would operate in parallel with consent to terms' continued governance of negotiated terms (and negotiated contracts), creating a Dual-Stream applicable to terms made by these distinct modes of contracting.

2. Contract Law should overtly permit drafters to unilaterally decide the form terms of adhesion contracts, without requiring the adherent's consent to the terms themselves. Form terms would be valid instead based on Consent to Adhere, comprising mutual consent: (i) to make a contract; (ii) to do so via a standard form containing terms supplemental to the 'core' terms negotiated by the parties; (iii) to the drafter unilaterally deciding the terms of that form; (iv) that the form's terms do not undermine the terms expressly negotiated. Consent to Adhere would be presumed from conduct typical of parties in adhesion contracting, on an all-or-nothing basis, notwithstanding any attempts by a party to otherwise reject some component of it.

3. Contract Law should not ask adherents to participate in controlling form terms' fairness, but should place the responsibility squarely on drafters, through a duty of fairness that fetters drafters' unilateral discretion over these. An unfair term constitutes a breach of this duty. Breach would not render the whole contract unenforceable as among the parties, but would render the breaching term unenforceable in all instances of that standard contract. Breach of this legal duty would also incur appropriate sanctions. Sanctions would incentivise the drafter to comply with the duty, eliminating the moral hazard the drafter

otherwise has to abuse its unilateral power by choosing terms that unfairly favour itself over adherents where the parties' interests conflict.

4. These developments in the doctrines governing adhesion contracts would be introduced via legislative instruments.

This proposal would help restore the law's integrity, and justify control of unfair terms (by a means that is operative, unlike consent to terms). It therefore seems to represent an effective response to the issue of imposition in adhesion contracts.

IV. Other Governance Considerations

The analysis thus far focused on identifying an *effective* legal response to the issue of imposition. As noted at the outset, it remains to be examined whether this response appears suitable more broadly, taking account of other general governance considerations, represented here by: (i) the integrity of the legal system; (ii) efficiency; and (iii) other significant collateral social effects.

A. Integrity of The Legal System

For the issue of imposition addressed in this chapter, the integrity of the legal system is a consideration that has already mostly been taken into account in identifying an effective response, because effectiveness was in part a matter of remedying the damage to the integrity of the legal system caused by imposed terms being enforced on the false pretence of consent.[312] Hence, §III's conclusion that the proposed measures would be an effective response to imposition entailed that they would significantly help restore the law's integrity.

But the proposals here would also help repair the law's integrity in a way not addressed there. It was noted in §2-II that courts' reliance on certain shortcuts of reasoning

[312] And in part a matter of not foreclosing operative means of controlling fairness by purporting that the terms were agreed.

tied to recurring fact-scenarios—notably the 'notice rule'[313] and 'signature rule'[314]—misapplied the objective test of consent when used in scenarios typical of adhesion contracting. The proposal here would, as alluded to in §III-B, allow these rules of thumb to *correctly* test whether an adherent's conduct satisfied the *Consent to Adhere*, rather than *incorrectly* test whether it satisfied *consent to terms*, in determining whether the parties made an adhesion contact incorporating the form terms. Through enabling this rectification, the proposal here further repairs the law's integrity.

B. Efficiency

In evaluating means of governing adhesion contracts, the criterion of efficiency must be assessed globally, taking into account the efficiency of the measure proposed, as well as its effects on the efficiency of adhesion contracting. After all, adhesion contracting is itself a mechanism which functions to govern private exchange, wherein efficiency is a material concern.[315] Indeed, efficiency is integral to the social utility underlying the ascendance of adhesion contracting, as discussed in §2-I. Hence, from an efficiency perspective, the specific point where governance *of* adhesion contracting ends and governance *by* adhesion contracting begins, is irrelevant, because efficiency is a goal 'all the way down'. Hence, to consider only the efficiency of the measures proposed here, and not the effects of those on the underlying efficiency of adhesion contracting, would distort the picture based on an artificial distinction.

Starting with the proposals' impact on the practice of adhesion contracting, this part of the picture would seem to be quite efficient. For the parties, it adds no new step to what they already do. In making the form terms, the drafter would be subject to a new duty of fairness. However, one of the reasons for proposing the duty as a fairness control mechanism

[313] *Parker* (n 110).
[314] *L'Estrange* (n 109).
[315] Collins, *Law of Contract* (n 17) 94–95.

was the need for the mechanism to operate within the existing process of the terms' making, because that is where and when the terms are pre-formulated and standardised, after which they cannot readily be changed. And the drafter was already well-placed to know what terms would be fair, but only Lacked the Incentive to choose them (c.12)—which the duty corrects. Arguably, the duty forces the drafter to reflect more on how potential terms might fairly accommodate the parties' conflicting interests, but in that case, correspondingly less on how they might be exploited to maximally advantage itself at adherents' expense. In fact, the reasonable drafter will have considered what would be fair terms, in order to evaluate whether there would be a market for those terms, that would give it an edge over competitors to offer to negotiate those terms. Another reason the drafter in the past will already have considered what would be fair is to know its risk exposure in the event, occasional though it may be, that that term become one where a court employs a contrived interpretation to effectively re-write an unfair term as what the court thinks would be fair.[316] Courts' lack of expertise in the countless matters covered by form terms makes for an uncertain range of possible such 'redrafts' that the drafter will wish to anticipate. Hence, the duty of fairness might even reduce the burden on the drafter, by allowing it to use its expertise to identify only what term would be fair, and not have to also imagine what other 'redrafts' courts could come up with—a risk eliminated if fairness is controlled by the duty. All-in-all, a trade-off in attention seems most likely, with any added burden on the drafter being modest at most.

The duty of fairness would also improve the efficiency of adhesion by inducing lawyers involved in drafting forms to eliminate superfluous terms not of sufficient value to the drafting firm to be worth the cost of the lawyer's time crafting them and explaining them, and the firm's time reviewing them. Examples include terms so harsh that the firm will not

[316] Llewellyn, 'Book Review' (n 48) 702–703.

enforce them due to the risk to its reputation as a reasonable business, and terms dealing with non-catastrophic remote contingencies.[317] As noted earlier, such terms are presently included due to the moral hazard that they allow lawyers to reduce their professional liability whilst adding to their billable hours. But under a duty of fairness, each term carries its own risk of breaching the duty, so that drafting firms will press lawyers to only include terms important enough to be worth that risk, and lawyers will be motivated to do likewise by professional liability if the terms the lawyer recommends are found to breach the duty.

The Consent to Adhere would also further the efficiency of adhesion, as drafting firms would abandon pointless efforts to tighten the practice into closer conformity with negotiation, through for instance forcing adherents to access the terms and more actively manifest consent, which needlessly burden adherents as well.[318]

Consistent with the Social Consensus to permit adhesion contracting (c.3, 8), it might be added that the proposed doctrines also allow parties to plan more efficiently their affairs outside the contract: By enhancing certainty that an adhesion contract will be found valid and enforceable, Consent to Adhere allows the drafter to rely more securely on the standardisation accomplished by the form, focusing its efforts on a few business variables it excels in, as discussed in §2-I. Meanwhile for adherents, being able to rely on the duty of fairness to police fairness lets them more securely ignore the form terms (even if they noticed some that were unfair) and focus their attention on other matters of greater interest.

Turning now to the efficiency of the proposed measures themselves, resources would be needed to enforce the duty of fairness. However, this would only be so where it is alleged to have been breached, hence only occasionally consuming resources, unlike Rakoff's

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[317] ibid.
[318] §2-II.

proposal which did so over every term of every contract.[319] Fairness control would meanwhile still be operative in other cases, where the risk of sanction for breach will induce reasonable drafters to avoid this by choosing terms that are fair. This allows control to primarily take place through drafter self-regulation within the existing process of crafting the terms, as discussed above, minimising the need for separate/external secondary control. Primary control through self-regulation vastly improves enforcement efficiency as compared to other proposals which impose onerous burdens on regulators, litigation, adjudication, etc. In an age of scarce public resources, efficiency should be seen as a key governance factor *favouring* the approach here. When separate/external enforcement is needed, breach of a duty is a finding which applies to every instance of an unfair term's use market-wide, thus maximising the control achieved for the resources expended, unlike other approaches which apply only to a single instance of a standard mass contract.[320]

Next to be considered is the proposals' impact on the efficiency of the underlying exchange. The duty of fairness will significantly improve the efficiency of exchange, as the risk of sanction for breach will deter drafters from their current behaviour of exploiting their unilateral discretion over form terms to choose unfair terms that are far from what would result from a functioning market for those terms. Indeed, in thereby being incentivised to make fair terms, drafters will draw on their market-research and industry experience, through which they have considerable knowledge of the preferences of the class of adherents they contemplated when they invested in bringing forth their offer to the market. Fairness and efficiency are not synonymous concepts, and it will sometimes be the case that a fair term is less efficient than an unfair term. However, where significant, the duty of fairness should then lead the drafter to seek to negotiate the unfair term—offering an inducement (such as a

[319] Text to n 248.
[320] See §II-C-ii-b.

price reduction) in return. The efficient term could thus still be made—but at what would be an efficient share of the overall efficiency savings of that (unfair) term.[321] This is important because, in modern society where equality is a fundamental value,[322] the usefulness of efficiency as a criterion for evaluating the suitability of measures governing exchange is greatly undermined by the fact that presently, the efficiency gains of adhesion flow disproportionately (indeed overwhelmingly) to the drafter over a mass of adherents.[323] The duty of fairness therefore furthers not only an efficient allocation of risks and responsibilities, but an *efficient distribution* of the gains of that efficient allocation—which is not the case presently.[324]

The duty of fairness would also significantly improve the efficiency of the underlying exchange through its impact on lawyers involved in form drafting. Presently, to reduce their professional liability, lawyers draft many form terms in a way vastly overprotective of the client firm, that the firm would not be willing to pay market price for if they had to be obtained in a functioning market. The duty of fairness would dissuade this inefficient rent-seeking, through the lawyer's opposing risk of professional liability if such terms are found to breach the duty.[325]

In sum, the proposals here would seem to offer, overall, significant efficiency gains.

C. Other Significant Collateral Social Effects

The final criterion assesses whether the proposed response might resolve the issue of imposition, only to cause other issues of equivalent concern; whether it might be 'using a shotgun to kill a fly'.

[321] A claim popular in the law & economics school of thought is that this is already what occurs without negotiation; however, the claim suffers from drafters' lack of incentive, given that the form terms are not shopped: Radin (n 6) 4–5.
[322] Collins, *Law of Contract* (n 17) 22–23.
[323] Kessler (n 29) 641.
[324] Text to n 322.
[325] Text to n 182.

The most evident significant collateral social effect of the response to imposition proposed here is that it would facilitate effective control of standard form terms' fairness—the other major issue in adhesion.[326] As discussed in §2-III, unfairness has been a longstanding and persistent issue. One of the problems of imposition was that the pretence that form terms were agreed deprives Contract Law of justification to otherwise control their fairness. And as a response to the issue of imposition, part of the effectiveness of the proposal here was to justify such control. But the duty of fairness does more than supply a *basis,* rooted in core ideals and consistent with fundamental understandings of Contract, for controlling the fairness of form terms. It also provides an operative *means* of control. Identifying a means of control that is strongly justified *within Contract doctrine* itself, and indeed helps restore, rather than further damage, the integrity of Contract Law (and Private Law more broadly), provides the best platform for concrete measures designed to address unfair terms (explored in the remaining chapters). Jurisdictions like Canada and the USA, which thus far have declined to adopt unfair terms regulation, might then be motivated to do so.[327] Jurisdictions that have unfair terms regulation, but which is limited in its scope of application and hindered by underenforcement, like the UK, might be emboldened and confront the issue with less ambivalence.[328] Hence, one of the most important collateral effects of the response to imposition proposed here is how it would ideally position the law to more effectively combat adhesion's other major issue, of unfairness.

The means of assuring an operative fairness control over the form terms of adhesion contracts proposed here—a duty of fairness applicable by operation of law—also has, by its nature in particular, positive effects on the prospect of effective fairness control. It does not

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[326] See §2-III.
[327] I am referring to comprehensive regulation: see Chapter 1.
[328] Text to n 10. *Office of Fair Trading v Abbey National* [2009] UKSC 6; *West v Finlay & Associates* [2014] EWCA Civ 316; *ParkingEye v Beavis* [2015] UKSC 67.

encompass so many specific commitments as, for instance, consent to terms, which rather comprehensively prescribes the manner in which fairness is to be controlled. By contrast, the duty's open-texture allows space to directly take into account considerations of effectiveness in confronting unfair terms, in deciding details such as the duty's scope, measurement of compliance, and sanction for breach. The duty's implementation via legislation, rather than as common law doctrine under court purview, enables further flexibility, particularly in crafting a secondary enforcement scheme that would most effectively address the distinct features of unfair terms as a socio-legal problem. Details of how the duty should be implemented are explored in Chapters 4-7.

Another significant collateral social effect of the proposal here is that it would resolve current problems of uncertainty around formation/incorporation. Scenarios like ticket-cases,[329] receipts,[330] shrink-wrap,[331] and browse-wrap,[332] for example, pose a dilemma for existing doctrine because how could someone have agreed to terms they had not yet received?[333] Other scenarios, like click-wrap, or notices incorporating-by-reference policies listed outside the form,[334] currently face uncertainty due to the question of whether the adherent ever had access to the terms. Similar uncertainty may arise in cases where the terms are partly-concealed, printed in fine (or faint) print, or in language which adherents could not be expected to comprehend.[335] To resolve cases like these often requires factual investigation into complications such as the precise sequence of events, the degree of difficulty accessing the terms, and what a typical adherent of that transaction-type could be expected to

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[329] See eg discussion in William Cornish and others, *Law and Society in England 1750-1950* (Bloomsbury 2017).
[330] See eg Rakoff (n 34) 1267–1268.
[331] See eg Chen-Wishart, 'Unfair Terms' (n 33) 108, 114, 119; Zamir and Farkash (n 107) 142.
[332] See eg Chen-Wishart, 'Unfair Terms' (n 33); Radin (n 6) 52, 62–63.
[333] See eg McCamus (n 76) 185ff; Zamir and Farkash (n 107) 142.
[334] See eg Chen-Wishart, 'Unfair Terms' (n 33) 108.
[335] This would include for example the terms targeted by the measures in §II-B.

comprehend. Slight differences in the facts of what are essentially similar cases then lead to opposing results, producing uncertainty that impairs market-participants' ability to plan and makes the law appear practically-speaking incoherent. By contrast, the Consent to Adhere proposed here is not affected by these issues. It assumes the adherent does not wish to inform itself of the terms, but does intend to be bound. Hence, whether the drafter provided access to the terms would only be relevant if the adherent requested access, and after receiving access, acted inconsistently with an intent to conclude the contract. Otherwise, the adherent's conduct would be typical of a party intending to contract by adhesion, satisfying the Consent to Adhere. What the adherent knew and understood, and when, are thus irrelevant. All that matters is whether the drafter provided adherents an opportunity to serve notice of a need for access, and of an intent not to be bound, where such is the case. Given the rationales of adhesion, and its predominance, the occasions on which adherents would request access to the terms and would decline to contract upon reviewing them would be relatively rare—all the more so given drafters' duty of fairness. And in those cases, it would be easier to answer consistently whether a party did or did not intend to conclude the adhesion contract, than what it knew and understood and when. Thus, the proposals here would provide greater certainty—important to commercial planning.[336]

On the other side of the ledger from these salutary effects of the proposals, a deleterious potential collateral social effect is the risk which preoccupied Rakoff of authoritarian relationships.[337] The law would overtly authorise one party to unilaterally determine obligations that bind others, which it already *de facto* tolerates, but under the guise of mutual consent. Arguably, a more permissive attitude acquiesces to an inappropriate authoritarian relationship between the parties. That concern is legitimate, but mitigated by

[336] See eg *Shogun Finance v Hudson* [2003] UKHL 62 (Hobhouse LJ).
[337] Text to n 260.

other facets of the proposals. For one thing, the arrangement that the Drafter Decide is by the will of the parties, which the Consent to Adhere respects (c.4(iii)), avoiding the greater evil of imposing negotiation on them. Further, the drafter's power is limited by the agreements that it only add Terms Supplemental to those negotiated (c.4(ii)), and which have No Conflict with the Negotiated terms (c.4(iv)). The drafter is also bound by a duty to make the terms fair.[338] This duty subjects the drafter to a unilateral responsibility that corresponds to and supervises its unilateral power, as in other legally-authorised relationships of power and vulnerability. The unilateralism is both a duty and a privilege. Moreover, as noted in §II-C-i, as contracts go, the relationships created by adhesion are often specialised and short-lived. The primary cause of authoritarian voluntary relationships, it was argued, was under-competitive markets which allow firms to dictate terms—even in negotiation, or without a contract at all. As a result, the core of the authoritarianism concern should be seen as a separate issue to be dealt with by the fields of Competition and Consumer Law.

Another negative potential collateral social effect, perhaps philosophically-related to authoritarianism but on the adherent's end, is fostering a 'culture of dependence' by releasing adherents from participation in making the terms and from responsibility for controlling their fairness.[339] However, in reality, adherents already do not participate in making the form terms. To require them to do so would be regressive,[340] as it would detract from the finite resources they have for participating in matters of greater interest to them—including other adhesion contracts, for which transaction-type they are (in some way associated with) the drafting-side firm. The adherent's passivity is not a matter of weakness, lassitude, or

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[338] Per §III-C.
[339] See eg discussion of the role of an ethic of self-reliance in the development of Contract doctrine in Atiyah (n 29) 278ff.
[340] See eg Collins, *Regulating Contracts* (n 24) 230.

dereliction, but of socio-economic rationality; it is the defining logic of adhesion, whose predominance evinces the Social Consensus in favour of its benefits (c.3, 8).

As far as controlling fairness, adherents not only have Limited Interest, but less Expertise, and no Self-Identifiability as parties at the time the form terms are pre-formulated prior to the subject-matter even reaching the market. Consequently, it is neither realistic nor helpful for them to play a role at that primary stage (c.7, 8). A situational dependency is in that sense justified. The specialisation and organisational complexity of modern society, discussed in §2-I, are constructed of complex interdependence, with self-reliance the exception not the rule—as the terms of adhesion contracts reflect.[341] The proliferation of complex regulation after the 19th century shows that the law has long recognised that Private Law's assumption of symmetric bilateral relations, and consequent prescription of formal equality (here of reliance and responsibility), is inapt in the many contexts in modern society having different geometries.[342] In this context, that means the law should not leave the situationally-dependent party to merely hope that what they can't know won't hurt them, as courts in practice presently do. It should protect justified dependence, by making the party with the unilateral power unilaterally responsible not to abuse it at the inequitable expense of the vulnerable party.[343] However, at the stage of secondary enforcement, when a drafter breaches the duty of fairness, it may well be that adherents as the parties whose interests are affected should bear responsibility to act—and not only for themselves individually, but for others similarly-situated, for the good of the market, and for the efficacy of the legal system. Chapter 5 considers this possibility further.

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[341] See eg Collins, *Law of Contract* (n 17) 33, speaking of 'co-operation'.
[342] Collins, *Regulating Contracts* (n 24) 8.
[343] Per §III-C.

Based on the preceding survey, the proposals here should have, overall a positive profile of significant collateral social effects.

V. Final Conclusion

The preceding analysis suggests that the proposals identified here as likely to be effective in addressing the issue of imposition also appear suitable from the broader perspective of other core governance considerations. Developing the law in this way would help repair the law's integrity, and help justify distinct control of the fairness of form terms on grounds profoundly-rooted in Contract Law.

Chapter 4. Prescribing the Scope of Unfair Terms Regulation: Rationales for Control & Exclusion

Introduction

With a justification for regulation of unfair terms in adhesion contracts, based on the discussion in the preceding chapter, the overarching question is what that regulation should look like. Addressing that question begins with resolving what scope of contracts and terms should be covered by the unfair terms regulation. This must be settled before the potential content of the regulation can be considered. The inquiry into the suggested scope of the regulation—pursued in this chapter—can be broken down into two steps. The first step is analysing what the implications are for the scope of unfair terms regulation of the particular justification for it endorsed in Chapter 3, in responding to the issues as defined in Chapter 2. The second step is to consider whether the principles that flow from that justification for regulation might be overridden by other principles, so that the *prima facie* scope of unfair terms regulation recommended by that justification should be restricted in order to accommodate any such overriding principles.

I. The *Prima Facie* Scope of Regulation Justified by the Analysis in Preceding Chapters

A. The Standard Form Terms of Adhesion Contracts

The *prima facie* scope of unfair terms regulation dictated by the analysis in Chapter 3 comprises all standard form terms of adhesion contracts. In §2-III, it was noted that the well-known issue of 'unfair terms' is concerned with the form terms of adhesion contracts, with no comparably wide consensus concern with unfair terms in negotiated terms or contracts. This was because in the negotiation context, the existing doctrine of consent to terms served to assure that the private exchange seeking the state's sanction was subject to an operative fairness control.[344] By contrast, the form terms of adhesion contracts are imposed without consent to terms. For these terms, Chapter 3 suggested that the 'consent to adhere' that is possible in the adhesion context could avoid imposition, and perform the function of giving effect to the foundational idea of contractual obligations as voluntary obligations; however, it could not simultaneously provide an operative fairness control, as consent to terms did in negotiation. That function would have to be fulfilled by making form drafters, in exercising the unilateral discretion over the form terms that adhesion contracting permits them, subject to a duty of fairness to make the terms fair. The duty of fairness would therefore need to apply to all form terms of adhesion contracts, in order to supply an operative fairness control in the adhesion context. The duty of fairness was to be implemented by means of regulation.[345] Therefore, the *prima facie* scope of the resulting unfair terms regulation would, like the duty of fairness it implements, apply to all form terms of adhesion contracts.

It might be wondered how it would be clear to market-participants (particularly parties having low information) whether the contract at hand is or is not an adhesion contract, subject to the regulation. Chapter 7 of this work details a proposed requirement that drafters self-register standard forms with the regulatory authority before using them on the market. This registration would generate a consumer-type label to be prominently displayed on the form, clearly identifying it (even for otherwise uninformed parties) as an offer to contract by adhesion, subject to the protection of unfair terms regulation. A drafter who places a form contract on the market without having completed this registration and affixed the label would

[344] And where it was not operative for some reason, doctrines such as incapacity, duress, undue influence, or unconscionability corresponding to potential reasons it was inoperative, provide for a procedural 'reset', with any new contract subsequently to be made having to abide by these 'ground rules'.
[345] §3-III-D.

be subject to criminal sanctions. This would help make it evident to market-participants whether a given contract falls under the regulation, or outside it (and thus subject to the traditional contract regime).

B. Questionably 'Negotiated' Terms of Adhesion Contracts

Given the demarcation line described above, one can anticipate the potential for drafters to leave some unfair terms out of the form *per se*, and include them among the purportedly negotiated terms—but still refuse to genuinely negotiate them. This might occur, for instance, through: the drafter categorically refusing to contract without adherents' express agreement to the unfair term; or offering two pre-determined and standardised unfair terms as 'options' from which the adherent must pick one; or offering a fair alternative in return for a change to the price term that is prohibitive and punitive (i.e. beyond the value of the unfair term, versus the fair term, to the drafter). In order to avoid circumvention of the regulation, terms that are not included in the form itself, but whose status as genuine negotiated terms is less than clear, should be treated as standard form terms for purposes of the regulation. As with some existing regulation, such as the UCTD, the burden of proof that any term of an adhesion contract was negotiated should therefore lie on the drafter,[346] who would need to be able to adduce evidence (including among other instances of contracts that the drafter made with the aid of the standard form in question) that the term truly was negotiated.

Further, to avoid routine exhaustive factual disputes and inquiries which could undercut the regulation, any purportedly negotiated term which it would not have served the interests of the adherent-class (and the drafter) to negotiate, per the rationales of adhesion contracting, should be treated as among such attempts to circumvent the regulation, and be deemed a standard form term for purposes of the regulation, regardless of the factual

[346] (n 13) art 3(3).

circumstances attending the making of the contract. In other words, for terms in this category, it would not be possible to rebut the presumption above, even with proof that the term actually was negotiated. To that extent, the question of whether a term within an adhesion contract was among the standard terms or the negotiated terms would be an objective test based on the rationales for permitting adhesion contracting, and the foreseeable interests of the adherent-class for a given form contract, rather than the fine details of how different terms were presented by the drafter in dealing with each adherent. Similar to how Chapter 3 provided that the consent to adhere was all-or-nothing and precluded a drafter from excluding, for instance, the contract's subjection to unfair terms regulation, the recommendation here may be understood as privileging the drafter's conduct in seeking to contract by adhesion as entailing an intent to negotiate only terms of significant interest to both parties, over any contrary intent that might otherwise be inferred from the way different terms were presented by the drafter to any given adherent. This approach also ensures that the scope of the regulation does not, as a result of technicalities in presenting terms, outstrip its *justification*, undermining its legitimacy and support.

It might be wondered how the term's significance to the drafter and adherent-class could be determined without other exhaustive inquiry—perhaps not for each individual instance of a contract, but at least for each standard form. The requirement mentioned above (and discussed in Chapter 7) that drafters self-register forms intended for use in adhesion contracting would include an obligation on drafters to differentiate the form terms from the terms it proposes to negotiate. Inherent in this differentiation, the drafter would be treated as certifying, based on its expertise and experience, an asymmetric interest as between the drafter and anticipated adherent-class as regards the standard form terms, and a significant interest by both in the terms the drafter proposes to negotiate. If such a certification was found to be fraudulent, or if despite warnings from the regulatory authority, a drafter engaged in a pattern of repeatedly making erroneous claims as regards the interests of itself and of the adherent-classes of its forms, the drafter could again be subject to penal sanction. By virtue of these arrangements, and expecting a rational response by the drafting firm to the deterrent of the sanctions, the regulation would then be able to proceed on an initial assumption that presentation of the terms as form terms or terms to be negotiated matches their significance to the parties. And in the event of an ensuing complaint of an unfair term, there would be means under the regulation, as part of adjudicating the dispute, to catch any false or erroneous certification, and to impose sanctions on the drafter. In turn, this would restore confidence in the ability to rely once more on an initial assumption that the presentation of terms as form terms or as terms to be negotiated matches their significance to the parties.

II. How Should the Scope of Regulation Be Affected by Other Principles?

A. Possible Curtailments of the Scope of Regulation

With the *prima facie* conclusion that unfair terms regulation should apply to all adhesion contract standard form terms, the further question that arises is whether there are rationales of exclusion, on the basis of which certain adhesion contracts or terms should be exempted.

i. Negotiating Capability: Should the Regulation Only Protect Adherents who are Unable to Negotiate?

It might be argued that protection against unfair terms should not be available to parties that were capable of negotiating, but instead adhered to another party's form. By this view, a party that possesses ample resources and *savoir faire*, such as a big commercial enterprise, for example, should be expected to use these to negotiate the terms of its contracts, and should not be extended the protection of the regulation (or else should be expected to insure itself against the risk of unfair terms). This reflects the classical position, and is reflected in myriad judicial statements, down to the present, such as: 'at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent'.[347] This outlook is part of what informs, explicitly or implicitly, the many existing unfair terms regulations that only protect consumer and sometimes small-business adherents, but not big business adherents.[348]

However, this view ignores the rationales for adhesion contracting, detailed in §2-I. In particular, where a transaction-type is of limited interest to one party and of special interest to the other, the overall interests of both parties are served by a division of labour wherein the non-core terms are left to the second party to determine. The second party is freer to attend to its special interests in the transaction, to make many contracts with the same standard form in which it made an investment, and to use this standardisation to help regulate its overall business by fixing variables so that it can focus attention on its core business drivers. The first party benefits from the second party's expertise with respect to the subject-matter of the transaction, from a share (in elastic markets, at least) of the second party's transaction cost savings, and from preserving its own transactional resources for other matters which more significantly affect its overall interests. Thus, even if the first party had resources and *savoir faire* that it *could* deploy to negotiate the contract, it would be *contrary to its interests* to do so (and in no other party's interest that it do so—except perhaps lawyers that might in that case be engaged to conduct negotiations).

For example, if Microsoft needed from Starbucks only a dozen coffees for office functions here and there, it would hardly make sense for it to negotiate special terms, just because it had the sophistication and resources that it could do so, rather than taking the

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[347] *Goodlife Foods v Hall Fire Protection* [2018] EWCA Civ 1371 [103] (Gross LJ).
[348] The reasoning underlying these is outlined in §iv.

coffees on Starbucks' standard terms. Even if Microsoft wanted to negotiate, it would make little sense for Starbucks to agree, and incur the costs and complexities involved in departing from its standard terms, just to sell a dozen coffees for those periodic office functions. Alternatively, suppose Starbucks' management occasionally reads news stories on Microsoft's MSN website. Should Starbucks negotiate special 'terms of use' for browsing MSN, rather than accept MSN's ordinary 'policies'? The calculations would be similar to those just mentioned, but in reverse.

Where a party that is capable of negotiating instead opts to adhere, because it is a case where adhering better serves its interests, it would be equally regressive to require the party to purchase insurance against the risk of unfair terms if it wishes to be protected from them. Such a stance would cause the market to be corrupted by unfair terms, and would still waste the adherent's resources—on insurance rather than on negotiation of the contract's terms. Since the party which is a drafter in one contract will be an adherent in many others, this too would be in no one's interests (except for insurers).

Looking more broadly at the object of contracting, contracts are voluntary instruments available to facilitate parties' pursuit of their interests. Thus, if it is further in the parties' interests to do so by adhesion than by negotiation, why should they not? The mere fact that a party could instead negotiate provides no reason why it should negotiate (or why it should have to purchase insurance if it chooses not to).

Where the party prefers to contract by adhesion, unfair terms regulation is then called for—as in other adhesion scenarios—to restrain the drafter from using its unilateral discretion over the form to insert unfair terms.[349] This, in turn, furthers the integrity of the institution of adhesion contracting, curing the defect that is otherwise present if, unlike negotiated

[349] In the example above, this might help, for instance, if Starbucks' terms include a blanket exclusion of liability, or if Microsoft's policies for MSN include tracking sensitive user data.

contracting, the state enforces contracts that lacked an operative fairness control.[350] The regulation's application thus encourages parties to contract by adhesion where, by adhesion contracting's rationales, it is socially valuable that they do so, rather than letting an otherwise risk of unfair terms induce them to make fewer contracts or to negotiate where negotiating is contrary to their interests (apart from the risk of unfair terms) and to others' interests.

ii. Self-Reliance: Should the Regulation Only Apply if the Adherent Can Prove that in the Circumstances it Had No Real Choice But to Adhere?

In some ways similar to the above suggestion, another argument might be that the regulation should only protect the adherent if it can prove that in the circumstances (not counting the practice of adhesion contracting itself), it had no real choice but to adhere. The focus here differs from the preceding proposition in that it does not seek to make a *general* assessment of the party that adhered and what its ability is to negotiate, but an assessment of the *circumstances,* and whether these made it realistically impossible in the case at issue for the party that adhered to negotiate. This argument is among those that support provisions in existing unfair terms regulation which take into account the transparency of the terms in considering the extent of the drafter's liability.[351] In the *Clendenning* case, the lack of time afforded the offeree to read the terms was emphasised as a factor in why the court did not enforce the term.[352] As applied to adhesion contracts, the Court of Appeal's 'red hand rule',[353] and the courts' general 'notice rule' and 'signature rule' (whose laying down itself

[350] Chapter 3.
[351] Discussed in §3-II-B.
[352] (n 114).
[353] *Spurling* (n 143); *Thornton* (n 101).

invoked the notice rule)[354] as to whether terms are incorporated, all rely on the notion that whether the adherent had notice and opportunity to review the terms is a key factor.

Underlying this argument is a conviction that self-reliance is to be promoted. In significant parts, this reflects a moral assumption that parties should take responsibility for looking after themselves and their own affairs, and a sociological conviction that the welfare of society depends on them doing so.[355] In Contract, this is consistent with its understanding, as discussed in Chapter 3, as being concerned with obligations resulting from private ordering and governed by party sovereignty. The outlook thus also frowns on inessential reliance on the state.

There is some merit in these views. However, they are not absolutes. Context dictates where they have purchase, and where other conclusions are called for. For example, Contract itself is not necessary: in subsistence economies, people survive without it. Hence, where there is a Law of Contract, state sanction of contractual exchange inherently recognises that mutual dependence is sometimes preferable to self-reliance as a means of fulfilment of individuals' various needs and of the general welfare of society, which benefits from the specialised division of labour that free exchange permits. In Adam Smith's words:

> It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. The tailor does not attempt to make his own shoes, but buys them of the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a tailor. The farmer attempts to make neither the one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbours, and to purchase with a part of its produce, or what is the same thing, with the price of a part of it, whatever else they have occasion for. What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than

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[354] §2-II-C.

[355] Atiyah (n 29) 273–283, 354–362, 417, 456, 469. Colin Scott and Julia Black, *Cranston's Consumers and the Law* (CUP 2010) 75–76.

> we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.[356]

In adhesion contracting, these rationales extend to the labour and craft of contract-design in itself, because of the asymmetric interests and expertise of the parties vis-à-vis the particular transaction-type.[357] The opportunity of a party with a limited interest in the matter to depend, in occupying the role of adherent, on a drafter with a special interest, allows it to preserve its resources for other matters where its self-reliance *is* called for—including potentially being the drafter of a different contract-type in which *it* is the party with the special interest and its counterparts have only a limited interest. Complex societies benefit from profound interdependence among members, which calls for cooperation, not just self-reliance.[358] Thus, beyond circumstances where self-reliant negotiation is impossible are many other circumstances where it is undesirable as compared to the cooperation that is made possible by adhesion contracting among parties that are all dependent on others in most contracts and depended on by others in (at most) a few contracts. In these circumstances where cooperation is called for, it is encouraged by regulation which protects the parties' interdependence against exploitation[359]--here being the risk of a drafter making unfair terms. Extending the protection of unfair terms regulation over all such circumstances is thus appropriate, yet still represents no more than a limited but essential role for the state in policing these socially useful complex private arrangements.

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[356] Smith (n 210) 350.
[357] §3-I-D (c. 9-12).
[358] §2-I-ii-a, text to n 40.
[359] Collins, *Law of Contract* (n 17) 33.

iii. Expertise: Should the Regulation be Inapplicable to Contracts whose Adherents have a Sophisticated Knowledge of their own Business?

Another argument which may be anticipated is that the regulation should not apply to adherents possessing a sophisticated knowledge of their own business, because this would override the party's expertise with the regulator's estimation. According to this view, the freedom of contract of sophisticated parties, such as big businesses, should be respected by leaving them to their own devices, rather than letting the regulation interfere with arrangements that are the product of the parties' own expert determinations.[360] This concern seems also to be part of what underlies, explicitly or implicitly, existing regulatory schemes that cover adherents who are consumers and small-business, but not big business.[361]

As it might apply to the regulatory scheme proposed in this work, this argument would seem to be misconceived. Under the regulation proposed here, the sophisticated party would remain free to negotiate terms, which would not be subject to regulatory review for fairness. However, as §i alluded, in transaction-types where the sophisticated party has only a limited interest, it may well expertly calculate that it is not in its overall interests to negotiate. This could be because the subject-matter of the particular contract is in fact peripheral to the party's own business over which its expertise extends.[362] It could be, as in the prior discussion, because the added transaction costs exceed what could be gained from negotiating terms of only limited interest, rather than focusing on matters of greater interest to the party (including other types of transaction that are key to its business, which it does wish to

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[360] See eg text to n 416.
[361] Law Commission, *Unfair Terms in Contracts* (Law Com No 292, 2005) para 2.24.
[362] Law Commission, *Unfair Terms in Contracts: A Joint Consultation Paper* (Law Com CP No 166, 2002) (*CP 2002*) para 5.9; *R&B Customs Brokers v United Dominions Trust* [1988] 1 WLR 321 (CA).

carefully negotiate).[363] In some situations, then, a sophisticated party will find it advantageous to adhere to the offering party's standard form. This does not curtail the sophisticated party's freedom of contract, but as noted in Chapter 3, enhances it by allowing it to choose not only whether to contract, but how to contract: by negotiation or adhesion. That freedom is best protected by unfair terms regulation's application, which assures that the party's expert calculation of when to negotiate and when to adhere will not be subverted by an unfair term.

The regulation, therefore, does not disrupt arrangements that are a product of the sophisticated party's expert determinations, but rather gives effect to them. Indeed, it does so at the expanded level that encompasses arrangements of how to contract in different situations. And it affords the sophisticated party greater confidence in making these determinations, through the regulation eliminating the 'wildcard' of an unfair term.

iv. Status: Should the Regulation be Restricted to Consumer Contracts?

Much actual unfair terms regulation is focused on contracts where the adherent is a consumer.[364] Such regulation is often seen as falling within a broader set of consumer protection measures.[365] The idea is that the unregulated operation of the market can leave consumers exposed to potential detriment, for which they require legal protection.[366]

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[363] Law Commission, *CP 2002* (n 362) para 5.17; Collins, *Regulating Contracts* (n 24) 66.
[364] Of note here, this includes the UCTD (n 13), and the CRA (n 154) which implements it in the UK. Originally, the Unfair Contract Terms Act 1977 (UCTA) included some controls restricted to persons 'dealing as consumers'. The ACL (n 154), as its name implies, is focused on consumers, but also covers small-business. Although not a regulation, the ALI Restatement Project (n 15) likewise deals with consumer contracts.
[365] For example, unfair terms regulation exists alongside other consumer protection measures in the CRA and ACL. The EC's 'fitness check' also included other consumer protection directives, and its results are now being presented together with a fitness check of its Consumer Rights Directive: see Commission, 'Results of the Fitness Check of Consumer and Marketing Law and of the Evaluation of the Consumer Rights Directive' (29 May 2017) <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332> accessed 11 September 2019. On the Consumer Rights Directive, see Weatherill, 'Consumer Rights Directive' (n 22).
[366] See eg Scott and Black (n 355) 3.

Regulating from this perspective therefore puts in focus the status of the party as a consumer. With respect to the contracting process, the protections may be viewed as responding to concerns raised by scholars that Contract Law has been distorted: It was celebrated as a central part of the liberal revolutions in enabling distribution of goods on the basis of freedom rather than status in the feudal order that liberalism replaced.[367] But inequality of bargaining power and adhesion contracting have led, in some ways, to recreating a neo-feudal consumer economy.[368]

Various arguments have been advanced as to why, in the contracting process, consumers are vulnerable, and merit special protection. These include consumers' lack of bargaining power, isolation, 'rational ignorance' of terms, and cognitive biases in appreciating terms' significance.

For unfair terms regulation, the most influential of these arguments has been that consumers suffer from inequality of bargaining power as compared to businesses, so that they are forced to accept the terms that a business offers, which might include unfair terms.[369] For example, this is said by the European Court of Justice ('ECJ') to underlie EU unfair terms regulation:

> [T]he system of protection introduced by the Directive is based on the idea that the consumer is in a weak bargaining position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.[370]

Related to consumers' lack of bargaining power is their isolation, which makes it unrealistic for them to routinely collectivise in order to increase their bargaining power and negotiate better terms.[371] With consumers isolated, firms can rely on the mass market business strategies that have come to dominate the modern economy—leveraging standardised terms

[367] *Anson's* (n 81) 4 citing Sir Henry Maine.
[368] Kessler (n 29); *Anson's* (n 81) 172.
[369] Ramsay (n 263) 627.
[370] Case C-240 to 244/98 *Oceano Grupo Editorial SA v Rocio Murciano Qintero* [2000] ECR I-4941.
[371] Collins, *Regulating Contracts* (n 24) 232.

to support standardised business operations, leaving only a few key variables to focus their attention on. In this context, the consumer who wishes to negotiate at all is seen as 'unreasonable,' and the firm will not engage, but stick to the 'numbers game' of the mass market—leaving the consumer with seemingly no bargaining power at all.[372]

Generally-speaking, it is likely true that consumers suffer from inequality of bargaining power in dealing with businesses. However, for present purposes, it is crucial to ask what is the source of that inequality of bargaining power? In fact, there would seem to be several possible sources. In many (but not all) cases, the consumer may lack the resources and *savoir faire*[373] (unlike the parties addressed in §i). In many (but not all) cases, the consumer may have limited time,[374] or may not be aware of terms that are 'hidden'[375] (unlike the party situation addressed in §iii). In many (but not all) cases, the consumer may—as discussed in this section—be isolated in a way that impedes collective bargaining, so that the business can afford not to negotiate at all with an individual consumer.[376] Yet, in *all* cases of adhesion contracting, as discussed in earlier chapters, the practice of adhesion itself displaces negotiation, so that a consumer has no bargaining power in relation to the form terms.[377] The displacement of negotiation with adhesion within that practice is characteristic of all adhesion

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[372] Rakoff (n 34) 1225.
[373] ALI, *Restatement on Consumer Contracts: Tentative Draft* (ALI 2019) 1.
[374] *Clendenning* (n 114).
[375] *Thornton* (n 101).
[376] *George Mitchell v Finney Lock Seeds* [1983] 1 All ER 108 (CA) 111. It might be added that these possible causes of inequality of bargaining power are not necessarily confined to consumers. In the last situation, for instance, one can easily imagine employment contracts which are 'negotiable' (ie not adhesion contracts) but where strong competition in supply and weak competition in demand, and/or the unavailability of collective bargaining for the employment relation in question, leave the offeree with no bargaining power, so that the employer can effectively impose terms. It would be imprudent to simply tack all scenarios of unequal bargaining power onto unfair terms regulation that is designed to address the specific issues of adhesion contracting. Distinct causes of contractual inequality, such as these, should be investigated in their own particular context (eg potential issues of Competition Law, Labour Law, etc.) and be addressed through what those inquiries identify as the most apt legal response.
[377] The inequality of bargaining power argument assumes that consumers would negotiate if they had the bargaining power to do so. In Chapter 3, it was argued that the predominance of adhesion contracting in modern society reflects a societal consensus to only negotiate a few core terms, and leave the rest to be made by adhesion (c.3). Nonetheless, for present purposes, whether or not consumers adhere by choice, or because they have no choice, the net result is no bargaining power over the form terms.

contracts, not just consumer contracts. Hence, the inequality of bargaining power that results from the practice is coterminous with the use of adhesion contracts—being the *prima facie* scope of regulation proposed in §I. Accordingly, inequality of bargaining power would not seem to provide a rationale for curtailing that scope to cover *only* consumer contracts.[378] It *is* conceivable that the other sources of potential inequality of bargaining power of consumers might justify *expansion* of the recommended scope of unfair terms regulation beyond adhesion contract terms.[379] Whether the evidence supports these claims of distinct bases that would justify regulation, and if so, whether expanding unfair terms regulation designed for adhesion contracts to include negotiated consumer contracts would be the appropriate response, or whether separate regulation tailored to potentially distinct forms of inequality deriving from distinct sources of inequality would be more apt in dealing with those, are questions outside the scope of the present work.

Another argument made as to why unfair terms regulation should be restricted to consumer contracts is that it is rational for consumers to be ignorant of the form terms (as adherents are), because of their limited interest in them.[380] Increasingly, this argument has been accompanied by another: that even if consumers knew the terms, behavioural studies indicate that they suffer from cognitive biases that disable them from a rational appreciation of the balance of risks and benefits inherent in complex terms, leading to systemic patterns of bad decision-making that call for regulatory prophylaxis.[381]

No doubt it is true of consumer contracts that the consumer is typically ignorant of the form terms, in which it has limited interest. But this only places the consumer in the same position as adherents in general. It is irrational for any party with finite resources to deploy its

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[378] Stephen Weatherill, *EU Consumer Law & Policy* (Elgar 2013) 147.
[379] See eg Law Commission, *Unfair Terms in Consumer Contracts* (n 10) para 7.53.
[380] Chen-Wishart, 'Unfair Terms' (n 33) 109.
[381] Ramsay (n 263) 636.

attention towards matters in which it has a limited interest, at the necessary expense of other matters (inside and outside of the contract) in which it has a greater interest. It is especially irrational to do so when, as is the case in the adhesion context, the terms are proffered on a take-or-leave basis, so that the adherent's choice is not whether to accept any particular form term, but whether to conclude the contract—and knowing that the offeror's competitors will also be making their offers via adhesion, using basically similar forms.[382] Thus, rational ignorance of form terms does not counsel restricting unfair terms regulation to consumer contracts, but reinforces the need for regulation of all adhesion contracts.

Likewise undoubted is the behaviourist insight that consumer contracting is afflicted by systemic patterns of distorted appreciation of terms' significance. However, cognition being a human faculty, cognitive biases are a human trait, not a consumer trait. The influence of irrational elements in decision-making is not confined to consumers, it defines human beings. To the extent that cognitive bias by consumers is a general concern, then, it is a concern further generalisable to other circumstances of contractual decision-making by human beings than consumer transactions (e.g. employment). Moreover, presumably the biases' import would be greater for negotiated terms than standard form terms, which are not accepted by consumers (or any other type of adherent) anyway, and are not usually drafted by individual human beings, but by firms, with every opportunity for study, deliberation, and calculation. The behaviourist proposition therefore undercuts basic Contract Law orthodoxy that humans are capable of making self-interested choices, and should thus be free to contract legal obligations through private ordering and respecting party sovereignty. In fact, the behaviourist proposition challenges even more fundamental assumptions of the common law, namely that actions are autonomous (rather than deterministic), and that it is fair for the law

[382] Law Commission, *CP 2002* (n 362) para 5.17.

to attribute responsibility based on them.[383] In short, the cognitive bias argument is not a basis for regulation seeking to correct a limited and isolated defect within the overall existing model of Contract Law; on the contrary, it calls into question foundational assumptions of the entire field (and beyond). Still less does it support the suggestion that unfair terms regulation should be restricted to those contracts that human beings make through the practice of adhesion and in the field of commerce in the role of consumers.

For these reasons, unfair terms regulation should undoubtedly include, but not be restricted to, adherents having the status of consumer.

v. Market Failure: Should Terms Which Comply with Enhanced Informational Duties to Adherents be Exempted from a Duty of Fairness on Drafters?

Another view holds that unfair terms are the result of a partial market failure for contract terms, afflicting the standard form terms of the adhesion contract.[384] The market functions for the contract's negotiated 'core' terms, but fails with respect to the form terms which are neither bargained by adherents nor shopped so that competition might pursue adherents' interests. Adherents, in consenting to adhesion contracts, fail to select the form terms rationally, as a result of asymmetry of information or of rational apathy given the disproportionate transaction costs.[385] In these circumstances, freedom of contract degrades into freedom of the drafter to impose terms, as detailed in §2-II. And due to the absence of any operative restraint, self-interest leads the drafter to make form terms which are biased in its own favour, as noted in §2-III. A means by which this market failure is often addressed in

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[383] Ramsay (n 263) 637.
[384] See eg Collins, *Regulating Contracts* (n 24) 230; Law Commission, *CP 2002* (n 362) para 5.16; Michael Faure and Hanneke Luth, 'Behavioural Economics in Unfair Contract Terms: Cautions and Considerations' (2011) 34(3) JCP 337.
[385] Faure and Luth (n 384) 340.

existing regulation is through enhanced information,[386] such as transparency obligations,[387] as discussed in Chapter 3, or the caselaw's red-hand rule for surprising terms, mentioned earlier in this chapter. In that case, some would argue (including notably those writing from a traditional law & economics perspective) that terms that comply with these measures should be exempt from subjection to substantive control through a device like the duty of fairness proposed here.[388]

However, from the standpoint of this work, it is less than clear that a market failure for standard form terms is the best way of characterising the issue.[389] This assumes, as noted, a market for contract terms whereby contract terms are to be made by negotiated agreement, leading to the further assumption that adherents not reading form terms is a 'problem,' and that the result of unfair terms represents a 'failure' by adherents to select form terms in their interest when they agree to adhesion contracts.

This account of adhesion contracting runs counter to that described in Chapter 3: There it was argued that the evolution of adhesion contracting and its ultimate ascendance show that a market for contract terms is not the rule but the exception, which applies only to terms of significance to both parties. Their preference otherwise (i.e. where their interests are asymmetric) is for terms to be made by adhesion. That the adherent does not read the terms is not a problem, given its limited interest in them, but rather a wise preservation of its finite resources for other matters (in and outside the contract) in which it has a greater interest. Moreover, the adherent understands that the drafter has a special interest in the form terms (many of which pertain more to regulating its general business, than to the parties'

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[386] ibid 338.
[387] Stephen Weatherill, *Contract Law of the Internal Market* (Intersentia 2016) 106, describing this as an approach 'typical' of EU Contract regulation.
[388] Alan Schwartz and Louis Wilde, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) 127(3) PaL 630.
[389] See also Stephen Weatherill (ed), *Better Regulation* (Bloomsbury 2007) 5.

transaction),[390] on account of which the drafter invested in crafting specific terms and offering them as a standard set, that the drafter is not set up to deviate from through individual negotiations, without undermining its mass market business structure.[391] The unilateral determination of the form terms, then, fulfils both parties' preferences, rather than being a failure of these to achieve accord.[392] However, the widely-perceived issue of unfair standard form terms evinces a view that this mode of making contract terms should not be without its own fairness control, just as negotiation has one through consent to terms.

Put another way, to perceive a market failure for form terms is to construct the market top-down, based on existing regulation of private exchange under the traditional doctrine of consent to terms, as being a market for contract terms.

By contrast, starting with recognition of a social pattern of the emergence and ascent to overwhelming predominance in modern society of adhesion, as an alternative to negotiation, the market appears instead as one for a mode of contracting that does *not* require bilateral participation in deciding every term of every contract, given that most are of special interest to one party, and limited interest to the other.[393] In this bottom-up construction of the market, the 'failure' is by the law, in failing to supply an operative fairness control for exchange by adhesion, as it does for negotiation via consent to terms: the 'market failure' is in the market for regulation.[394] Self-absorbed and blind to its social vocation, the law continues to require consent to terms, but has ceased to require an operative fairness control—the opposite of what the market wants.

Very evidently the assumption persists—reflected not only in the market failure view, but in many of the others discussed previously in this chapter—that negotiation of terms is

[390] §2-I-A-ii-c.
[391] §2-I-A-ii-b.
[392] §3-I-D (c. 13(ii)).
[393] Chapter 3.
[394] In other words, a 'regulatory failure': Weatherill, *Better Regulation* (n 389) 6.

the 'proper' mode of contracting, and adhesion the aberration, the bastardisation.[395] This leads to the search for enhanced informational duties which can resolve adhesion's information asymmetry, 'freeing' adherents to select better terms.[396] Yet, even if the terms were clear and comprehensible, adherents have no interest in reading them,[397] and drafters have no interest in changing them:[398] there isn't a market failure for form terms, there is a market failure for negotiating them. This is underscored by the alternate market failure argument made based on disproportionate transaction costs, which does not describe a market failure for the terms, but expressly describes a market failure for negotiation.[399]

Accordingly, the market failure argument does not support exempting from the duty of fairness standard form terms which comply with enhanced information duties.

vi. Regulatory Overlap: Should the Regulation Exclude Terms Already Subject to Another Legal Regime?

Another situation commonly seen as providing a reason for potential exemption from unfair terms regulation is if the terms in question are already subject to another legal regime. Underlying this view is concern with possible negative consequences of regulatory overlap. Overlap cases can be divided into two main types. The first type comprises terms which have actually been approved by other law. The second type pertains to terms that fall within an area already subject to comprehensive field regulation.

a. Conflict: Terms Approved by Other Law

[395] Hence why negotiation is still presented as the norm: §2-I-A.
[396] §3-II-B; Schwartz and Wilde (n 388).
[397] Zamir and Farkash (n 107).
[398] Rakoff (n 34).
[399] Faure and Luth (n 384).

Starting with the first scenario of terms which have actually been approved by other law, the concern in these cases is with conflict.[400] As a basic principle of legality, there is a need for the law to avoid internal inconsistency, which produces conflicting guidance for subjects and prevents them from planning their behaviour in such a way as to assure their legal compliance.[401] Where the approval is part of comprehensive regulation of some field (the second case to be dealt with after the present one), this concern may be multiplied if the conflict would upset the overall scheme of that regulation.[402] Where the other law consists of international law, there is yet a further concern that the conflict could result in breach of the state's international obligations.[403]

These concerns are reflected in exemptions found in existing unfair terms regulation. For example, the UCTD exempts 'terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party'.[404] The UCTA also exempts terms 'authorised or required' by domestic law or which embody international law to which the UK is party.[405] The ACL likewise does not apply to terms 'required, or expressly permitted' under other law.[406]

The concerns presently under consideration are legitimate. However, it might be asked why unfair terms regulation should give way to other laws, rather than vice versa? The answer should be based on the legal principle that the general yields to the specific. The analysis in this chapter has been that unfair terms regulation should be general regulation which applies to adhesion contracts concerning potentially any subject-matter. Assuming the

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400 See eg Law Commission, *Exemption Clauses: Second Report* (Law Com No 69, 1975) para 346.
401 Lon Fuller, *The Morality of Law* (Yale 1969) 65.
402 Law Commission, *Exemption Clauses* (n 400) paras 265–266.
403 ibid 260–261.
404 (n 13) art 1(2); see also CRA (n 154) s 73.
405 (n 364) s 29(1).
406 (n 154) s 26(1)(c): 'law of the Commonwealth, a State or a Territory.'

law under which a term has been approved is more specialised, its approval should then prevail, and preclude scrutiny for unfairness under unfair terms regulation.[407] But if it happens that an approval is under some law that is even more general than the unfair terms regulation, then the latter should remain applicable. This is the case, for instance, where existing unfair terms regulations oust what would otherwise be the approval of terms under the Private Law of Contract, in its suggestion that the adherent agreed to the terms.

This highlights the need for a further specification for terms which are not mandatory, but only permitted: in order for a term to be exempted from unfair terms regulation, the purpose of its permit under the more specialised law should have to substantially overlap with the fairness concerns at issue under the unfair terms regulation. Otherwise, there is no conflict merely in terms being permitted for one purpose and not for another—just as there is no conflict in the same item of evidence being relevant for one purpose and not for another.[408] As an example, a standard pay-rate in an employment contract for skilled or high-risk labour of some type should not be treated as immune from attack under unfair terms regulation merely because it exceeds what employment legislation permits in intending to specify a general *minimum* wage (i.e. a wage floor).

b. Impairment: Terms in Areas Subject to Comprehensive Field Regulation

Turning to the second set of cases, the scenario here is one in which the term (or contract as a whole) lies within a field that is already subject to comprehensive regulation. The concern is that if the unfair terms regulation is permitted to be operative in that field, it may upset the scheme contemplated by the field regulation.

[407] Preceding the UCTA (n 364), the Law Commission for instance cited disclaimers of negligence already covered in the Solicitors Act 1974, and provisions approved under the Warsaw Convention on carriage of goods by air: Law Commission, *Exemption Clauses* (n 400) paras 260, 265.
[408] *R v Mohan* [1994] 2 SCR 9 (SCC).

An illustration of this is Business and Securities Law. The ACL expressly excludes any 'contract that is the constitution…of a company, managed investment scheme or other kind of body."[409] The UCTA likewise excludes contracts insofar as they relate to '(i) the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership), or (ii) to its constitution or the rights or obligations of its corporators or members.'[410] Even in Germany, §310(4) *Bürgerliches Gesetzbuch* ('BGB') exempts standard terms in 'the field of…company law,' which refers to business contracts where 'the parties have a common goal of cooperation.' The rationale for these exclusions may be summarised by the statement: '[t]his area of activity is, of course, already very fully regulated,' and would be ill-served by the intervention of 'a new system of control which has not been specifically designed to operate in this field.'[411]

Concern about upsetting field regulation is appropriate. As in the preceding section, exemption of areas from the application of unfair terms regulation should depend on the latter being more general, and the field regulation being more specific (as one normally expects for regulation of a particular market sector). But it might be asked why exemption is needed beyond scenarios where declaring a term unfair would conflict with a provision of the sectoral regulation—in other words, an instance of the type of case already considered in the preceding section? Justification for a broader exclusion would seemingly lie in a conviction that the field regulation is an integral scheme which would be impaired by the unfair terms regulation 'intervening' into its domain, as this would disrupt its operation and distort its results.

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[409] (n 154) s 28(3).
[410] (n 364) sch 1, para 1(d).
[411] Scottish Law Commission, *Exemption Clauses: Second Report* (Scot Law Com No 39, 1975) para 255.

But these assumptions are not always true. Much regulation is not integral, but 'patchwork' and possessed of its own internal compromises and inconsistencies.[412] A regulation may not even be comprehensive with respect to its field, but partial—dealing with only certain kinds of mischief, which might not include the same fairness concerns at issue under the unfair terms regulation.[413] Yet, many fields do have at least some regulation. Hence, if anything, the fact that there is, as discussed in §2-III, a general concern about unfair terms in adhesion contracts, would suggest that most existing field regulation is *not* so comprehensive as to have already addressed fairness concerns that exist across these fields.

Moreover, where there *is* a comprehensive and integral scheme, it might still be assuming too much to believe that its integrity is so delicate that any incursion by unfair terms regulation would threaten it. Contemporary society is characterised by a vast amount of regulation, with overlap both profound and compound. Consider a contract as simple as a football fan buying a snack from a concession stand at a club's stadium. Besides sale of goods, food safety, and public health regulation, the terms may be influenced by a franchise agreement, and thus subject to franchise regulation, as well as insurance, subject to insurance regulation. The location might make the terms subject to competition laws, zoning laws, the fire code, etc. The terms may be affected by agreements with unionised staff, subject to labour laws. The terms' relationship to the marketing and sale of the snack could be subject to regulation of unfair trade regulation. The terms on which the fan uses a bank card to pay would be subject to banking and financial regulation. If the snack was a beer, it would be subject to regulation of controlled substances, and if the fan was a drunken hooligan who proceeded to injure a partisan of the opposing club, terms restricting the vendor's negligence liability could be subject to Tort Law. If all these regulations can co-exist in a routine

[412] Marcus Moore, 'The Past, Present and Future of Law Reform in Canada' (2018) 6(2) TPLeg 225, 251.
[413] Indeed, this is currently the case for contractual protection of consumers in Canada's common law provinces.

transaction, it seems doubtful that the application of unfair terms regulation would regularly cause all existing underlying field regulation to be abruptly thrown into disarray.

A nuanced response might therefore be most appropriate: Besides scenarios of a direct conflict between the provisions (the case in the preceding section), unfair terms regulation should only be excluded where it would frustrate an important purpose of the (more specialised) field regulation.[414] Apart from those scenarios, in order to avoid exempting many fields of contractual activity from unfair terms regulation, and thus hollowing it out—preventing it from attaining its *own* purpose—it should be applicable notwithstanding the existence of field regulation. In cases of overlap but not repugnancy, the overall scheme of the field regulation, and the extent to which it already addresses fairness concerns of the kind at issue under the unfair terms regulation, should instead be dealt with as contextual factors to be considered in assessing the fairness of a term under the unfair terms regulation (and also potentially as to the appropriate remedy).

vii. Certainty: Should Contract-Types Having Especial Need for Certainty be Exempt from the Regulation?

Another argument sometimes seen is that certain types of contracts require especial certainty, which subjecting them to unfair terms regulation would unacceptably undermine. As a result, it is suggested that these types of contracts should be exempted from the scope of application of the regulation.

Sometimes, this is based on the claim that such contracts' terms have been determined in consultation with entities representing the various types of players involved, and have been effectively accepted as 'law' by members of the industry, so that the regulation should defer

[414] In dealing with analogous issues of overlap, federalism in Canada only makes a provincial law inoperative if it seriously 'impairs the core' of a federal power: *Canadian Western Bank v Alberta* 2007 SCC 22.

to these determinations.[415] Contracts in the area of transport may serve to exemplify this argument's use. Contracts in the area of transport are exempted, for instance, under art 1(2) of the UCTD, s 28 of the ACL, and UCTA Sch 1 paras 2-3. With respect to the latter, the British Maritime Law Association ('BMLA')'s submissions to the Law Commission included, as explanations for the request for exemption from unfair terms regulation, that:

> certainty of interpretation is regarded as being of crucial importance, that standard contracts are often created after international negotiation and that the market is content with the use of standard terms…The BMLA is aware that a status quo recommendation may be stigmatised as conservative, but is of the view that contractual change and uncertainty often results in legal costs.[416]

In other cases, the argument for exemption due to a need for especial certainty is based on standard form terms in certain contract-types being part of what defines the principal subject-matter of the contract (the 'product') or inseparable from the (negotiated) price term. This is the case, for instance, with insurance contracts and with certain types of financial industry contracts such as futures markets or financial swaps.[417] Where these contracts are themselves products that may be re-sold, the argument goes further: that a lack of certainty would inhibit their resale, or cause them to be unjustifiably discounted based on the risk of a standard form term that is integral to its value being ruled unfair under unfair terms regulation.[418] Thus, the EU regime, for instance, directs that 'in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject' to regulation.[419] Insurance contracts are also exempted from the UCTA.[420]

It may well be the case that select contract-types require especial certainty. Whether or not such is the case, contractual certainty is already widely-recognised as of crucial

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[415] Collins, 'Flipping Wreck' (n 57).
[416] Quoted in Nick Gaskell, 'Unfair Contract Terms and the Maritime Provisions in s.28(1)-(2) of the ACL' (Consultation Paper, Review of the Australian Consumer Law, 8 December 2016) 5.
[417] Collins, *Regulating Contracts* (n 24) ch 9.
[418] ibid.
[419] UCTD (n 13) preamble, recital 19.
[420] (n 364) sch 1, para. 1.

importance to markets generally.[421] And the stakes are of course higher in any standard form contract, since uncertainty around a term could affect numerous contracts made which included that standard term, not just one contract with one particular party. The key questions would therefore seem to be: by what process and on what terms is certainty best pursued?

It is far from evident that exempting select contract-types from unfair terms regulation is the answer.[422] Beyond the observation just made that certainty is of high concern in all standard contracts, and the question it raises about where a bright line between application and exemption might then be drawn, there are other reasons to think that it does not well address the certainty concern. For example, the earlier quote from the BMLA highlights how even if terms are not subject to unfair terms review, their certainty would not be assured under the Private Law of Contract, due to the uncertainty of contractual *interpretation*.[423] In recent years, considerable uncertainty has been seen in courts even as regards the proper approach to employ in contractual interpretation,[424] let alone being able to predict with certainty the result of a given approach's application to interpreting a term whose meaning is disputed.

It may be helpful to probe deeper into the nature of the concern for certainty. Whether via subjection to interpretation under Private Law, or review under unfair terms regulation, a concern for certainty is one grounded in reliance interests.[425] The issue is whether such questions as might be raised about the terms get answered *before* parties rely on them in contracting or only *after* they have already done so. Accordingly, from the standpoint of unfair terms regulation, the appropriate response to this concern seems not to be to exempt

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[421] See eg Law Commission, *Unfair Terms in Contracts* (n 361) s 2.24; Ewan McKendrick, *Contract Law* (Macmillan 2019) 61, 66, 79–80; Scott and Black (n 355) 77.
[422] Scott and Black (n 355) 92–93.
[423] Gaskell (n 416).
[424] Lord Sumption SCJ, 'Recent Developments in Contract Law in the Supreme Court' (Law Faculty, Oxford University, 2 March 2017).
[425] Lon Fuller and William Perdue, 'The Reliance Interest in Contract Damages: 2' (1937) 46 Yale LJ 373.

the terms of select contract-types from the regulation, but to afford parties with especial need for certainty the opportunity to obtain a pre-determination of the fairness of terms prior to relying on them by contracting on the basis of them (and perhaps making other related business arrangements as well). Consistent with this conclusion, the succeeding chapters of this work *do* include a proposed optional procedure by which any interested party may apply for a pre-determination of the fairness of terms prior to contracting in reliance on them.

As far as the suggestion, in the first set of cases considered in this section, that the entities that negotiated these contracts sufficiently represented the interests of the players involved, and that the regulation should thus defer to them, there is no safe way to presume that *a priori*. Unless it is a legally-recognised instance of collective bargaining (in which case unfair terms regulation would treat the terms as negotiated, and not reviewable), the point of the regulation is that parties' protection from unfairness where they have not themselves negotiated the terms is something that must be verified, not assumed.[426] Thus, the appropriate response to this argument is to consider it as part of the context that must be borne in mind in assessing the fairness of terms under the regulation: To the extent that the drafting of the standard form was preceded by stakeholder consultations or negotiations, and to the extent that such discussions fairly represented the interests of the adherent, this would militate in favour of a finding that the term is fair. If it turns out that the party's interests were not represented, or that the discussions were something less than a genuine negotiation, then the regulation can address, as it should, any unfair terms that resulted.

Turning to the suggestion in the second set of cases that certain standard form terms are definitive of the subject-matter or inseparable from the negotiated price of a contract, these too are matters that should be dealt with *under* the regulation, rather than as reasons for

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[426] Scott and Black (n 355) 92–93.

being excused from it. If the terms in question truly are definitive of the subject-matter or inseparable from the price which the adherent had reason to understand it was contracting for, one would expect this to point towards finding the terms fair. On the other hand, if they are only somewhat related to the subject-matter or price, their relationship to the subject-matter or price (and other) terms would just be one routine factor of the context to be considered in assessing terms' fairness under the regulation. The closeness of the relation may often be a matter of degree which can only be dealt with as a matter of weight among the factors to be considered in assessing a term's fairness, rather than by the black-and-white question of regulatory exemption or application.[427]

And again, if that approach is inadequate to a party's need for certainty, the regulatory provision that *is* responsive to that need is for the party to avail itself of the regulation's proposed option to apply for a pre-determination of a term's fairness prior to contracting in reliance on it.

[427] To the extent there might be concerns that judges lack the industry-specific expertise needed to make reliable determinations on these questions, it might be noted here that Chapter 6 recommends a mixed bench which incorporates, alongside legal experts, experts from the relevant industry, appointed to cases on an *ad hoc* basis.

Chapter 5. Key Regulatory Choices in Designing Control of Unfair Terms

Introduction

This chapter concerns certain key decisions as to how a legal response to the issue of unfair terms in adhesion contracts should take shape as a particular regulatory regime. Approaching these decisions as a set of interrelated regulatory design choices,[428] the chapter considers in each case various options, before identifying the choice that seems most likely to be effective. Following the methodology outlined in Chapter 1, the chapter then secondarily takes these options recommended for their likely effectiveness and assesses whether they remain suitable proposals in the light of other important governance considerations (the integrity of the legal system; efficiency; and significant collateral social effects).[429]

I. How Free Should the Drafter Be to Choose the Standard Form Terms?

It was previously concluded, in Chapter 3, that drafters should be permitted to determine the standard form terms of adhesion contracts, subject to the parties' agreement that those terms supplement and not undermine the contract's negotiated terms, and subject to a duty to make these form terms fair. From the standpoint of contracts generally, this respected the fundamental understandings of contractual obligations as private ordering and as personal obligations governed by party sovereignty. From the standpoint of contracts of adhesion specifically, it implemented the foundational idea of Contract as voluntary obligation, expressed in the parties will to contract by the adhesion method, and in their self-

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[428] Pearl Eliadis, Margaret Hill and Michael Howlett (eds), *Designing Government: From Instruments to Governance* (McGill-Queen's 2005).
[429] §1-II.

selected roles of either drafter or adherent within that method. Also, the division of labour associated with those roles mirrored the asymmetry of the parties' interests and expertise in the matters dealt with by the form (relative to interests outside it) and timeliness of opportunity to self-identify as a party. This arrangement, with the aid of a duty of fairness fettering the drafter in deciding the terms, afforded the necessary means of controlling the fairness of state-sanctioned private exchange terms in a way that reflected the parties' perceptions of fairness to them, factoring in not only the obligations contained in the form terms themselves but also the transaction costs of their determination.

The question now to be addressed is how free drafters should be in making these determinations, beyond the constraints already mentioned? In this regard, different options can be imagined of how the regulation should be designed: the drafter could be left with a relatively free-hand; a state body could create default terms which drafters would have to carry a burden of justifying any departure from;[430] or the regulation could restrict drafters' choices to among a set of terms pre-authorised by an impartial corporatist body.[431]

The same rationales that dictated that the drafter should decide the terms, subject to the constraints already mentioned, seem further to suggest that the drafter should enjoy as much freedom as possible in doing so, outside of those constraints. As noted in Chapter 3, the drafter knows best its own business, and is also expected to know that of adherents-to-be of its standard form, through its market research and continuously growing body of first-hand experience in a line of trade.[432] In assessing the fairness of terms, context is critical, particularly how the terms impact the parties' interests.[433] State officials or corporatist bodies, being somewhat removed from these facts, will only be partially aware of them, whereas the

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430 §3-II-C-i.
431 Radin (n 6) 226.
432 §3-I-C-ii-b.
433 ibid.

same facts will be vividly felt by the drafting firm as matters affecting its personal economic welfare or survival. To the drafter, not only personally affected but specially invested in the form terms of transaction-types for which it undertakes that role, it should be most evident what terms would be in the best interests of the parties. Beyond that, what is principally necessary is to ensure that the drafter choose those terms. This is the purpose of the duty of fairness (and what ancillary features might be needed in order to assure that the duty function as intended—a matter to be considered later in this chapter).

Assuming for the time being that the duty of fairness called for in Chapter 3 can be made effective, it's not clear how default terms made by the state or a restricted set of terms authorised by a corporatist body would improve the effectiveness of the regulation.

Starting with the state option, a version of this idea proposed by Todd Rakoff, employing court-implied default terms, was already considered and rejected in Chapter 3.[434] However, that rejection was in part because the proposal envisioned deviations from the default terms only rarely being approved, which undermined fundamental understandings of Contract as private ordering governed by party sovereignty. In addition, the deviations were to be assessed with central regard for whether the drafter's term contributed to relationships of subjugation, a concern that was only tangentially tied to the issue of fair terms addressed by the regulation here. Nevertheless, if under any proposal of state default terms, drafters' proposed terms are to be rejected, and the state's default terms used, frequently enough to have any significance as a distinct option from letting the drafter decide the terms *a priori*, this would embody a significant step in the undesirable direction of a 'a centrally controlled and inflexible order,' as David Slawson put it.[435] Or as Karl Llewellyn concluded—having experience with civilian legal systems in which state default terms are sometimes contained

[434] §3-II-C-i.
[435] Slawson (n 8) 532.

in civil code provisions on nominate contracts—it would mean 'crude misfitting hand-me-down' rules incapable of fairly governing 'the particular detailed working needs of each line of business.'[436] Generalised determinations made by a state body remote in interest from the contracted obligations, and limited in the contextual expertise it can bring to the wide range of matters that must be covered by form terms, must be expected to result in default terms which themselves often depart from what would be a fair accommodation of the parties' conflicting interests in any real and specific context.

As argued in Chapter 3, such terms must also often be expected to depart from what is fair to *either* party, by only 'crudely' fulfilling what non-conflicting interests the parties had in the transaction they sought with one another.[437] That the terms are only defaults, which the state can discard in favour of terms proposed by the drafter, creates no advantage over starting with the drafter's terms in the first place, *unless* the duty of fairness is itself ineffective. If that were the case, the state's crude default terms might be 'less worse' than the one-sided terms presently typical of adhesion contracting in the absence of a duty of fairness. But to assume that a duty of fairness cannot succeed, and that top-down state decisionmaking is the only way to accommodate conflicting interests, would be a radical departure from the usual start-point of the common law of Contract. As Lord Morris of Borth-y-Gest described, 'I think we all start with a general predisposition in favour of freedom of contract.'[438] Indeed, given the frequent association in common law countries of the scheme of Contract Law with economic performance, and of economic performance with a sceptical stance against state 'paternalism'[439]—especially in matters of market 'intervention' and of individual rights—the state option might not even be viable as a general law applicable to most contracts (which are

[436] Llewellyn, *Common Law Tradition* (n 44) 362.
[437] §3-II-C-i.
[438] Speech in the House of Lords on the UCTA, quoted in Ramsay (n 263) 626.
[439] Collins, *Law of Contract* (n 17) 106.

now made by adhesion, as noted in Chapter 1). In Canada, common law provinces have shown no inclination to follow the approach of default terms used in Canada's civilian province of Québec,[440] just as in the US no other state has followed this tack as used in the former French colony of Louisiana.[441]

In that regard, terms made by corporatist bodies, likely significantly informed by private industry-associations, might stand a better chance of being viable than a proposal centrally reliant on public ordering.[442] Industry-specific corporatist bodies might also be able to tailor terms to their 'line of business' more ably than the state could to all lines of business. As Karl Llewellyn said, particularly where 'two-fisted bargainers on either side have worked out in the form a balanced code to govern the particular line or trade or industry…Contracts of this kind (so long as reasonable in the net) are a road to better than official-legal regulation of our economic life.'[443] However, within an industry, the nature of different businesses still varies, along with their interests, so that if the corporatist body is expected to play the primary role, the problem of overgeneralisation remains, even if reduced. In addition, it might prove difficult to rely on the set of corporatist bodies being able to keep pace with a marketplace extremely complex, diverse, and dynamic. Market ordering is counted on to produce innovations; yet by nature, significant innovations would depart radically from the image of fairness held by the corporatist body, reflecting the very business model the innovations make obsolete. At any given point, there would also be problems of classification. Where a firm's interests so dictate, it would challenge the classification, creating upfront uncertainty that would undermine the effectiveness of the regulation. Thus,

[440] CCQ (n 237) Title Two.
[441] Louisiana Civil Code, art 1914.
[442] Radin (n 6) 226.
[443] Llewellyn, *Common Law Tradition* (n 44) 363.

whilst possibly more viable than state-made contracts, this option would have weaknesses of its own.

All in all, whether default terms made by some entity would provide a useful minimum safety net would seem to depend on whether a basis can be identified which provides reasonable confidence that the duty of fairness *can* be made to significantly fulfil its functions (a question to be discussed later in this chapter).

II. Who Should Bear the Primary Responsibility for Enforcement of the Regulation?

Specifying a duty of fairness does not make it effective.[444] Enforcement mechanisms are needed in order that drafters will comply with it.[445] To that end, another fundamental regulatory design choice to be considered is *who* should bear the primary responsibility for ensuring that the duty is respected.

One option would be a state regulator reviewing contracts for possible violations. A second possibility would be adherents, by taking legal action against drafters. A third alternative would be drafters themselves, through the creation of incentives for self-regulation.

Starting with the option of a state regulator, one observes that the volume of adhesion contracts made in modern society is enormous. The resource burden on the state of having to scrutinise them would be extraordinary. Given states' manifold governance obligations and scarce resources, this option would not seem realistic. It would only be possible for the regulator to scrutinise a selection of contracts, which does not match the regulatory objective

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[444] Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (OUP 1998) 14.
[445] ibid 17.

of cleansing the market of unfair terms.[446] Selective enforcement would only have *a chance* of inducing the market-wide compliance sought by the regulation if the consequences of violation were sufficiently serious that, despite the small risk of being caught with only selective enforcement, the consequences would induce substantially all drafters to self-regulate. This scenario should therefore be seen as one where self-regulation by the drafter is the primary means of enforcement—incentivised by the risk of serious consequences if it does not, and gets caught by the regulator as a secondary enforcer.

Turning to the option of adherents taking legal action against drafters, although such a ‘corrective justice’ approach is often used in Private Law,[447] it would not seem well-suited to the context of adhesion contracting. As discussed in §2-II, standard form adherents are typically unaware of (and do not understand) the content of the form terms, and thus would not know that there is an unfair term.[448] Further, as discussed in Chapter 3, the form terms are those which there is no market to negotiate because adherents lack sufficient interest, so the same would be true of their upfront willingness to litigate these.[449] As a result, unfair terms will enter the market, contrary to the regulatory goal of keeping the market cleansed of them. In some cases, a particular adherent might later suffer a sufficient ‘loss’ as a result of an unfair term to seek redress through legal action. Yet, the term would remain on the market in all instances of the contract made with other adherents. Even if actions allowed for enjoining the term’s use, the drafter could craft a new unfair term, introduce it in its subsequent iteration of the standard form, and use that for some time—unless and until a new adherent suffers a loss and proceeds to take action. In short, these corrections lag behind unfair terms’ entry into the market, so that the market would be continuously contaminated with unfair

[446] §1-II.
[447] Ernest Weinrib, *The Idea of Private Law* (2nd edn, OUP 2012) ch 3.
[448] Faure and Luth (n 384) 353.
[449] Collins, ‘Circulate Documents’ (n 11) 793–794.

terms, thus failing to achieve the regulatory object. Legal action by adherents could only accomplish the goal of the regulation if the regulation: (i) grants adherents a sufficient interest in the duty's enforcement to warrant some adherent (or its legal representative) reviewing the terms and taking action; and (ii) imposes a sufficiently serious consequence, where the action is well-founded, to induce substantially all drafters not to introduce unfair terms into the market because of the liability risk. This scenario should likewise be seen as one where the primary means of enforcement is drafter self-regulation, incentivised by the secondary enforcement risk of its liability if it does not self-regulate.

It seems evident, then, that the regulation should place primary responsibility for the duty's enforcement on the drafter, through incentive-driven self-regulation. The ubiquity and constancy of the use of adhesion contracts in modern society suggests that, as a matter of practical necessity, the only way of keeping the market cleansed of unfair terms is for drafters to regulate themselves to choose fair terms. After all, before a standard form can exist, a drafter must act to craft one. In crafting one, a drafter is capable of choosing fair terms instead of unfair terms. Incentivising the drafter to do so would nip unfair terms in the bud, and avoid having to rely primarily on other options which offer too little too late.

III. What Incentive is Sufficient for Drafters to Choose Fair Terms?

If the drafter should bear the primary regulatory enforcement responsibility through incentivised self-regulation, the question then to be answered is what consequence of employing an unfair term would be sufficient to induce substantially all drafters to choose fair terms, leaving only a limited and thus manageable need for secondary enforcement?

Among conceivable options, the one commonly-used in existing regulatory models is to declare the term unenforceable. Another option common in other types of regulation would be to make breach of the duty an offence under the regulation, and to fix fines for violations. A third option would be for the drafter who breaches the duty to make restitution to the contract's adherents of the drafter's improper gain from use of the unfair term.

The first option is the one dominant in existing regulatory models, including unconscionability in the US, the EU's UCTD, the UK's UCTA and CRA, and Australia's ACL.[450] The term is declared unenforceable, but meanwhile the drafter retains what it gained from the term's use prior to the declaration. Thus, in most cases the drafter will still have gained from having breached the regulation. And even if the declaration could be obtained before the term reached the market, the drafter will have lost nothing by trying to get away with it.[451] As a result, this option not only fails to sufficiently incentivise drafters to self-regulate, but in fact leaves them with an incentive to breach the regulation.[452]

Turning to the possibility, common in other regulation on various subject-matters,[453] of fixing fines for a regulatory offence consisting of breach of the duty, the amount prescribed as the fine seems crucial to its prospects of effectiveness. Many regulations provide for fines in fixed amounts disproportionately small compared to what parties gain by breaching them. If the 'real' goal of these regulations (acknowledged or not) is either 'tokenistic' in being seen to be politically responsive to pressure to 'do something' about a problem, or to give symbolic effect to public disapproval of the conduct without truly trying

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[450] UCC (n 145) §2-302; UCTA (n 364); UCTD (n 13) art 6(1); CRA (n 154) s 62(1); ACL (n 154) s 23(1).
[451] Collins, 'Circulate Documents' (n 11) 793–794. It is true that in court actions in some jurisdictions, if costs are awarded, it is possible that a drafter may lose those. However, institutional and procedural arrangements are variable, and should be treated as a distinct regulatory design question (addressed here in Chapter 6). For present purposes, I note only that even under such rules, it seems unlikely that a drafter might lose more than what it gained from use of an unfair term, given that even in an action that it calculates is a worst-case scenario, it could simply admit the claim before the accrual of any significant costs.
[452] ibid. See also Scott and Black (n 355) 99.
[453] See eg Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 (UCPD) art 13. As noted earlier, at the time of this writing, the EU is now also moving towards adding such a dimension to the UCTD: Commission, 'Proposed Directive on Better Enforcement and Modernisation' (n 13) art 3. Pecuniary penalties are already permitted for certain kinds of unconscionable conduct under s 20 of the ACL (n 154).

to change it, or else to discourage vigilantism leading to a breakdown of social order, then the low level of compliance secured by such regulations might suffice to make them 'effective'.[454] That is, fines in small amounts might reflect a view that the 'optimal level of enforcement' for these regulations is low.[455] For the regulation proposed here, its goal of market-cleansing defines a high level of enforcement, which nominal fines cannot secure. Larger fixed fines would run the opposite risk of being in some cases disproportionately severe as compared to the 'magnitude' of the offence, causing the regulation to be discredited as draconian, and fomenting reaction that could lead to its repeal *in toto*. If the regulation grants the regulator discretion over the fine amount, one should expect the same risk to induce the regulator to generally select fines that err on the side of being too low, resulting in systemic underenforcement.[456] In short, the opposing risks of fines that are too high or too low can only be avoided by tailoring the amount of the fine to the gain of the drafter from a particular unfair term's use in the particular contract.

Such a tailoring could also be achieved by the third option mentioned, of having the drafter who breaches the duty be liable to make restitution to the contract's adherents for its improper gain from use of the unfair term. If drafters thereby could expect to lose all that they would gain from an unfair term, were it not for the regulation, they would have no incentive to make unfair terms (apart from the chances that secondary enforcement of the regulation might not occur, a factor considered in the next section). This approach is often used in market regulation in circumstances where a party would otherwise retain an unjustified gain,

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[454] Baldwin, Scott and Hood (n 444) 14.
[455] ibid 19.
[456] Obviously, discretion also creates uncertainty. Of note, the proposed amendments to the UCTD would require the judge or regulatory authority to consider in each case at least 10 criteria in imposing a fine: Commission, 'Proposed Directive on Better Enforcement and Modernisation' (n 13) arts 3(1), 2(a)–(g), (3)–(5).

or where the risk of regulatory evasion is high absent effective deterrence.[457] Both of these qualities apply to unfair terms in adhesion contracts, as argued in the preceding paragraphs.

Standard forms are typically drafted by businesses (and with professional legal help), who can be expected to respond rationally to incentives in making business choices, such as whether to employ a fair or unfair term. But if behavioural studies found that a greater incentive was necessary, or a lesser incentive sufficient, to induce substantially all drafters to choose fair terms, then self-regulatory incentives could be modified in correspondence with that percentage of what drafters would gain from unfair terms were it not for the regulation.

IV. Who Should the Regulation Empower to Initiate Secondary Enforcement?

In order for monetary incentives to induce drafters to self-regulate in compliance with the duty of fairness, drafters must expect that the secondary enforcement which would realise those incentives *will* be initiated if do not self-regulate. The question which follows, then, is who should the regulation empower to initiate secondary enforcement if a drafter fails to self-regulate?

One option would be to rely on a regulator to pursue enforcement proceedings. Another possibility would be for adherent-side agents to take action, such as consumer groups for a consumer contract. A third alternative would be action by adherents themselves.

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[457] In regulation by Private Law, this is an equitable remedy in circumstances of unjust enrichment, breach of fiduciary duty (which have some important features analogous to those in adhesion, as discussed in §3-III-C), and sometimes even breach of contract: *Attorney-General v Blake* [2000] UKHL 45. In regulation through statutory instruments, examples include antitrust and securities regulation: Steven Peikin, 'Remedies and Relief in SEC Enforcement Actions' (*Securities & Exchange Commission*, 3 October 2018) <www.sec.gov/news/speech/speech-peikin-100318> accessed 14 September 2019. The proposed changes to the EU unfair terms regime would make the drafter's gain from the unfair term one of the 10 criteria alluded to in (n 456) to be considered in determining a possible 'penalty': Commission, 'Proposed Directive on Better Enforcement and Modernisation' (n 13) art 3(2)(f).

The option of relying on the regulator to pursue secondary enforcement proceedings confronts the same difficulty discussed earlier on the question of who should be counted on as the primary regulator: scarce public resources.[458] The regulator would only be able to pursue selected cases. Since drafters will know this, they will discount the secondary enforcement incentives in proportion to the low probability of being among the cases selected. What drafters gain from the unfair term will then exceed the expected value of enforcement fines based on their *actual* risk, so that rational drafters will choose unfair terms. To avoid this, the fines would have to be increased by a large amount in offsetting inverse proportion to the low prospects of being caught. This would turn the regulation back into the 'draconian' regime dismissed in the preceding section. As a result, the regulator, with its scarce resources, cannot be relied on for secondary enforcement, but could certainly be empowered subsidiarily to act in selected cases where preferred options are unavailable.

Turning to the possibility of adherent-side agents or groups bearing the secondary enforcement burden, such groups might be expected to be already monitoring contract terms in particular industries, without having to devote new resources solely for the sake of enforcement of unfair terms regulation. A greater burden would be enforcement *action*. For this, such groups would have limited resources, as the state does.[459] Further, as noted in §I, it might not always be possible to find or straightforward to identify an industry-monitoring group covering each business in a complex and constantly-changing marketplace. A regular need for creation of them or contestation over them would consume even more resources.

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[458] This assumes that the regulator would not itself keep the proceeds of fines, but would transmit them to the general state treasury, and operate under a fixed budget set by government. If the regulator did keep proceeds, it would have more resources, but may be seen as 'in the business' of prosecution rather than impartial, potentially critically undermining public confidence. The proposed changes to the UCTD may embody a different view on this: see Marco Loos, 'The Modernization of European Consumer Law: A Pig in a Poke?' [2019] ERPL 113, 122.

[459] This assumes, similarly as for the state (and for the same reasons), that such groups could not retain the proceeds of fines collected through enforcement actions. Also, unlike adherents (individually or collectively), industry groups would not have a private claim against the drafter, since they are not a party to the contract.

Thus, adherent-side industry-groups also should not be counted on to carry the burden of secondary enforcement, However, if empowered subsidiarily, they too could help at times when preferred options fail to mobilise.

In most cases, the preferred option should be to rely on adherents themselves. At first blush, this may seem counter-intuitive since adherents typically do not read (or understand) the terms when making an adhesion contract, and have only a limited interest in matters governed by the form terms, as compared with other matters, even in the same contract, that they negotiate. However, they *do* have a *legal* interest in the terms, unlike industry-groups or a regulator. That primary interest provides grounds for a private claim, which then gives the adherent a secondary interest which may be more significant—as indeed recommended in the preceding section, calculating it as restitution of the drafter's improper gain from use of the unfair term. By thus *aligning* who the regulation counts on to exercise *the power of enforcement* with who holds *the interest in enforcement*, the regulation can best assure that secondary enforcement will indeed occur.

Meanwhile, the quantum of liability previously recommended was that which would provide the right incentive-level to attract primary self-regulation by drafters, leaving only limited need for secondary external enforcement. Would it be tenable for adherents to retain this 'equitable compensation'?[460] It certainly seems so, being philosophically appropriate and legally consistent with similar remedial practice elsewhere in Private Law in response to situations involving self-interested abuse of legally-sanctioned unilateral discretionary power affecting an interest of another party that is vulnerable if that power is abused.[461] Retaining the sum also allows the adherent to defray the costs of secondary enforcement, *viz.*, of reviewing adhesion contract terms (with legal assistance, where warranted) on occasion, and

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[460] McCamus (n 76) 423–424.
[461] (n 437); §3-III-C.

taking action if a term is unfair. This helps assure that where self-regulation fails, secondary enforcement occurs, which in turn is what supplies the incentive for self-regulation to succeed most of the time, creating a mutually-supporting positive feedback loop that would make the regulation effective in achieving its aim of market-cleansing.

It might also be noted that adherents change contract-by-contract, unlike the regulator and unlike the adherent-side industry-group for contracts in any given industry. Relying on adherents as secondary enforcers therefore has the further advantage of enabling the task of regulatory enforcement to be widely-distributed across the regulation's domain or 'space',[462] minimising the burden on any one party.

V. Should the Standard Secondary Enforcement Action be Individual or Collective?

Designating adherents as the secondary enforcers to be relied on in most cases (with adherent-side industry-groups and the regulator empowered to act subsidiarily when needed) draws attention to another important regulatory design question: whether the standard secondary enforcement action should be individual or collective?

Under the Private Law of Contract, legal claims are typically individual, and thus so are the remedies. In a suit for breach of contract, for example, a claimant could recover its individual loss. Likewise, existing unfair terms regulations such as in the UCTD, the ACL, and the unconscionability provision in the United States, have a defensive character similar to private law vitiating doctrines—with the standard remedy being to declare the term unenforceable in the contact with that individual, most likely in defence of a suit (or

[462] Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] PL 329.

countersuit) against the individual for breach of contract.[463] Individual claims and remedies are not well-suited to the adhesion context, where the same standardised contract is used for mass contracting with many adherents.[464] An individual claim, even for restitutionary damages, would leave the drafter still in possession of its improper gain from the unfair term's use in all other instances of the standardised contract that it made with other adherents. Hence, unless every adherent brought its own claim, the drafter would retain an overall incentive to choose unfair terms. Similarly, declaring an unfair term unenforceable in a claim concerning an individual instance of a standard form contract leaves the term still in force in all other instances of the form's use with other adherents, and indeed allows the drafter to continue making new contracts containing the same unfair term.[465] Unless parallel proceedings were brought by each adherent—which would overwhelm the justice system—such an individual approach is unable to accomplish the regulatory object of keeping the market cleansed of unfair terms.

By contrast, a standard enforcement proceeding that is collective by nature would enable all instances of an unfair term on the market to be dealt with together and at once, so that the term would be cleansed from the market. Further, a collective remedy of the drafter's aggregate restitutionary liability for all instances of the unfair term on the market would disgorge the whole improper gain that resulted from its use. This mass remedy corresponds to the nature of unfair terms in adhesion contracts as a mass wrong.[466] Since drafters approach

[463] The UCTD (n 13) does authorise consumer groups to take special action seeking an injunction of broader remedial application (art 7) and envisage such action by public regulators (Weatherill, *Internal Market* (n 387) 115), but the standard case is presented as individual (art 6), resulting in a finding that the term 'not be binding on the consumer'.
[464] Collins, 'Circulate Documents' (n 11) 793–794.
[465] ibid.
[466] Weatherill, *EU Consumer Law* (n 378) 298.

the choice of a standard form term as a mass market decision, not an individual decision, this approach is required in order to make the incentives for self-regulation effective.[467]

For these reasons, the standard enforcement action under the regulation should be a class action, comprising claims on behalf of all adherents of the form at issue. Class actions, where they have been permitted, generally must meet conditions such as there being an identifiable class, a common issue, and a suitable aggregate remedy.[468] In adhesion contracting, it is not normally possible to answer those questions in advance so as to allow for something like collective bargaining. However, once a standard form containing an allegedly unfair term has been used on the market, few applications of conditions like those would seem to involve less difficulties than a claim on behalf of all adherents to a standard form. The remedies suggested above, of enjoining the term's continued assertion or incorporation, and restitutionary liability for the drafter's aggregate gain from use of the term on the market, would fulfil he criterion of the need for a suitable aggregate remedy, whilst also helping ensure the regulation's effectiveness, as noted.

Encouraging the use of class actions as the standard secondary enforcement procedure would, through this aggregate restitutionary liability, also yield a sufficient interest for capable plaintiff lawyers to monitor adhesion contract terms and assist adherents in pursuing claims (as class representatives). Plaintiff-side class action lawyers' participation would significantly strengthen the effectiveness of secondary enforcement, as well as the prospects of primary self-regulation by drafters. For adherents, the ability to claim the drafter's gain as restitution would help provide a suitable incentive to pursue secondary enforcement even where the loss by the individual adherent is small or where it is large but non-pecuniary. This would avoid the problem noted by Justice Brandeis, that:

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[467] Scott and Black (n 355) 120–121.
[468] See eg *Hollick v Toronto* 2001 SCC 68.

> although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no [individual] suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.[469]

However, in cases where the loss to adherents as a class (or to an identifiable subclass) *exceeds* the drafter's gain from use of the unfair term, the action should be permitted to instead obtain as a remedy the class' aggregate loss. Hence, with the drafter's liability equalling the greater of its gain from use of the term with a collection of adherents, or adherents' collective loss, the drafter could only lose from making an unfair term. The drafter would thus be incentivised to choose fair terms, and encouraged to carefully turn its mind during the drafting process to what loss might be caused to adherents by use of terms that the drafter might by itself prefer. Indeed, even where an unfair term is used, this remedial recommendation would incentivise the drafter to voluntarily withdraw it from the market as soon as possible: it has no incentive to leave it on the market, since whatever it would gain from that would be disgorged; meanwhile, the longer the term is in force, the greater the chance that adherents *will* suffer a loss which exceeds the drafter's gain, in which case the drafter is liable for that greater sum.

Thus, the forces described in this section would together seem likely to help foster effective primary self-regulation by drafters.

VI. How Should Graduation of the Enforcement Sequence be Timed in Relation to Breach?

"Responsive Regulation' theory includes the claim that compliance is best secured through enforcement steps being graduated into a 'pyramid' of escalating coercion and

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[469] *FTC v Klesner* 280 US 19, 28 (1929).

consequences for non-compliance.[470] The question thus arises: how should this principle be implemented in regulating unfair terms in adhesion contracts?

One option would be to provide for a sequence of intermediate enforcement steps post-breach, and to authorise the legal claims described above to proceed only if and when these intermediate measures fail.[471] Another option would be to have no intermediate measures post-breach, but to have such measures pre-breach, including prior to a form even being placed on the market.

The legal system often follows the first approach, taking the breach of a duty as the start-point for party-specific discussion about the need to comply with it. In Criminal Law, for example, a person engaged in low-level crime may at first be questioned by police, then given warnings, then have charges laid but stayed pursuant to a deferred prosecution agreement, before ultimately being prosecuted. The post-violation enforcement sequence may extend yet further at the sentencing stage, through judicial inclination initially toward lighter sentences, proceeding to harsher sentences for repeat offenders. Similarly, in implementing the UCTD through the CRA, the UK created post-breach intermediate steps: A consumer or group may file a complaint for review by the Competition & Markets Authority ('CMA'), which then may decline to pursue it, or else may pursue it by negotiating compliance undertakings with violators, with the ultimate possibility being court action seeking to enjoin the drafter from continuing to use the term.[472] Under such a regime, a drafter has little incentive to comply unless it becomes one of the violators that the regulator chooses to pursue, and until the regulator pushes that violator to 'undertake' to abide by the regulation

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[470] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) ch 2. Under this approach, enforcement might start, for instance, with education/information in the hope of securing voluntary self-regulation, progress to moderate steps such as warnings and compliance orders, before climaxing in punitive sanctions.

[471] Scott and Black (n 355) 100 referring to the 'two-layered' approach espoused by Ewoud Hondius.

[472] (n 13) sch 3. Another step could be being found in contempt if the court's order is not complied with.

which it was obliged to abide by in the first place. The drafter is subject to market competition, and cannot afford the 'liberality' of complying with regulations that its competitors do not—unless and until enforcement escalates to the point that it has no choice. In the meantime, unfair terms loiter on the market, undermining the regulation's ostensible goal of cleansing the market of them.

Given the goal of keeping the market cleansed of unfair terms, the better regulatory design choice would be for the graduated steps of the enforcement pyramid to occur pre-breach, including before a form is used to make contracts on the market. John Brathwaite notes that the dialogical aspect of intermediate enforcement steps is important to the success of the Responsive Regulation approach.[473] It would seem advisable, then, to provide drafters an opportunity like that afforded by the Israeli Standard Contracts Law, to apply for pre-approval of proposed terms as fair prior to introducing them to the market[474]—thus obtaining definitive feedback on potential terms. Procedural details of this streamlined application will be discussed in Chapter 6, but the costs of the optional application would be borne by the drafter. This would avoid draining essential resources from secondary enforcers who would be called to resist the application (interested persons or groups, failing which the regulator), as well as incentivise drafters to self-regulate as much as possible before consuming limited external regulatory resources. Terms which are rejected would be enjoined from inclusion in the contract, but there would be no liability, as the measure would only be available before the terms reach the market. As an additional pre-breach opportunity for more extensive personalised compliance dialogue, the regulation should make available even before an application for pre-approval of terms optional pay-per-service private consultations with

[473] '[T]he flexible listening components of responsive regulation are more fundamental than the pyramid': John Braithwaite, 'Responsive Regulation' <http://johnbraithwaite.com/responsive-regulation/> accessed 14 September 2019, invoking John Braithwaite, 'The Essence of Responsive Regulation' [2011] 44(3) UBCLRev 475.

[474] Standard Contracts Law 5743-1982 (Israel) (SCL) ss 12–15.

external experts licensed by the regulator. These too would only be available prior to introduction to the market of the terms that are the subject of the consultation. Under this measure, discussions would simply be confidential advice (binding neither the drafter nor the regulator), provided for the purpose of drafter access, if needed, to expert compliance advice prior to or during the drafting process.

In contrast to offering these pre-breach graduated steps of enforcement, the regulation should admit no means post-breach of avoidance or delay of the secondary enforcement actions detailed earlier. In order for the associated incentives to function effectively, their application in the event of breach must be as certain as possible. This allows the drafter to precisely calculate the risk of non-compliance. And the calculation would be that it is not worth trying to get away with an unfair term—not even temporarily until further enforcement steps are engaged—because by then liability will have accrued, as is necessary if the market is to be kept cleansed of unfair terms. As rational actors, able to calculate the costs of compliance versus non-compliance, and the benefits of self-reliance versus access to but expense of external assistance with compliance, what drafting firms need is not leniency but certainty, which facilitates their appreciation of risk. Given the regulatory object of market cleansing, that certainty must be clear to drafters before terms reach the market, not post-breach, by which time unfair terms will have already mass-contaminated markets. Thus, for instance, the regulation would *not* allow the negotiation of compliance undertakings, as the CRA does[475] (or private settlements, as class actions do): Any drafting firm that fails to self-regulate, but later wishes to withdraw an unfair term that has become a basis for litigation, has already done the damage of contaminating the market. Such a party is exactly who the regulation's secondary enforcement provisions are meant to apply to—thus reinforcing that

[475] (n 152) Sch 3(6).

compliance must occur before placing a form on the market, as ‘compliance’ after that (or indeed only after litigation commences) is not compliant with the regulation’s goal of preserving a market free of unfair terms.

VII. Summary of Proposals

To summarise, the preceding analysis suggests that the following key regulatory design choices would together help sketch the outline of an effective legal response to the issue of unfair terms in adhesion contracts:

1. Subject to the obligations set out in Chapter 3 that standard form terms be supplemental to and not undermine the negotiated terms, and that they be fair, drafters should enjoy maximum freedom in determining the standard form terms, as they know best their own business and that of their clients, and can expertly determine what terms would be fair. Presently they have no incentive to choose those terms, but they would under an effectively-implemented duty of fairness. Notably, the regulation should not constrain drafters through a regime of state default terms that they would have to apply to vary for each term of each contract, or through having to choose among term options authorised by a corporatist body.

2. The regulation should rely on incentivised self-regulation by drafters, in the very process of deciding the terms, as the primary means of enforcing the duty of fairness. Given the ubiquity and constancy of adhesion contracting, failing to place such incentives on drafters, and relying on external bodies to undertake discrete regulatory action to enforce compliance for every term of every contract, would be unrealistic, and hence would severely compromise the regulatory objective of cleansing the market of unfair terms.

3. The incentives for drafters to self-regulate must meet or exceed their self-interest in making unfair terms, in order for them to instead choose fair terms. This may be achieved by making drafters liable, in the event of failure to comply with the duty of fairness, to make

restitution to adherents for their improper gain from the unfair term, or else for adherents' loss, whichever is greater. Merely declining to enforce the unfair term provides no such incentive. Even prescribing regulatory fines for violation of the duty of fairness would be insufficient, as the fines in routine cases would likely need to be low in order to be realistic to impose, and hence would fail to supply adequate incentive for drafters to self-regulate.

4. For secondary enforcement, the regulation should principally rely on adherents. Adherent-side industry-groups and the regulator should be subsidiarily empowered to act if no adherent does. However, the latter entities' limited resources only allow for selective enforcement, which is inadequate, given a regulatory objective of keeping the market clear of unfair terms. Empowering adherents as secondary enforcers allows the burden of enforcement to be widely-distributed. In addition, the expense and aggravation of enforcement for adherents would be offset by the availability of restitutionary damages as a remedy in the private claims they are entitled to make, as parties holding a legal interest in the contract. This would help assure consistent enforcement, needed in order to attain the high level of enforcement represented by the goal of market-cleansing.

5. The standard secondary enforcement action should be collective, not individual in nature. It should take the form of a class action on behalf of all adherents to the form at issue. This would ensure that the mass character of the wrong is captured and countered through aggregate liability and market-wide enjoinder of the unfair term's use. Otherwise, allowing drafters to profit from use of an unfair term market-wide, whilst only being liable to the lone adherent pursuing the (individual) claim, leaves drafters with an overall incentive to make unfair terms. Collective action would also create a (derivative) interest for class action lawyers, typically retained on a contingency-fee basis, who could significantly help, as a cohort of expert 'private attorneys-general,' in policing fairness in matters as pervasive as standard form contract terms.

6. The regulatory enforcement pyramid's graduation should be timed to concentrate intermediate recourses which are more dialogical and less coercive than ultimate recourses in the period prior to terms' introduction to the market. A regulatory goal of market-cleansing calls for doing everything realistically possible to prevent unfair terms from reaching the market, and contaminating it. Recourses which could cooperatively engage drafters in compliance activity during this pre-market period include opportunities to apply for a pre-determination of terms' fairness before using them, and seeking personalised compliance advice from experts licensed by the regulator during the process of deliberating over and drafting terms. These optional recourses would be funded by drafters to ensure that their use complements the incentive to primarily self-regulate, rather than undermining it. Meanwhile, no intermediate steps should be permitted post-breach. At that point, it is essential to support the self-regulatory incentives primarily relied upon by the regulation, in pursuing its goal of preventing the market's contamination by unfair terms, by providing maximum certainty to drafters who are calculating their risk of liability if they do not self-regulate.

VIII. Other Regulatory Considerations

The set of interrelated regulatory design choices above together provide a framework for what should be an effective legal response to the issue of unfair terms in adhesion contracts. Yet, as noted in Chapter 1, it must now be considered whether such an approach seems suitable in light of other important governance criteria, represented here by factors of: (i) the integrity of the legal system; (ii) efficiency; and (iii) significant collateral social effects.

A. Integrity of the Legal System

The regulatory framework sketched out above respects and preserves the integrity of the legal system in several important ways. Perhaps above all is the fact that by not forcing the drafter to either use a default term or persuade regulators to permit an exception to it, the making of contract terms is kept as much as possible a process of private ordering and of party sovereignty, thus displaying utmost respect for these fundamental understandings of contractual obligations. As discussed in Chapter 3, freedom of contract is exercised through the choice to contract via adhesion, and within adhesion by parties' self-selected roles of drafter or adherent for a given transaction-type. It is constrained only by the internal limits of the consent to adhere (the form terms must be supplemental to, and not undermine, the negotiated terms), and by the drafter's duty of fairness (required in order to give effect to the state's need for assurance of an operative fairness control over private exchange it is asked to sanction). Fairness too—at least in the parties' eyes—is best advanced by this arrangement, which takes advantage of the drafter being the entity in the best position to determine what terms would be fair (greatest interest, expertise, and engagement with the subjects to be governed by the form), but which adds a duty of fairness to ensure that the drafter chooses the terms it identifies as fair. In these respects, the regulation preserves what Hugh Collins perceives to be the greatest strength of the Private Law of Contract as a governance mechanism: its reflexivity.[476]

Consistent with the rest of Contract Law, and of Private Law generally, the framework set forth above also leaves enforcement first and foremost in the parties' hands. The primary enforcement mechanism is self-regulation by the drafter, incentivised by the risk of private liability to its contractual counterparts if it fails to do so. And the secondary enforcement mechanism when the drafter fails to self-regulate is this private legal action by adherents, incentivised where well-founded by the equitable compensation available through

[476] Collins, *Regulating Contracts* (n 24) ch 4; Hugh Collins, 'Regulating Contract Law' in Christine Parker and others (eds), *Regulating Law* (OUP 2004). On reflexive law, see Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) L& Soc'y Rev 239.

the action even if the adherent's loss is small. The state (and state-endorsed interest-groups) play only subsidiary roles in this enforcement, in contrast to other common regulatory strategies which call for more significant incursions of Public Law.[477] This seems important in Contact Law, whose private and personal character have long since become core economic and political ideals of our socio-legal system.[478]

The remedy of restitutionary damages, proposed here, is not the usual contractual remedy. However, it is important to bear in mind that the wrong here is not breach of contract, but breach of a legal duty. As detailed in Chapter 3, that duty is imposed by law in virtue of a circumstantial relationship between drafter and adherent, inherent in the practice of adhesion, in which the drafter enjoys legally-sanctioned unilateral discretionary power affecting an interest of another party that is vulnerable if that power is abused by self-interest going beyond what is fair and equitable. In other circumstances with similar features, it was noted, both Private Law and other market regulation do admit of similar remedial practice.[479] Moreover, where adherents' loss exceeds the drafter's gain from the unfair term, the remedy would be Private Law's usual one of compensating loss.

The suggestion above that the standard action should be a class action, rather than an individual action, inverts the norm for proceedings in the broader legal system. Indeed, some jurisdictions do not otherwise have class actions, whilst others have them but not in Contract.[480] However, class proceedings appear especially well-suited to the usual case raised by unfair terms in adhesion contracts, in view of the criteria which typically determine when

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[477] §II, IV.
[478] Kessler (n 29); Radin (n 6); §3-II-C.
[479] §III.
[480] Individually-negotiated contracts present particular problems for the conditions typical for class actions (§V), whereas adhesion contracts do not. For class action purposes, there is little difference between a drafter breaching a duty of fairness that obligates it to only include fair terms in the adhesion contract, and, for instance, the drafter misrepresenting that the terms would be fair in marketing materials that adherents relied upon in agreeing to enter the adhesion contract, for which a class action would be available in Tort.

class actions will be authorised: there is an identifiable class (adherents of that form contract), a common issue (the fairness of the term in question), and suitable aggregate remedies (market-wide injunction of the unfair term's use, and restitution of the drafter's gain from using it). A strong correspondence is also present at the level of the objectives of class actions: access to justice, deterrence, and judicial economy:[481] Access to justice would be furthered, in that the cost of claimant legal representation would be prohibitive unless it could be shared among adherents. Deterrence would be enhanced, as without class liability, the drafter would gain from use of the unfair term market-wide, whilst only being liable for the single instance of it in an individual claim, and thus be incentivised to choose unfair terms. Adjudicative economy would be supported, through alleviating the system from being burdened by many separate claims concerning the same legal issue. In other words, in being a collective wrong that requires a collective remedy, an unfair term in an adhesion contract also frustrates the procedural norm of an individual legal redress mechanism in precisely the way that calls for a class proceedings mechanism to avoid a systemic failure of justice that saps public confidence in the integrity of the legal system.

Risk of another systemic failure, in this context, of the common law's usual response to legal wrongs is alleviated by the proposal to locate the graduated enforcement sequence *before* the duty's breach rather than after, reflecting the regulation's preventive goal of keeping the market clear of unfair terms. As with the example from §VI of low-level crime, Private Law typically might start with a demand letter, before settlement negotiations, mediation, and ultimately adjudication; and at the remedy stage, the damage recoverable is limited in various ways unless there is evidence of deeper-seated disregard for the law, such

[481] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (LCO 2019) 1.

as intent to harm or bad faith. This fits the approach of correcting wrongs,[482] wherein the legal system shows little initiative in preventing the wrong, beyond creating a rule against it. Further measures begin only once the rule is broken. By contrast, the framework proposed here is concerned with enforcement even before an unfair term is made—engaging with drafters directly and as part of the very activities that might otherwise result in them committing the wrong of an unfair term,[483] whilst offering no prospect of 'mercy' afterwards. This inversion of the usual approach mirrors the regulation's goal of prevention of wrongs, rather than correction. Otherwise, given the goal of keeping markets cleansed of unfair terms, the customary approach would be too little too late: an individual injustice might be corrected (and the wrongdoer punished), but the damage to the market would be done—and thus to the credibility of the legal system, making it a system failure.

With that context in mind, the approach proposed here supports rather than detracts from the integrity of the legal system, by averting this systemic failure. The legal system already recognises the possibility of such circumstances through, for example, injunctions, which are available to prevent irreparable harm.[484] Unfair terms in mass contracts that pervade markets present such a risk, a conclusion reinforced by the availability of injunctions under some existing unfair terms regulations.[485] The proposals here pursue the logic of prevention further, through measures which engage the potential wrong even earlier, when it can be counselled against or enjoined even before use, rather than in the midst of it already causing irreparable harm.

At a general level, it should be recognised that, as compared to existing unfair terms regulations, which have suffered from problems of underenforcement and questions of

[482] Weinrib (n 447) ch 3.
[483] Braithwaite, 'Essence of Responsive Regulation' (n 473).
[484] See eg *Ebay v MercExchange* 547 US 388 (2006).
[485] ACL (n 154) s 232(1); CRA (n 154) sch 3(3) implementing UCTD (n 13) art 7.

fitness-for-purpose,[486] the effectiveness of the framework described here is itself an important factor furthering the integrity of the legal system. False promises serve only the short-term political functions of appearing to 'do something,' of symbolising public disapproval without significantly changing wrongful behaviour, and of mediating conflict without resolving its cause where that suffices to maintain social order, upon which the established political order relies.[487] They serve these functions not only at the cost of longer-term political disillusionment, but at a cost to the law as the instrument of choice,[488] of discredit and impotence which threaten the Rule of Law. The framework outlined here is designed to actually fulfil unfair terms regulation's promise of cleansing the market of unfair terms.[489]

In sum, the assessment in this section suggests that the regulatory framework proposed, on the whole, supports the integrity of the legal system. It preserves Contract as a sphere of private and personal legal activity, but rectifies systemic flaws that would result from misapplication of typical Private Law responses to the atypical issue of unfair terms in adhesion contracts.

B. Efficiency

As noted in Chapter 3, the criterion of efficiency needs to be considered at multiple levels, because the regulation is meant to govern adhesion contracting, which is itself a mechanism of economic regulation with efficiency as one of its key objectives. The design of regulation thus impacts the underlying practice, and the overall efficiency is what matters.

Starting with the efficiency of regulatory enforcement, the framework recommended here is designed to minimise the burdensome need for surplus external resources, which have

486 §1-I.
487 Baldwin, Scott and Hood (n 444) 14.
488 Michael Trebilcock and others, *The Choice of Governing Instrument* (Economic Council of Canada's Regulatory Reference 1982).
489 Hugh Collins, 'The Revolutionary Trajectory of EU Contract Law towards Post-National Law' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart 2018) 320.

plagued so many regulatory efforts, and invited waves of deregulation. Through strongly-incentivised primary self-regulation by drafters, combined with secondary enforcement by adherents, the scheme avoids relying at any stage principally on the state or another outside body. Here, these serve subsidiary roles, where needed. The proposals here eschew the idea of external regulators being tasked with crafting and updating terms covering every matter in every type of contract, and of comparing those to form terms preferred by drafters.[490] The proposals obviate the need for an external regulator to scrutinise every term in every contract in order to police and prosecute unfairness. Through effective incentivisation of drafters to self-regulate, the proposals avoid in the vast majority of cases the necessity of recourse to a secondary enforcement process in general, and the burden of such process on any external adjudicative forum in particular. By standardisation and collectivisation of claims and remedies, the scheme here maximises adjudicative economy in those cases where secondary enforcement does become necessary. Even the pre-market collaborative enforcement measures (consultations and pre-approval applications) do not consume external regulatory resources, being at the election and expense of drafters, who are in a position to calculate case-by-case, based on the cost of the measures compared with the liability risk, when and how often these mechanisms are an efficient step to include in the compliance process.[491]

Turning to the impact on the practice of adhesion contracting, the framework proposed is designed to leverage the activity that contracting parties are already engaged in, to again avoid creating surplus burdens, this time on the parties themselves. Thus, the secondary enforcement scheme serves to incentivise drafters as the primary enforcers, within the process that they must already engage in of deciding the form terms, to self-regulate by

[490] §I.
[491] This would also avoid the risk of a pre-approval system flooding and breaking down: Scott and Black (n 355) 102.

choosing fair rather than unfair options. As noted in Chapter 3, the drafter to a significant extent constructs the class of future adherents through what it puts (including the subject-matter, and its sphere of distribution) on the market. The drafter's market-research and business experience in a given line of trade well-position it, in making those decisions, to know what terms would be fair to adherents and itself. What is left is a need for the drafter to opt for those terms (as the duty of fairness addresses). Secondary enforcement requires some adherent to review the terms and act in the event of an unfair term. However, this only moves up to an earlier point in time what must occur anyway at some later point[492] if anyone is ever to have known that the contract contained an unfair term (and if no one ever would, in what real sense would it be unfair?). The proposed pre-market measures create an option, not a burden, for drafters. And in some sense, their intent is to replace existing processes of seeking guidance on compliance that would already occur (e.g. first from in-house counsel, and ultimately firm-chosen external experts) with more reliable sources (i.e. expert compliance consultants trained and identified by the regulator, and the adjudicator prescribed by the regulation for applications for pre-approval of terms). It could be that, in some or all of the activities referred to in this paragraph, considering the duties imposed by the regulation will take some additional time, deliberation, or duplication versus in the absence of regulation. However, the marginal burden of this seems likely to be modest, and could be offset by efficiency gains in market transactions themselves—to be considered next.

Addressing now this last element of efficiency, the regulation's effectiveness should itself, as discussed in Chapter 3, result in major efficiency gains by eliminating inefficient rent-seeking behaviour. Currently, drafters exploit the fact that form terms are neither bargained with adherents nor subject to competitive pressure since they are not shopped, to

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[492] Faure and Luth (n 384) 348–349.

make 'overreaching' terms[493] that would never be made in the absence of this 'market failure' (or regulatory failure, as argued in Chapter 4). Further efficiency gains can be expected from the regulation deterring firms from letting their lawyers add numerous superfluous terms not sought by the drafter, which are inefficiently 'overprotective'.[494]

It is true that some terms which are unfair may be efficient (and vice versa). But in that case, as discussed in Chapter 3, the regulation serves to incentivise the drafter to include the unfair but efficient term among the negotiated terms, with compensation through the price term. In this way, the efficient level of compensation can be empirically ascertained, rather than guessed by the drafter (or imagined by some law & economics proponents as having already been factored into the price, despite no incentive to do so for a form term neither bargained nor shopped among competitors).[495] This is vital in order for the result to not merely be a more efficient level of overall societal welfare, but a more efficient distribution of efficiency gains within that collective—an aspect of efficiency that is obviously fundamental to parties' interest in the social and legal institution of Contract.[496]

Specific features of the proposed regulatory framework which further efficiency in contributing to the regulation's overall effectiveness also enhance the efficiency of market transactions in more direct ways. By not constraining a drafter through centrally-preconceived default terms, the drafter's special interest and expertise in the subject-matter covered by the form can be leveraged to craft the most suitable terms possible, including strong consideration of efficiency. The options available to drafters to seek advice and/or a pre-determination of the fairness of terms, allows them to get more reliable guidance on

[493] Llewellyn, 'On Warranty' (n 71) 403.
[494] Rakoff (n 34) 1242.
[495] In other words, only under effective unfair terms regulation, not in its absence, could the claim by Omri Ben-Shahar and others that adherents do not care about unfairness in the form terms, and do not want to pay for fair versions, be accepted: Omri Ben-Shahar, 'Regulation Through Boilerplate: An Apologia' [2013] 112(6) MichLRev 883, 895 ff.
[496] §3-IV-B.

compliance, so that there is less uncertainty and litigation, whose costs may enrich insurers and lawyers, but reduce the efficiency of market transactions (including, ironically, contracts for those very services). The availability of those same measures might also diminish the extent to which drafters aiming to avoid liability might feel a need at times to err on the side of caution in a way that would hurt efficiency.[497] More generally, the preventive focus of the described framework (through strong incentives for *a priori* self-regulation, pre-breach compliance collaboration, and predictability of post-breach liability) does all possible to keep unfair terms from contaminating the market, given how much more complicated and onerous a process it is to cleanse the market once it becomes contaminated.

Combining the various dimensions of efficiency considered in this section, efficiency would seem to be a great strength of the approach proposed, and one which distinguishes it from other common regulatory approaches. Reliance on the parties already familiar with and interested in the transaction, and on processes that these parties are already engaged with, allows the most efficient enforcement of the regulation itself, whilst also preserving and enhancing the efficiency of the underlying market.

C. Significant Collateral Social Effects

The regulatory framework proposed here has a number of potentially significant collateral social effects to consider.

Significant collateral economic benefits other than efficiency may result from preserving private parties' freedom to draft terms, and rejecting a centrally-preconceived classification of contract-types and associated default terms, with parties expected to take their cues and contest any departure from these. First, it escapes the danger of such a

[497] But that prospect is also significantly diminished by a margin of appreciation that drafters should be granted, as discussed in Chapter 7. In general, considerations that would minimise a risk that drafters might regularly make unfair terms accidentally rather than deliberately are dealt with in Chapter 7.

classification relying on a frozen image of the economy, and of any given default term being hard to separate from the larger set, which ensemble represent fixed ideas of the economic arrangements that society should aspire to. In other words, the approach here averts the risk that a fixed or monist image of the economy, used as a baseline for comparison in combating unfair terms, might also impede diversification, sub-specialisation, and above all innovation in economic arrangements. The need for regulation to protect innovation is important,[498] and critical to longer-term economic interests. Flexibility and creativity—including a need for variation and experimentation, on the road to innovation[499]—are among the greatest assets of the market as a mechanism of economic governance. The framework here invites drafters to continue to craft terms that will come to define new markets, and new ways of doing business in old markets. By thus rejecting a regime of default or authorised terms for every type of contract that might be made via adhesion, the approach here avoids the unwanted potential collateral economic effect of stifling the ferment that animates thriving markets.

Scholars, including Margaret Radin in her prominent recent take on boilerplate, have often suggested that Contract is governed mostly through private ordering and party sovereignty in order to give effect to fundamental social values of limited government and decentralised authority.[500] This, it is further argued, is why Contract is so central a social institution, and so powerful an idea—in fact used in conceptualising the foundations of the state and the legitimacy of its claims to authority.[501] To the extent that the system or society repose credence in such arguments, it might be noted that the framework proposed here supports limited government and decentralised authority by empowering the parties to enforce fairness in Contract, rather than inviting the state or industry-groups to take charge.

[498] Cristie Ford, *Innovation and the State: Finance, Regulation, and Justice* (CUP 2017).
[499] Roberto Unger, 'Legal Analysis as Institutional Imagination' [1996] 59(1) MLR 1.
[500] Radin (n 6) ch 3. See also Slawson (n 8); Rakoff (n 34).
[501] Radin, ibid.

Further, although the regulation would 'command', it does not 'control,'[502] as many other (including existing unfair terms) regulations do. Instead, it better respects the value of autonomy, inherent in the voluntariness of Contract, by letting party-initiative drive compliance, and confining the law's role to correcting incentives distorted by the regulatory failure to date (including courts' treatment of form terms as validly agreed, and the systemic issues discussed in §A).

Are the incentive-corrections so great that firms will decide not to draft, and if they cannot contract on their terms, then as law & economists sometimes suggest, will leave the market altogether? Whilst a poor calibration of incentives would likely cause adverse collateral economic effects, the framework proposed here would seem to calibrate them appropriately; and in any case the spectre of causing business to grind to a halt seems over the top.[503] Under the proposal, liability would normally take the form of restitution—thus precisely tailored to the drafter's gain—not less, creating an incentive for unfair terms, but also not more, creating a disproportionate risk that would warrant excessive caution by drafters or invite mere speculative enforcement actions by adherents. Where the loss to adherents is greater, the drafter would be liable for more than it gained. However, its permission to draft was premised on it being in the best position to anticipate and avoid drafting terms that would have that result. Causing loss to adherents for which it is liable and which exceeds its own gain is business incompetence, so that the additional liability could be viewed as resulting from its own negligence rather than from a regulatory miscalibration of remedies. In any case, the arrangement by which the firm has the unilateral right to draft but also the unilateral responsibility to do so fairly makes it the right choice of who should bear the loss in that case.

[502] Baldwin, Scott and Hood (n 444) 24.
[503] Collins, *Regulating Contracts* (n 24) 275–279.

Still finer-tuning of incentives was provided for via the suggestion that the formula for liability be adjusted in accordance with possible findings from behavioural studies that a somewhat lesser or greater share of the gain from the unfair term would induce substantially all drafters to opt for fair terms. Finally, considering situations where the drafter might be less than certain what terms would be fair, measures were proposed which permit them to obtain advice and a pre-determination of the status of terms before placing them on the market and incurring any liability risk whatsoever. Making these measures at the drafter's option and expense correlates with the drafter being best-placed to calculate when they are warranted, and to bear the loss of getting it wrong. That drafters would, despite all this, leave the market, because of the possibility that sometimes liability could exceed gain, seems unrealistic: They already face such risks in that, for instance, sometimes one cannot avoid breaching a contract. And among such cases, sometimes the innocent party's loss will be greater than what the breaching party gained—indeed, potentially far greater. Firms, in fact, operate continuously in a sea of potential liabilities—not just contractual liability, but tort liability (including potential vicarious liability for unauthorised acts), competition and trade practice liability, public law liabilities such as discrimination, criminal liability, and so on. And yet firms remain in the market, obtaining insurance where it is worthwhile, based on how capable they are of controlling significant risks.

A different possibility is that the remedial recommendations of the regulatory framework proposed here, if successful, may provide a model of how adjustments could be made to Private Law's governance of social issues more broadly, in order to address systemic flaws in some of its standard approaches. For example, the characteristics of unfair terms in adhesion contracts that make it the type of wrong that calls for collective rather than individual proceedings and remedies may point to other social problems in disparate areas which have similar features and would be better handled collectively. Parallels leading to useful collateral applications might also be derived from characteristics that ground the need for a preventive rather than corrective approach to unfair terms, and for concentrating graduated enforcement measures prior to a wrong's commission, with more stern measures unavoidable afterwards.

Another possibility, but one which would require much further study beyond regulation of unfair terms in adhesion contracts, is that more effective compliance with Private Law norms might be achieved through more frequent reliance on restitutionary, rather than compensatory, remedies, because of the ability of the former to directly address and alter incentives for wrongdoing.[504] Given the crisis of civil justice in many jurisdictions,[505] the model of incentivised self-regulation suggested here might also be valuable in greatly diminishing the burden of litigation and adjudication. This could improve access to justice whilst simultaneously raising not lowering levels of legal compliance, unlike for instance the drafter-controlled arbitration of which Margaret Radin complains.[506] Looking at the type of remedy proposed here from the opposite direction, it might also be the case that a number of social problems currently governed by Criminal Law could be more effectively and efficiently regulated by incentivised private self-regulation.[507] To be sure, this might be inappropriate or at least inadequate for crimes which are particularly morally reprehensible. But for less serious crimes, where the Criminal Law is felt to be a 'crude' instrument, and is applied inconsistently due to that concern, the model here may provide a useful alternative. It might also better serve the interests of victims of crime, and ameliorate the significant adverse social effects of crime on victims, violators, the community, and the countless other social problems that need more public resources.

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[504] This would at least seem to be possible where the wrongs are closer to intentional than accidental.
[505] See eg Adrian Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999).
[506] Discussed in §6-I-A.
[507] The SEC for instance, to a significant extent does this in antitrust and securities law: see Peikin (n 457).

Chapter 6. The Machinery of Regulatory Enforcement: Which Institutions and Procedures, with What Roles?

Introduction

Having considered key aspects of a regulatory framework that, combined, show how a duty on adhesion contract drafters to make fair terms could function in practice, the question to be addressed in this chapter is what legal machinery would enable implementation of this framework. This question can be broken down into two separate but related sub-questions. The first concerns what type of institution should be empowered with implementing the regulation. The second focuses on what type of procedure should guide the legal actions proposed in Chapter 5 (by adherents for breach of the duty of fairness, and by drafters for pre-approval of terms) under the regulation.

I. Institution

A. To Whom Should the Institution be Primarily Responsible?

In addressing what type of institution should be empowered with enforcing the regulation, perhaps the first question to be asked is who the institution should be primarily responsible to.

One option, consistent with party sovereignty, would be to have an institution chosen by and primarily responsible to the parties, such as a private arbitral tribunal. Alternatively, the institution could be designated by and primarily responsible to the state, as a matter of public interest.

The option of an institution primarily responsible to the parties might give further effect to the contractual principle of party sovereignty, by extending it to the means of resolving disputes concerning personal obligations that, as discussed earlier, were themselves products of party sovereignty.[508] However, despite what that may contribute to the integrity of the legal system, it is of doubtful assistance to the effectiveness of unfair terms regulation. In adhesion contracting, the asymmetric engagement of the parties could affect the choice of institution, biasing the fairness assessment.[509] This risk is arguably heightened by the fact that the dispute already stems from an allegation that the drafter abused its specially powerful position within the adhesion relation in an unfair way. Margaret Radin cites, for instance, (non-impartial) arbitration clauses as a prominent *example* of unfair terms—thus not a suitable option for *assessing* whether the terms are fair.[510] Moreover, if different contracting pairs choose different institutions, this would not serve the need for an integral system that can coordinate decision-making among cases in order for the regulation to effectively guide behaviour.[511] Although parties to negotiated contracts are nevertheless permitted to contract out of regular litigation in the public justice system, to allow this in assessing the fairness of standard contracts used on a mass scale would invite frequent direct contradictions of result or reasons, and impede the emergence of a jurisprudence on unfair terms.[512]

By contrast, an institution designated by and primarily responsible to the state could be expected to abide by such norms as impartiality, procedural fairness, and of decisions guided by the law rather than by parties' wishes or expectations in any given case. All of this would enhance the chances of decisions that give suitable effect to the regulation's duty of fairness. Further, a state institution would internally coordinate decisions from case-to-case, in an integral system, thus fostering consistency in the duty's application, permitting more

[508] §3-I-B-ii.
[509] Radin (n 6) 4, 134.
[510] ibid xiii–xiv, 116.
[511] ibid 134–135.
[512] ibid.

effective guidance of subjects' behaviour.[513] This is particularly important for the regulation here, given its primary reliance on self-regulation by drafters.

Beyond these immediate considerations, it is important to note that whilst the substantive details of adhesion contract terms are, as discussed in Chapter 3, matters that primarily affect personal interests rather than the public interest, the opposite is the case for the question of whether the terms are unfair in breach of a duty imposed by law. Moreover, unfairness in a term standardised for use with many adherents embodies a mass wrong. The harm that it causes extends well beyond even that, reaching a systemic level: For instance, economically, the presence of an unfair term contaminates the market. Because the term profits the drafting firm, it results in competitive pressure on rival firms to also resort to unfair terms. Meanwhile, for the legal system, the constant presence of unfair terms *en masse* risks 'normalising' unfairness, leading to successive erosion of standards of fairness—as the history of adhesion contracts shows.[514] The goal of the regulation was therefore not just to correct unfairness in a complainant's contract, but to rid the market as a whole of unfair terms.[515] Thus, once the spectre is raised of an unfair term being on the market, in breach of the duty, the effectiveness of the regulation demands that the market be cleansed of all instances of that unfair term, regardless of the demands of particular parties. And it demands that a clear signal be sent to all form drafters, who the regulation relies on to self-regulate. Hence, an institution responsible to the state, devoted to serving the public interest in that regulatory objective is most apt.[516]

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[513] ibid.
[514] ibid 85.
[515] §1-I.
[516] Cristie Ford, 'Remedies in Administrative Law: A Roadmap to a Parallel Legal Universe' in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context* (3rd edn, Emond 2018) 49.

As well, a state institution can be given more powers than a private body. This is important because a more comprehensive and flexible collection of powers best-positions an institution to ensure the efficacy of the regulation.

B. Should the Institution be of General Jurisdiction or Specialised?

In the last chapter, it was proposed that the regulation should encompass secondary enforcement proceedings brought by adherents against drafters for breach of the duty of fairness, as well as optional applications, as part of drafters' role of primary self-regulation, for pre-approval of terms (which applications could be resisted by interested parties). Implementation of these mechanisms requires, as part of the regulation's institutional planning, an adjudicative body suited to oversee and decide the outcome of those proceedings. But what form should such an adjudicative body take?

One option would be an institution of general jurisdiction, such as an ordinary court. Alternatively, the institution could have a specialised jurisdiction in the questions which arise under the regulation, as for example, would an Immigration Board[517] or a Workman's Compensation tribunal.[518]

In the case of unfair terms regulation, it is suggested here that a specialised body would be preferable: The assessments to be made would benefit from particularised expertise.[519] And these assessments can be made without having to inseparably decide many related issues spanning a broad field or wide range of different areas.[520]

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[517] Immigration and Refugee Board of Canada, 'About the Board' (16 February 2018) <https://irb-cisr.gc.ca:443/en/board/Pages/index.aspx> accessed 16 September 2019.
[518] West Virginia Offices of the Insurance Commissioner, 'Office of Judges' <www.wvinsurance.gov/ooj> accessed 16 September 2019 (WVWC).
[519] Ford, 'Administrative Universe' (n 516) 49. Scott and Black (n 355) 110.
[520] Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context* (3rd edn, Emond 2018) 536.

In proceedings under the regulation here, the question is whether a standard form term is unfair. Particularised expertise would help in answering that question. For one thing, the fairness of terms must be measured considering their impact, and thus would benefit from expertise in that.[521] This should include expertise with what makes unfair the term-types already commonly recognised as always or often unfair, since many of these fall into patterns of what specifically is unfair about them, as the table of terms listed by the CRA and ACL in §2-III showed.[522] For example, several of the listed term-types are seen as unfair in part because of how they reverse or distort presumptively fair background rules of other fields such as Tort, Civil Procedure, Competition and Consumer Law, or Employment Law.[523] Expertise with the background and operation of term-types would also assist in determining whether a term has a legitimate business purpose, relevant to the transaction, as part of using a proportionality analysis to assess its fairness, as suggested and detailed in the next chapter. Second, beyond familiarity with the terms, masterful skills of *interpretation* of standard form contract terms would help in expertly ascertaining the purpose of a term, as well as its meaning, in assessing whether a term might be disproportionate because it is unnecessarily overreaching.[524] Third, and relatedly, a specialised expertise in adhesion contract *drafting* would be important in enabling the adjudicative body to appreciate, once more in assessing the proportionality of a term as a measure of its fairness, what alternatives might be available to the term as drafted, that could achieve the term's purpose at more or less detriment to the interests of adherents. Moreover, a specialised adjudicative body would see its expertise in making fairness assessments continuously enhanced by dealing over and over with such

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[521] §3-I-C-ii-b.
[522] See also Weatherill, *EU Consumer Law* (n 378) 150.
[523] Text to n 161.
[524] See eg text to n 182.

cases, and only such cases, as a focused area, and from all such cases being adjudicated in that specific institution so as to maximise information-sharing and coordination.[525]

The issue of whether a form term in an adhesion contract is unfair is also one which can be adjudicated in relative isolation from broader issues.[526] The adjudicative body would certainly need *familiarity* with broader and related areas of law, as mentioned above, and elaborated in §C below. However, the circumstances would be relatively rare that a case concerning whether a term is unfair could not be resolved without simultaneously resolving other or broader issues of potential dispute. Indeed, as discussed in Chapter 4, the scope of the regulation excludes terms whose subjection to the regulation would conflict with other law or frustrate a core purpose of specialised field regulation. Within Contract Law, there is no obvious reason why issues that fall outside the areas of expertise which it was suggested that the adjudicative body under the regulation should have, would need to be conjoined with deciding terms' fairness: whether a term is fair or not would seem capable of being answered independently of many Contract Law controversies such as the individual circumstances of a contract's formation, whether the contract was breached, whether a breaching party has a defence, or remedies for breach. Outside of Contract, this would even more often be true; but where another issue truly cannot be resolved separately from the fairness of the term, by definition it should fall among those cases that lie outside the scope of unfair terms regulation, for the reasons mentioned above.[527] For example, suppose a term purported to define a standard of care for product defects, in conflict with strict liability provided under product liability legislation: the unfair terms regulation would not apply.

[525] Flood and Sossin (n 519) 311.
[526] ibid 536.
[527] Detailed in §4-II-A-vi.

For these reasons, regulation is most likely to be effective if the fairness of terms is decided by an adjudicate body having specialised jurisdiction in making such assessments.

This would also allow for the possibility of having specialised procedures for assessing fairness under the regulation, tailored to specific procedural needs of an effective regulation, as discussed in §II below.

Although the CRA, in implementing the UCTD in the UK, relies on ordinary courts, there is precedent for the choice of a specialised body in other jurisdictions. As an example, Israel's Standard Contracts Law relies on a specialised court (the Israeli Standard Contracts Tribunal), whose mandate is specifically focused on assessing the fairness of standard form contract terms.[528]

C. What Types of Expertise Should the Institution Incorporate?

A question which follows is what types of expertise the adjudicative body should incorporate.

One option would be a bench composed entirely of legal experts, as in a court. Alternatively, it could comprise persons without legal training who are experts rather in underlying substantive issues (here being the subject-matter and social impact of the terms), as is the case with, for example, the Canadian Radio-television and Telecommunications Commission.[529] A third option would be a bench comprising a mixture of legal experts and experts in the underlying subject-matter and social impact of the terms. An example would be a Competition Tribunal.[530]

There seem to be several reasons why the efficacy of the regulation would benefit from the adjudicative body's inclusion of legal expertise. Given that the substance of the

[528] Israel SCL (n 474) ch 2.
[529] 'Canadian Radio-Television and Telecommunications Commission: About Us' (12 December 2008) <https://crtc.gc.ca/eng/acrtc/org.htm> accessed 16 September 2019 (CRTC).
[530] Competition Tribunal Act RSC 1985, c19 (2nd Supp) (Canada) s 3(2).

disputes to be decided is a question of fairness, it would seem particularly important to ensure a fair process in arriving at those decisions—one of the core rationales for dispute resolution by those steeped in the values of 'legality'.[531] There is also a need for decision-making and associated reasons to be informed by their aptness to guide subjects' behaviour—all the more so here given the regulation's primary reliance on self-regulation by drafters and secondary reliance on enforcement action initiated by adherents. Being a central legal function, guidance of subjects' behaviour comprises another key rationale for including legal experts on the bench of the regulatory institution.[532] Assessing the fairness of terms would also be aided by certain more specific legal skills, such as interpretation and drafting, for the reasons mentioned in the prior section, as well as weighing the proportionality of incommensurable interests, as the overall means for deciding fairness under the regulation, as noted. Since contract terms are legal instruments, legal specialty would also be important for the purpose of assuring expert understanding of the legal implications of the terms at issue. Moreover, since many of the term-types commonly viewed as unfair operate, as mentioned, by reversing or distorting presumptively fair background rules of other fields of law (Tort, Civil Procedure, Competition and Consumer Law, Employment Law, etc.), legal expertise would be vital in appreciating how a given term relates to and affects background law.[533] Indeed, sufficient legal expertise would be needed to ascertain those cases in which determining a term's fairness under the unfair terms regulation would conflict with or frustrate a core purpose of more specialised law (e.g., sectoral legislation), in which case the unfair terms regulation's institution should disclaim jurisdiction.[534] Legal expertise in appreciating areas of Contract Law related to contractual fairness would also be helpful, in being able to draw

[531] Fuller, *Morality of Law* (n 401).
[532] ibid; HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 89; OW Holmes, 'Path of the Law' (1897) 10(8) HarvLRev 457.
[533] Scott and Black (n 355) 98.
[534] §4-II-A-vi.

on these in fairness decisions and to assure clear overall guidance to legal subjects. Examples of topics in Contract Law which involve (at some level, and in some way) considerations of substantive fairness include, among others, penalty clauses, illegality, and unconscionability. Being aware of precedents of cases resolved under such Private Law doctrines, and which involved terms potentially similar to a term challenged as unfair under the regulation here, would also be useful.

For all the foregoing reasons, it seems important that the regulatory institution be constituted so as to include legal expertise. However, the legal expertise that is incorporated should not be too specialised itself in relation to any single specific area of law, such as contract drafting, or even Contract Law as a whole, given the way contracts and their potentially unfair terms reach into so many other fields of law, as mentioned, and can only be understood in light of how they affect the pre-contractual background scheme of legal 'regulation' operative in those areas.

Meanwhile, it would seem beneficial to have the body tasked with deciding the fairness of terms also be able to incorporate other (non-legal) types of expertise as well.[535] An expert appreciation of the general context of a term—not just the rest of the contract, but the subject-matter it concerns, the transaction-type, the industry, etc.—is crucial. It allows the term to be assessed as it functions in real life, considering its impact on parties like those involved in the dispute, rather than evaluated as a mere abstract proposition.[536] Slawson provides another example which underlines the importance of an expert contextual appreciation:

> One apparently harsh clause could overbalance a dozen seemingly generous clauses…if the evidence showed that the parties knew or had reason to know

[535] Ford, 'Administrative Universe' (n 516) 50.
[536] ibid.

> that the contingency covered by the harsh clause was more likely to occur than were all the contingencies covered by the generous clauses together.[537]

Society's continued commitment to Contract as private ordering in the adhesion era, and indeed the unprecedented reach of Contract under that model, with its asymmetric division of labour which gives wide berth to the contextual expertise possessed by the drafting firm, reflects the value of that contextual expertise.[538] Regulation's role should not be to undermine that, but to 'perfect' it, through contextually-sensitive scrutiny for cases where self-interest may have biased the drafter's choice of term in an unfair way.

As will be detailed later in discussing the procedure that would be most effective in implementing the regulation, it is neither necessary nor desirable that this contextual appreciation go further, and concern itself with non-generalisable peculiarities of the parties to the dispute (even if those affect a term's impact on them), or the wider adjudicative fact-context (i.e. facts outside the practice of adhesion which might be alleged to bear on the parties' intentions). Such considerations lie outside the regulation's public interest rationale in addressing unfair terms as a collective and systemic problem, not a matter of correcting particularised injustice to individual parties, as explained in §A. These suggestions are also consistent with the approach of Israeli law.[539]

Focusing on the general rather than the specific context, and on the market rather than the adjudicative-fact context, makes it possible to incorporate experts on these matters into the bench. This is preferable to relying on party expert witnesses, who besides being too particularised in their focus and concerns, also carry problems of bias and expense that would threaten the regulation's effectiveness.[540]

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537 Slawson (n 8) 564.
538 §3-I-C-ii-b.
539 Sinai Deutch, 'Controlling Standard Contracts — The Israeli Version' (1985) 30(3) McGill LJ 458, 470.
540 Scott and Black (n 355) 110.

The modern economy's specialisation, discussed in §2-I, means that standard form terms deal with an extraordinarily wide range of subjects, over a wide range of transaction-types, industries, and markets. How, then, could the regulatory institution incorporate expertise over such a wide range of contexts? The contextual experts would be *ad hoc* members of the bench, varying case-by-case, in conjunction with varying contexts. However, the composition of the bench would remain the same in all cases: a combination of legal experts and legally-untrained experts in the underlying social context, as with Canada's Competition Tribunal.[541] Another example, dealing with the issue of unfair terms, is Israel's Standard Contracts Tribunal.[542] It has a mixed bench, comprising in each case a member of the Tribunal who is a legal expert, as chair, and two other panellists, at least one of whose expertise will not be in law but in the market context.[543] Where the legal significance of a case requires, the President of the Tribunal may appoint additional legal experts to an adjudicative panel.[544]

The regulation here would be well-served by a similar arrangement. Besides a legal expert as chair, a panel should have one contextual expert whose expertise is in the relevant industry or market sector,[545] and one who is an expert in the wider social context, such as an expert in regulatory impact assessment.[546]

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[541] Competition Tribunal Act (n 530) s 3(2).
[542] Israel SCL (n 474) s 7(b).
[543] ibid. There is always one consumer group representative: s 7(b).
[544] ibid 7(a).
[545] In industries which are inherently polarised, there should be two industry experts, one representing each side: Ford, 'Administrative Universe' (n 516) 50. For example, for employment contracts, there would be both an employment-side industry expert and a management-side industry expert, as is the case in proceedings before a labour relations board: see eg Labour Relations Act, 1995, SO 1995, c 1, sch A (Ontario) s 110(2).
[546] The inclusion of a member with special expertise in this area could respond to several of the criticisms heard by the author at the Second Expert Round Table on 'Impact Assessments and EU Contract Law' (Oxford University, 23–24 November 2017), alluded to in Weatherill and others (n 10).

D. What Should be the Overall Structure of the Institution?

Beyond what features would be desirable in the body which adjudicates complaints for breach of the duty of fairness and applications for pre-approval of terms, a broader query in designing the machinery of regulatory enforcement is what overall institutional structure would best implement the regulation?

The first question to be asked is whether constructing an adjudicative body is a sufficient institutional plan for the regulation, or whether the regulation also calls for constituting a body which could perform other non-adjudicative functions that would contribute to the effectiveness of the regulation? If the answer is the latter, the second question is what should be the relationship between the two bodies?

A core part of the regulatory strategy recommended in Chapter 5 was reliance on private action: primary self-regulation by drafters, and secondary enforcement action brought by adherents. Key to supporting these activities is a suitable body for adjudicating actions for pre-approval and breach, as discussed in the preceding sections. That, however, is only one part of the picture. Other sorts of activities are also needed in order for the regulation to be effective. For example, subjects must be informed of the regulation, the incentives it contemplates for them, and the conduct expected of them. This necessitates effective means of publishing and disseminating such information to them (and updating and redistributing that information as the regulation evolves). Also, drafters were to have an option of seeking pre-market pay-per-service compliance consultations with private experts licensed by the regulator. Overseeing this program presents another required task. Chapter 5 also suggested that the state have a subsidiary power to initiate proceedings for breach of the duty of fairness if no adherent or interested group steps forward, and have subsidiary standing to resist drafter applications for pre-approval of terms, again where necessary. To protect the independence of the adjudicative body, a separate state body should be the one to contest these actions.[547]

Also from the perspective of the regulation's public interest foundation, discussed in §A, a more general commitment to assuring the regulation's effectiveness is called for.[548] This would encompass regulatory provision for monitoring activities such as research, stakeholder consultations, tracking of results, statistical analysis, etc. Compliance with decisions of the adjudicative body must be monitored as well, leveraging means such as investigation, orders of disclosure, and coercive enforcement measures where needed. In response to insight gleaned from reflexive inputs, the regulation and its implementation should also be revised. And in order to assure public accountability, there must be reporting duties to the legislature or executive branch from which derives the regulation's delegated power.[549]

In short, a full picture of successful regulation-in-action is one with scope for a wide range of regulatory activity outside of adjudication.[550] To fulfil the various functions that flow from this full picture of effective implementation, enforcement, and revision of the regulation, an 'administrative' body would be needed—beyond the adjudicative body discussed earlier, and having its own expertise and resources.[551] An environmental protection agency may provide an illustration of such an administrative regulatory institution.[552] Many existing unfair terms regulations include provision for regulatory administrative authorities, for instance under the UCTD in several European jurisdictions.[553]

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547 Flood and Sossin (n 519) 254.
548 Ford, 'Administrative Universe' (n 516) 50.
549 Flood and Sossin (n 519) 331.
550 Ford, 'Administrative Universe' (n 516) 48.
551 ibid 49.
552 United States Environmental Protection Agency <www.epa.gov/> accessed 17 September 2019.
553 Phillip Hellwege, 'Standard Contract Terms' in Jurgen Basedow, Klaus Hopt and Reinhard Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (OUP 2012) 1588, 1591.

The further question is: what should be the relationship of this administrative body to the adjudicative body?

In order to maintain the adjudicative body's independence, and its impartiality given the administrative body's active role in enforcement as described above, the two bodies must be separate.[554] Separation might also help firewall the adjudicative body, in the event of regulatory capture[555] (to whatever degree) of the administrative body, until such time as corruption of the latter can be cleaned up.[556]

On the other hand, their common authorisation, jurisdiction, and subject-matter specialisation suggest likely benefits to regulatory effectiveness from their bureaucratic coordination.[557] Administrative activities such as publicising and explaining the adjudicative body's judgments, monitoring and enforcing compliance with its decisions, intervening or acting subsidiarily in cases under adjudication, and researching new issues expected to affect adjudication in the future, are all examples of regulatory tasks which would be aided by bureaucratic integration of the two bodies. And conversely, the adjudicative body would benefit from the administrative body being highly attuned to its needs, when performing activities like publicity of decisions, research, intervention, and revision of the regulation—perhaps especially pertaining to matters of procedure before and by the adjudicative body. Examples of institutions with a hybrid structure include a workman's compensation scheme or human rights commission.[558]

As a whole then, the regulatory institution should be structured as a hybrid body, with an integrated bureaucratic organisation, but independent funding and control, and

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[554] Flood and Sossin (n 519) 295.
[555] Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2012) 25.
[556] Moore, 'The Past, Present and Future of Law Reform in Canada' (n 412) 257.
[557] Ford, 'Administrative Universe' (n 516) 48.
[558] WVWC (n 518); Canadian Human Rights Commission, 'About the Process' <www.chrc-ccdp.gc.ca/eng/content/about-process> accessed 17 September 2019.

autonomous functions for its administrative and adjudicative branches. Overall, the institution's mandate would encompass responsibility for the fulfilment of nearly all functions relevant to effective implementation and enforcement of the regulation.

II. Procedure

A. Who Should Drive Procedure Before the Regulatory Tribunal?

Turning to the procedural framework for action before the regulatory tribunal, another important regulatory design question is who should be relied on to direct the proceedings.

One option would be for this to be mostly the responsibility of the parties, as is typical in litigation before common law courts. Another option would be for procedure to be largely driven by the regulatory institution, closer to the human rights commission example given, or perhaps to the inquisitorial model of civilian courts. A third possibility, following a 'network governance' approach, would be for different aspects to be the responsibility of different actors within the 'regulatory network.'[559]

Given the overriding public interest in proceedings under the regulation, as discussed in §A, reliance on an adversary model of procedure, which leaves control of proceedings in the parties' hands, seems undesirable.[560] When the parties' interests do not correspond with the public interest, their choices concerning the course of proceedings would be distorted in ways that reflect those divergences between their personal interests and the public interest. This could affect, for instance, the evidentiary record, the remedy sought, or whether a case should be settled.

On the other hand, Chapter 5 rejected the prospect of relying on the regulator to bear more than a subsidiary responsibility for initiating proceedings. Once an action has been

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[559] Candace Jones, William Hesterly and Stephen Borgatti, 'A General Theory of Network Governance: Exchange Conditions and Social Mechanisms' (1997) 22(4) The Academy of Management Review 911.
[560] Ford, 'Administrative Universe' (n 516) 50.

commenced, the regulator could take a more active role in directing proceedings (modelled, say, on the human rights example given above). However, there would remain a variety of procedural responsibilities that could be more effectively discharged by distributing them among the various actors contemplated by the regulation, according to their various roles, interests, and expertise.[561] The parties, for instance, would be in a better position than the regulator to carry out tasks like identifying the class of adherents and ascertaining what a drafter gained from an unfair term, for which it might be liable to make restitution.

For that reason, a network approach to procedure would seem most effective in implementing the regulation here.[562] As discussed earlier, the contracting parties would be primarily relied on to initiate compliance proceedings, because aligning these responsibilities with those who hold interests in them provides the best assurance of the steps being consistently taken.[563] For drafters, this means the responsibility to pursue applications for pre-approval of terms in cases where they need more certainty and calculate the proceedings as worth the cost. For adherents, it means the responsibility to instigate complaints for breach of the duty of fairness. Once proceedings are underway, the parties should be permitted to explain why they believe the term is fair or unfair, with reference to the general context (as mentioned). This context is, after all, a matter on which the drafter is expected to have useful expertise, and this is also true of the plaintiff's class action lawyer whose business it becomes, in a sense, when she immerses herself in the case and invests a significant chunk of her time into it. Drafters should also be permitted to seek to join as co-defendants any competitors employing similar terms. This would facilitate the regulatory goal of market-cleansing, and avoid skewing the market by enforcing the duty only against a small and

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[561] Christine Parker and others (eds), *Regulating Law* (OUP 2004) 277.
[562] ibid 273–279; Jones, Hesterly and Borgatti (n 559).
[563] §5-IV.

unlucky arbitrary subset of parties who are all engaged in essentially the same conduct.[564] Plaintiff lawyers have an incentive to procure from the drafter the class of adherents along with what the drafter projected it would gain from the term alleged to be unfair, and to aggregate those claims. They are therefore best-placed (assuming regulatory authorisation to compel those disclosures by the drafter) to fulfil these procedural tasks.

Beyond these responsibilities of the parties and their legal representatives, the regulator would adopt a more proactive stance in directing proceedings than in customary adversary procedure (as in the human rights example, and reflected to some degree in the recent more general trend towards more active 'case management' within adversary litigation itself[565]). To begin with, the duties of the administrative arm of the regulator are relevant to proceedings in several ways. Perhaps most obviously, these include its subsidiary responsibility to initiate actions for breach and resist drafter applications for pre-approval, where it has reason to believe a form contains an unfair term, and no adherent or related interest-group steps forward. Based on its market-research, the administrative branch should also be permitted to petition the regulatory tribunal to add or remove parties to an existing case, in support of the regulatory goal of market-cleansing as opposed to mere selective enforcement.[566] Meanwhile, the regulatory tribunal would, of course, bear the fundamental responsibility of deciding cases and providing reasons. However, it should also have ancillary procedural powers, such as the ability to order production of information, to order a market investigation by the administrative branch in support of a case's adjudication, and to order

[564] The UCTD similarly allows remedies against joint defendants from the same sector using the same terms: (n 13) art 7(3).
[565] Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996) s II.
[566] cf UCTD (n 13) art 7(3).

special remedies (apart from those suggested in Chapter 5) where needed in order to assure the regulation's efficacy.[567]

In these ways and for these reasons, a sharing of procedural responsibilities among the various actors making up the regulatory 'network' (e.g., drafters, adherents and their legal representatives, the administrative branch of the regulator, and the regulatory tribunal), consistent with their roles as envisioned by the regulation, would seem the most effective procedural scheme.[568]

B. How Elaborate Should be the Procedure?

Also important, in deciding the procedural machinery for implementing the regulation, is how elaborate the procedural regime should be.

As an initial question, it might be asked whether the general type of procedure should be the complex and formal procedure of ordinary court litigation,[569] or the streamlined and flexible procedural approach often used, for example, by administrative tribunals.[570]

There would seem no evident need for the onerous type of procedure used for ordinary court litigation. As discussed in the preceding section, once proceedings have been instigated by the parties, thereafter they would not be primarily party-driven, necessitating a complex and formal sequence of procedural 'fencing.' Control of proceedings would be in the hands of the tribunal, which could more effectively get to where it feels it needs to be in order to suitably decide a case through a streamlined and flexible procedure. And meanwhile, this would prevent parties from exploiting procedure to abuse one another or subvert the course of justice. Since the duty of fairness represents an obligation of results and not of means, the terms themselves would be the crucial factor in a case, and readily accessible by

[567] Ford, 'Administrative Universe' (n 516) 49.
[568] Text to n 561.
[569] Scott and Black (n 355) 108.
[570] Flood and Sossin (n 519) 27.

all, including the tribunal, whose mixed bench also directly incorporates the legal and contextual expertise needed to appreciate the terms' operation and impact. Hence, there would be no need for processes of party discovery, interrogatories, depositions, party requests, etc. All of this suggests that a streamlined procedure would be most suitable.

Given the public interest in resolving questions about the status of terms which, being in standardised contracts, affect the whole market and not just the individual parties who commenced an action, the tribunal would also preclude party settlements, absent special circumstances. The complexities precipitated by the possibility (indeed encouragement) of settlements in ordinary court litigation—chaotic and protracted series of negotiations, posturing, quests for leverage, conciliation, mediation, further negotiations, etc.—would thereby also be avoided in most cases. It may be wondered whether this might leave the tribunal unduly congested with proceedings, as many ordinary courts are—one of the reasons they may employ rules which encourage settlements. The context here is different in that a case would consist mainly of review of the term by an expert panel. Accordingly, adjudication would not itself be such a burden as to cause a need for diversionary measures, which do not necessarily alleviate a dysfunctional-level burden, but rather thrust it out of public view, back into private disputing. And that is especially important in this context: The regulation's preventive goal of keeping the market clear of unfair terms means that eliminating disputes is not helpful without the unfair terms that are the cause of the disputes also being eliminated. The logic of the scheme proposed here, as discussed in Chapter 5, relied on drafters effectively self-regulating, which in turn dictated that no post-breach means of evading secondary enforcement liability be permitted, as this could cloud the associated self-regulatory incentives.

The preceding arrangements avoid placing an onerous procedural burden on any of the actors involved in the regulatory network. This enables the regulation's effectiveness to be fostered through expeditious resolution of proceedings, needed in order to keep pace with the market, and expedient resolution,[571] needed in order to ensure that proceedings are proportionate to what is at stake[572] and do not entail costs[573] that would in themselves distort party-incentives from those which the substance of the regulation relies on (primarily and secondarily) to secure compliance, as discussed in Chapter 5.

Given these guidelines, it might be wondered how procedure under the regulation would approximately take shape? A sketch of proceedings may be provided: The parties, besides being responsible for instigating proceedings, could make short written submissions to the tribunal regarding the merits, the proper context to use (relevant market, etc.) in contextually assessing terms' fairness, and the appropriate remedy (e.g. the scope of injunction, and in actions for breach, quantum of liability). But as mentioned, parties would not engage in discovery, interrogatories, depositions, requests etc. Meanwhile, the tribunal directly incorporates expertise through its composition. However, where it needs additional information to assess the terms in proper context (or to calculate liability in actions for breach), the tribunal (as discussed in the prior section) is empowered to pursue this information itself through procedural mechanisms left flexible for that purpose. Otherwise, in cases falling comfortably within the knowledge and expertise of the tribunal, the decision would principally just be a matter of reviewing the contract's terms. Apart from cases of exceptional complexity or significance of some kind (e.g. novel or elusive niche markets, massive markets, terms in extremely wide-use, etc.), which call for additional procedural safeguards to ensure the tribunal arrives at the correct result, the usual case would therefore not entail a live/oral hearing: the tribunal would decide based on the written record.

[571] ibid 192.
[572] Woolf (n 565) s I.8-I.9. Weatherill, *EU Consumer Law* (n 378) ch 10.
[573] Flood and Sossin (n 519) 192.

The tribunal's reasons for judgment would also be quite short, and it would be left to the administrative arm of the regulator, as part of its informational responsibilities (mentioned earlier, and elaborated in Chapter 7), to provide regulatory subjects fuller information as needed in order to guide their behaviour to comply with the regulation.

The tribunal would also enjoy general discretion to adapt its procedure, when cases with special features so require.[574] This extra layer of flexibility would further regulatory efficacy by helping assure that the procedure remains responsive to the market and proportional to what is at stake in each case, so as not to distort the incentives that the substance of the regulation relies on to procure compliance.

C. What Should be the Evidential Framework for Regulatory Proceedings?

Related to the issue of what type of procedure should govern actions under the regulation is the question of the evidential framework that should apply in those proceedings.

One option would be the rigorous and exhaustive system used in ordinary court litigation. Alternatively, proceedings could be governed by the more relaxed and restrained evidentiary system often used in administrative tribunals.[575]

The exhaustive approach seems unsuited to proceedings under the regulation here.[576] As referenced in §I-C, the background for assessing terms' fairness should be restricted to the general context (e.g., transaction-type, industry, market, type of business, etc.) Otherwise, taking account of non-generalisable peculiarities of the parties that affect the terms' particular impact on them would conflict with the parties' intent to contract on the basis of standardised

[574] ibid 27.
[575] ibid 188.
[576] Scott and Black (n 355) 108–109.

terms, reflected in the consent to adhere.[577] Likewise, the sequence of events leading up to conclusion of what is, ultimately, just a single instance of a standard contract used *en masse*, is immaterial to the fairness of the terms as such, and should thus be restrained from admissibility.[578] In ordinary litigation's 'search for the truth' of what transpired in bringing about a dispute between two parties, 'adjudicative' facts like these are often of crucial importance. But in adhesion contracting, form terms are pre-formulated prior to any discussion with or even self-identification by particular adherents, and are not negotiated. Preoccupation with their communications would not aid, but distort, appreciation of adhesion terms' fairness, and defeat the regulation's public interest objective of confronting unfair terms as a collective and systemic, not individualised and particularised, problem.

Nor would what efforts the drafter made to make the terms fair be proper evidence, since the duty of fairness is one of results, not means.[579] The central item of evidence in any given case would be the terms themselves (facilitated by the fact that the legal and contextual expertise needed to accurately appreciate their operation and impact would, as detailed earlier, be incorporated within the adjudicating bench itself). A restrained approach to evidence is therefore most appropriate. Moreover, an exhaustive approach would impose a burden on the tribunal which would make it hard for it to keep pace with cases as they arise—at least not without costs disproportionate to what is at stake,[580] which could distort parties' incentives from what is intended by the substantive approach of the regulation.[581] A restrained approach to evidence could avoid this, as in many administrative tribunals.[582]

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[577] §3-III-B.
[578] Fairness in other respects, such as if there was a misrepresentation or duress, would be matters to be dealt with by the Private Law of Contract, not by proceedings under the regulation.
[579] cf Irish UTCCRs (n 13) s 8(4)(b).
[580] Flood and Sossin (n 519) 191–192. Weatherill, *EU Consumer Law* (n 378) ch 10.
[581] As described in Chapter 5.
[582] Flood and Sossin (n 519) 188.

The rigours that the evidentiary system of ordinary courts subjects evidence to, in order to test its reliability, also seems unsuited to this context.[583] Per the preceding discussion, proceedings under the regulation would typically not entail testimony of fact-witnesses, nor vast amounts of party documentary or material evidence supporting claims about adjudicative facts, which as external evidential sources selected by interested parties, are of uncertain reliability and require testing. And since the bench itself incorporates the expertise it requires, opinion-evidence from party-retained expert witnesses would also normally be excluded, obviating a need for the evidential system to supervise the qualifications and impartial testimony of party experts. Beyond the contract itself, and its expert appreciation internalised within the tribunal, in any case where significant additional evidence is required, the flexible procedural system discussed earlier would allow the tribunal itself to precisely identify and directly pursue this from such sources, by such means, and to such extent as it judges most appropriate. The tribunal's expertise and impartiality call for a relaxed approach to supervising the introduction of such evidence into proceedings.[584]

As with the regulation's approach to procedure, it may serve to elucidate further elements of a rough picture of a recommended evidential framework.

The parties should be entitled to file with the tribunal limited evidence supporting their positions on the matters which they were permitted to make submissions on, as mentioned earlier: the fairness of the terms, the correct context for the tribunal to apply in assessing the terms, the appropriate remedy, etc. Permitting this is important as much as for reasons of procedural fairness to the parties,[585] in proceedings whose focus is (substantive) fairness, as for whatever reassurance it would provide that the tribunal had an adequate

[583] ibid 192.
[584] ibid 234.
[585] ibid 183.

evidentiary record upon which to base its decision. With the bench's composition supplying the contextual expertise necessary to assess terms' fairness accurately, the essential evidence in an ordinary case is the terms themselves. In cases where the tribunal sees a need for additional evidence, it would itself obtain the bulk of it, through for example: orders of production, searches or summons, commissioning research reports or investigation by the administrative branch, consulting additional impartial experts, etc. A broadly similar approach to evidentiary matters characterises Israel's Standard Contracts Tribunal.[586]

As in other administrative tribunals (including Israel's under unfair terms regulation), an evidential framework restrained and relaxed as compared to that typical in ordinary court litigation, would best complement the streamlined and flexible procedure recommended in §B. Together, these would allow the regulation to be implemented and enforced most effectively.

D. What Should the Regulation Provide as far as Rights of Review and Appeal?

A further pair of questions to be addressed is what rights of review and appeal the regulation might permit from proceedings before the regulatory tribunal.

Starting with appeals, one option would be to provide for appeal rights to an appellate court. Alternatively, judgments of the regulatory tribunal could be final, and exclude appeal proceedings.

It would not seem to well-serve the effectiveness of the regulation here to permit appeals. Conferral of original jurisdiction on the regulatory tribunal was based on the crucial importance of specialised expertise—both legal and contextual, reflected in its mixed bench—to accurately assess the fairness of terms in a wide range of contexts. Appeal rights to

[586] Israel SCL (n 474) s 9(b).

generalist appellate courts would, practically-speaking, conflict with this design choice, by subjecting these expert conclusions to inexpert second-guessing.[587] In addition, the flexibility of the tribunal's procedural arrangements, as described above, was meant to enable the tribunal to adapt and scale *its own* proceedings (including the size of the panel deciding a case) in synch with the complexity or significance of a given case, in order to maintain a proportionality between proceedings and what is at stake in them.[588] Further proceedings in an appellate court would not respect that capability,[589] and would upset the procedural proportionality achieved by the tribunal, thereby distorting party incentives from what was intended by the substantive regulation in order to secure compliance.[590] It was also proposed earlier that the tribunal streamline its procedure, to facilitate reaching finality in proceedings expeditiously, and thus be able to keep pace with the market, as the regulation must. Given how frequently adhesion contracts are used, and how markets are continuously evolving, that need for finality is more important to the regulation's effectiveness than an incrementally smaller risk of error potentially achieved through appeals. Error is a risk that cannot be eliminated by (any number of) appeals, and in this case, the risk might even increase due to appellate courts' generality rather than specific expertise.

On the other hand, no institution (including a public one) can simply be trusted to self-regulate. The risk of errors that are not marginally-occurring yet inevitable 'accidents,' but the result of bias or systemic defects, calls for incorporation of a safety valve. Accordingly, judicial review should be permitted.[591] The reviewing institution would be a generalist court, which has expertise in such questions of procedural fairness and legality. However, to avoid similar concerns as were raised by the question of appeal rights, access to

[587] Flood and Sossin (n 519) 161.
[588] ibid 222.
[589] ibid 161.
[590] Text to n 580.
[591] Ford, 'Administrative Universe' (n 516) 67.

judicial review should be limited. In the first place, this could be accomplished by restricting the permitted grounds of review to concerns about proper conduct by the regulatory tribunal. Valid grounds would include matters such as lack of jurisdiction, procedural unfairness, bias, or error of law in the narrow sense of application of the wrong legal standard.[592] Secondly, a partial privative clause could further restrict the availability of review by establishing as a bar that the applicant prove a *prima facie* likelihood that there was an issue, which falls under one of the grounds, and was sufficient to have altered the tribunal's decision. The limited grounds of review would need to be enforced at the request stage, in order to prevent abuse of review proceedings, which could distort the incentives planned by the substantive regulation. Cost rules for review applications could incentivise primary self-regulation by making the applicant responsible for the full costs of the application (including a high special fee paid to the regulator to apply for review under the unfair terms regulation) unless its *prima facie* case succeeds. If it succeeds, then the special fee to the regulator is cancelled, and the sides would bear their own costs of the review. The regulator would be the primary respondent in the court proceedings.

This limited review furthers the efficacy of the regulation by helping ensure proper conduct by the regulatory tribunal, yet without 'second-guessing' the tribunal, thereby trivialising and undermining proceedings before it, which the regulation contemplates as best-geared to its effectiveness.[593]

III.Other Regulatory Considerations

The suggestions above sketch out a machinery that should be effective in implementing regulatory enforcement. Still to be considered is whether this suggested

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[592] Flood and Sossin (n 519) 562.
[593] ibid 162.

machinery would be suitable from the standpoint of other important governance considerations, represented here by factors of: (i) the integrity of the legal system; (ii) efficiency; and (iii) significant collateral social effects.[594]

A. Integrity of the Legal System

Starting with the regulatory institution, the fact that it would be primarily responsible to the state is consistent with the Private Law of Contract's enforcement by state courts. Precluding parties from contracting out of this, in favour of party-controlled dispute resolution, theoretically might conflict with Contract's fundamental principle of party sovereignty.[595] However, as discussed in Chapter 3, adherents do not consent to the specific terms of the form.[596] And since the state should only permit drafters to unilaterally decide form terms subject to a duty of fairness imposed by law,[597] the state must be able to control the institution that assesses whether a drafter did comply. Meanwhile, as regards the jurisprudence on unfair terms that will be generated by the regulation, its integrity would be better fostered by consolidating its in-practice elaboration within an internally-coordinated state body than by decisions emanating from a variety of party-chosen adjudicators.

The nature of the proposed tribunal, as a specialised body incorporating mixed expertise (legal and contextual), contrasts with disputes in Contract Law (and Private Law more generally) typically being adjudicated by generalist courts presided over strictly by legal experts. However, other specialised tribunals, such as Landlord-Tenant Tribunals[598] and Labour Relations Boards,[599] also deal with contractual disputes in regulated areas of what was previously part of the general domain of the Private Law of Contract. Chapter 3's

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594 §1-II.
595 §3-I-B-ii.
596 §3-III-B.
597 §3-III-C.
598 Social Justice Tribunals Ontario, 'Landlord and Tenant Board' (*SJTO*) <www.sjto.gov.on.ca/ltb/> accessed 18 September 2019.
599 Labour Relations Act (n 545) s 110(2).

recognition of unfair terms in adhesion contracts as a distinct problem that requires a Distinct Doctrine,[600] to be implemented via regulation (in part to avoid disrupting precedent),[601] makes the use of a specialised tribunal consistent with how the law handles other such scenarios (as in the examples just given), and thus coherent with the overall structure of the legal system. It is also concretely supported by a specialised model having been relied on by Israel, for decades already, in its Standard Contracts Tribunal.[602] Further, developing an unfair terms law with the reflexivity needed to preserve public confidence in Contract,[603] requires that, on the whole, parties perceive the tribunal's fairness assessments to be accurate, thus calling for specialised legal and contextual expertise, as noted. Wider legal coherence should not be upset, since as discussed in §B, the fairness of a term can usually be decided separately from resolving other legal issues which may arise. And where it cannot, the scope of the regulation, as drawn in Chapter 4, excludes its application, in light of that risk.[604] Suppose, for instance, that the fairness of a term at issue is inseparable from warranty provisions of the Sale of Goods Act 1979: in that case, the term would be exempt from unfair terms review, to avoid conflict with or frustration of the Act. Where concerns about impact on wider legal coherence exist, it should also be recalled that the chair of the tribunal is empowered to appoint additional legal experts to the panel deciding the case.[605] As a further safeguard, judicial review is provided, if the tribunal exceeded its jurisdiction, for example.[606]

The regulation's use of an administrative body to perform various non-adjudicative functions important to effective implementation and enforcement of the regulation, is also

[600] §3-III-A.
[601] §3-III-D.
[602] Israel SCL (n 474) ch 2. Specialised administrative review in Israel in fact dates to the preceding law of 1964: see Aubrey Diamond, 'The Israeli Standard Contracts Law, 5724–1964' (1965) 14(4) ICLQ 1410, 1415.
[603] Collins, *Regulating Contracts* (n 24) ch 4; Collins, 'Regulating Contract Law' (n 476); Lon Fuller, 'Reason and Fiat in Case Law' (1946) 59(3) HarvLRev 376, 378–380.
[604] §4-II-A-vi.
[605] §I-C.
[606] §II-D

reconcilable with precedential institutional arrangements in unfair terms regulation in several jurisdictions, as noted in §I-D. In the UK, for instance, the CRA vests a broad spectrum of regulatory powers in the CMA[607] (and subsidiary powers in multiple other administrative agencies[608]). The system-justification for this again goes hand-in-hand with the activity being one that has been identified as requiring regulation, in the public interest, and having a challenging objective (keeping markets cleansed of unfair terms).[609]

Whilst a proposed new institution obviously will require efforts at broader system integration, both by the new institution and by institutions already part of the system, there is no reason that it should pose a threat to the integrity of the legal system. This is especially the case since the scope of the regulation here expressly excludes cases where its application would conflict with other laws or interfere with the intended operation of other integral schemes of legal regulation.[610]

Turning to procedural elements, the active role of the regulator in proceedings, the streamlined and flexible approach to be utilised, the restrained and relaxed rules of evidence, and the limited rights of review (and no appeal) from tribunal judgments are certainly all departures from what is typical of adjudication in Contract (or Private Law more generally). A system-coherent justification for these can be found, however, once again in the fact that they are part of a comprehensive scheme of regulation of a distinctly-identified problem,[611] in the public interest, and having a challenging goal (here, cleansing markets of unfair terms). This also maps where the unfair terms regulation would fit into the broader legal system, alongside other existing schemes of regulation of various other issues which are also using procedural approaches that share certain features as proposed here (as in the several examples

[607] CRA (n 154) s 70, sch 3, 5.
[608] CRA (n 154) sch 3(8)(1)(b)–(k).
[609] Ford, 'Administrative Universe' (n 516) 50.
[610] §4-II-A-vi.
[611] §3-III-A, D.

given above, ranging from landlord-tenant to telecom regulation to labour relations to human rights commissions).[612] These legal issues for which special procedures are used under their associated legislation are either part of or cognate to areas of law in which adjudication takes place according to ordinary procedure before ordinary courts. The co-existence of these differing procedural arrangements in proximate fields is managed without causing evident great violence to the integrity of the legal system. The general procedural approach proposed here also has precedent in regulation of the very issue of unfair terms, under Israel's Standard Contracts Tribunal.[613]

To the extent that the institutional and procedural arrangements sketched here would, taken together, comprise a machinery of secondary enforcement that would be effective, as compared to existing unfair terms regulations, which have suffered from problems of underenforcement and questions of fitness-for-purpose,[614] that is also significant here: As discussed in §5-VIII-A, it affects the integrity of the legal system whether regulation purporting to deal with a social issue is effective in doing so, versus only being effective at the level of seeming to do so for the purpose of diffusing political pressure or more extreme possible social unrest. By selecting enforcement features designed to avoid the regulation being either an unfulfilled promise that is underenforced[615] or a 'wild card' that is only sporadically effective,[616] the proposals here further the integrity of the legal system in this important way. This is especially significant, given the prominent role that adhesion contracting occupies as an experience of law for ordinary citizens.[617]

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[612] 'Landlord and Tenant Board' (n 598); CRTC (n 529); Labour Relations Act (n 545); Canadian Human Rights Commission (n 558).
[613] Israel SCL (n 474) ch 2.
[614] §1-I.
[615] Commission, 'Proposed Directive on Better Enforcement and Modernisation' (n 13).
[616] Radin (n 6) 124.
[617] §2-II.

B. Efficiency

In prior chapters, it was noted that one must assess the efficiency of unfair terms regulation at multiple levels, since the regulation governs contracting, which is itself a mechanism of economic regulation with efficiency as one of its key objectives.[618] However, because the aspects of the regulation discussed in this chapter concern the institutional and procedural machinery of secondary enforcement, their relevance to the efficiency of the underlying practice of adhesion contracting, and of market transactions themselves, is limited. What relevance they have at those levels resides mainly in whether they contribute to the effectiveness of the substance of the regulation, which Chapter 5 already concluded would enhance efficiency at those underlying levels. The argument throughout the present chapter has been that the institutional and procedural arrangements identified there are ones that *do* help assure the efficacy of the regulation. Beyond that, the efficiency question to be addressed in this chapter is inherently preoccupied with the efficiency of the proposed institutional and procedural arrangements themselves.

This question is of great importance, given a widespread crisis of civil justice[619] in which the cost, delay, complexity, intrusion, intensity of conflict, and unpredictability involved in vindicating a legally-protected interest are disproportionate to the interest itself[620] --sometimes even when the interest is substantial.[621] Accordingly, many harm-sufferers rationally decline to pursue enforcement. The result, in practice, is to reduce the substantive law to little more than a lawyer's aesthetic, as well as to encourage its violation by those with the power to do so. Under such (too common) circumstances, 'justice' becomes a commodity

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[618] §3-IV-B.
[619] Zuckerman (n 505).
[620] Weatherill, *EU Consumer Law* (n 378) ch 10.
[621] Woolf (n 565) s I. Scott and Black (n 355) 105.

few can afford.[622] Indeed, it is precisely because of these risks that this chapter is necessary, and not superfluous to the question of how to regulate unfair terms:[623] it is vital not to overlook the efficiency of enforcement proceedings, and in consequence, develop a regulation that is too expensive to enforce. For example, presently, UK policy in pursuing unfair terms violations of the CRA is to be 'selective in taking enforcement cases, focusing particularly on those which have a market-wide impact or precedent-setting value.'[624] In deciding when to enforce, consideration is to be given 'particularly' to prioritisation principles,[625] which state:

> In order to make the best use of our resources in terms of real outcomes for UK consumers, we need to ensure that we make appropriate decisions about which projects and programmes of work we undertake across all areas of our responsibility. The CMA has agreed with the Treasury that we will deliver direct financial benefits to consumers of at least ten times our relevant costs to the taxpayer (measured over a rolling three-year period)
>
> In seeking to target both our resources and enforcement strategy, the CMA needs to consider a range of factors including impact on consumers, strategic significance, risks and resources.[626]

However strategically significant the cases pursued might be, such a selective and targeted approach is inconsistent with the UCTD's object of cleansing markets of unfair terms.[627]

In order to avoid such an outcome, the need for efficient means of enforcement must be anticipated. With respect to the proposals in this work, in fact, key substantive aspects recommended in Chapter 5 were influenced by foresight of the risk that, otherwise, burdensome secondary enforcement proceedings could render the regulation ineffective. Such aspects included relying primarily on self-regulation, induced by carefully-tailored incentives which simultaneously empower the mass of adherents as enforcers; and standard actions

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[622] Woolf (n 565) s I; Weatherill, *EU Consumer Law* (n 378) ch 10.
[623] Baldwin, Scott and Hood (n 444) 17.
[624] CMA, *Guidance* (n 10) s 6.2.
[625] ibid.
[626] CMA, *Prioritisation Principles* (n 10) ss 1.4-1.5.
[627] See text to n 489.

being collective, to maximise the compliance secured by each investment in enforcement action and co-opt the expertise and skill of class action lawyers as 'private attorneys-general.' There, the concern was mostly with the volume of proceedings that would be required; here, the concern is with the efficiency of them.

Implicit in these comments is the conclusion that the enforcement machinery set out in this chapter is significantly more efficient than the default option of ordinary court procedure. What informs this conclusion?

A body primarily responsible to the state, rather than to the parties, helps assure that the resources invested in adjudication resolve the issue of a given standard term's fairness once-and-for-all, rather than the import being confined to an individual dispute between particular parties.[628] A body specialised in the single issue of making fairness assessments of form terms would be able to extract a much greater return on the upfront investment of mastering that task, than a body of generalised jurisdiction which does so only to resolve one case, before turning to other issues.[629] The bureaucratic investment that institutions require could also be maximised by consolidating (organisationally, but not in function or control) the adjudicative body with the administrative body which publishes information, monitors compliance, studies markets, and takes other actions required in order to make the regulation effective. In these respects, the regulatory institution appropriately mirrors the efficiency rationales of the system of mass transacting that it regulates, and the efficiency of the systems of mass production and distribution that adhesion contracts in turn facilitate.[630] The tribunal also avoids relying, as bodies of only generalised knowledge must, on exhaustive evidential records and costly but biased and therefore unreliable expert opinions. By instead

[628] Collins, 'Circulate Documents' (n 11) 793.
[629] Deutch (n 539) 474.
[630] §2-I-A-ii-b.

incorporating tailored expertise into the bench, the legal and contextual considerations relevant to fairness assessments can be grasped most efficiently. This again mirrors the efficiency rationales of adhesion contracting, in its tailoring by transaction-type, as detailed in §2-I. The *ad hoc* status of the contextual experts on the mixed bench allows for their identification based on the needs of each case, thereby enhancing the accuracy of fairness assessments, whilst averting the cost of an engrossing cadre of permanent in-house experts. Expert judgments, in turn, alleviate the argument for appeals.

Where the tribunal needs additional information, it can be acquired most expediently by the adjudicator-driven and flexible procedure, which allows the bench—guided by its expertise, yet bound by its impartiality—to directly obtain the evidence by the means most appropriate in the circumstances. Similar rationales underlie the relaxed approach of Israel's Standard Contracts Tribunal.[631] Exhaustive and highly inefficient procedural measures such as party discovery, interrogatories, depositions, party requests, etc. can thus be obviated, along with the rigours of testing the reliability of evidence obtained by these vast trawling expeditions by interested and inexpert parties. Meanwhile, the tribunal's expertise can be leveraged to streamline proceedings, with ordinary cases able to be focused on a review of the terms. Their impact would be considered in a context both defined and confined (i.e. locally generalised, but not individualised). Consequently, potentially exhaustive adjudicative fact evidence on matters such as parties' communications and understandings—almost certainly of no assistance in assessing the fairness of a pre-formulated standard form term—would be inadmissible. Israeli unfair terms law also declines to consider such matters.[632] Lastly, restricting judicial review (and barring appeals)—as well as incentivising parties to

[631] Deutch (n 539) 475.
[632] ibid.

make efficient choices of when to request review—would help preserve the efficiencies of the tribunal machinery.

The foregoing reasons suggest that the machinery outlined here would offer important efficiency gains, as compared to reliance on regular courts. Similar choices have been made for similar reasons for other issues subject to regulation, mentioned throughout this chapter.[633] This included some areas previously carved out of what at one time was subject only to the Private Law of Contract. Moreover, Israel, following a broadly-similar procedural approach as proposed here, on the common issue of unfair terms, has proven that it is sustainable over time.

C. Significant Collateral Social Effects

If the enforcement machinery recommended here proves effective and efficient, one can expect the omnipresent 'floodgates' concern to be raised:[634] i.e. that it will ultimately lead to 'too much' litigation, overwhelming adjudicative institutions, deterring socially beneficial economic activity, encouraging opportunistic litigation by claimants (or their legal representatives), and tearing away at the fabric of society through the contention and conflict of an inclination toward legal disputation. That concern is self-evidently an important one, but bears further scrutiny.

First, it raises again the question of the 'optimal level of regulatory enforcement'.[635] This work has proceeded from the premise of a regulatory object of market-cleansing.[636] Such a result constitutes a high level of compliance, and therefore implicitly sees the social detriments of a lower level of compliance as worse, all told, than the social detriments animating the floodgates concern. That calculation reflects, in part, a view mentioned

[633] Flood and Sossin (n 519) 343.
[634] *Ultramares Corporation v Touche* 174 NE 441 (NY 1932) (Cardozo CJ).
[635] Baldwin, Scott and Hood (n 444) 19.
[636] §1-II.

throughout earlier chapters that the economic activity that would be deterred is not beneficial but exploitative; and that effective regulation would support, rather than detract from, socio-economically beneficial private ordering via adhesion. It reflects a view, mentioned in earlier chapters, that whatever political or symbolic purposes may be served by a lesser standard, the socio-economic motive for unfair terms regulation is not advanced by going to the trouble of regulating them, only to remove a few, whilst leaving a vast number still on the market, in what has for a long time been seen as a critical and pervasive problem.

Second, doubt is warranted about the prognostications of the floodgates-worriers. Indeed, as noted in §B (and referencing elements from Chapter 5), the scheme proposed here takes an approach importantly informed by an intent to avoid the system (and society) being imposed upon by a flood of claims. This the regulation achieves above all through its primary reliance on incentivised self-regulation. So long as secondary enforcement is reliable and expeditious, as the measures in this chapter seek to ensure, the *spectre* of nothing-to-gain everything-to-lose liability for the drafter if it fails to self-regulate, will cause rational drafters to self-regulate in the vast majority of cases. Hence, secondary enforcement would much more rarely be needed. Where it is necessary, the burden on the system is minimised by streamlined proceedings.

It should be added that the proposals incorporate a safety valve in the event that results do not precisely match expectations: The broad powers and responsibilities of the administrative branch of the regulator included monitoring the impact of the regulation[637]—including not only its effectiveness, but significant collateral social impacts. It would thus be expected to take cognisance of any significant negative collateral social effects. And if adjustments are needed to the regulation or its implementation or enforcement, in order to

[637] §I-D.

diffuse an emergent collateral problem, the administrative branch of the regulator is empowered to make such adjustments (or, where more substantial reforms are required, to recommend these to the supervising public authority, if not already clear through its reporting duties).[638] This 'revisable' aspect of the regulatory machinery thus incorporates into the regulation a capacity to self-assess, and to address inevitable flaws, including the possible emergence of previously unanticipated problematic collateral social effects.[639]

For these reasons, the institutional and procedural arrangements outlined in this chapter would seem to bear an overall positive profile of potential collateral social effects.

[638] ibid.

[639] Cristie Ford, 'Principles-Based Securities Regulation in the Wake of the Global Financial Crisis' (2010) 55(2) McGill LJ 257, 300.

Chapter 7. The System of Regulation: Vernacular Law for the Various Actors in the Network of Regulation

Introduction

Having dealt with the substantive core and procedural machinery of unfair terms regulation in the previous two chapters, the questions remaining to be addressed in this chapter are of regulatory form. One key such question is how unfairness, which has been conceived of in this work as centrally a matter of substantive disproportion,[640] should be formulated as a legal test. Answering that requires considering how to manage competing interests of legality like certainty and flexibility, as well as what analytical framework jurists should follow in administering a legal test based on the animating normative conception. A different question of regulatory form concerns the forms, modes, and choice architecture in which to present key information about the regulation to the different types of actors (e.g. jurists, drafting firms, adherents, etc.) within the regulatory network, in seeking from them the behaviours that the scheme requires. In particular, looking at the regulatory context from a systems theory perspective,[641] tailoring to different audiences may be necessary based on how such audiences' respective frameworks of meaning and cognitive or institutional biases affect their behavioural responses to information.[642]

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[640] §2-III.
[641] Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007) s 2.4.3.
[642] Gunther Teubner, *Dilemmas of Law in the Welfare State* (deGruyter 1985) 309.

I. Formulating a Legal Test for Unfairness

A. The Optimal Level of Precision of the Fairness Rule

In addressing how the duty of fairness should be formulated as a legal test, one question is the optimal level of precision with which the fairness rule should be articulated.[643]

One option would be to express it in very broad terms, such as the word fairness itself. Alternatively, it could be expressed in precise terms, such as whether promises exchanged are of equal value. A third option in between would be standards which take the form of guiding principles.

Articulating a standard of fairness broadly would enable it to encompass a wide range of conceivable manifestations of unfairness. The open-ended discretion this affords adjudicators would permit them to make flexible assessments, tailored to the distinct features of any particular context.[644] In the cat-and-mouse game of regulatory compliance, this would construct a large space where the mouse would have difficulty escaping the cat. This approach is typical of equity, for example, which uses the very word 'unfair' (or similar terms such as 'undue,' and 'unconscionable'). Whether a contract is unconscionable depends in part, for instance, on whether the defendant can show that it is 'fair, just, and reasonable.'[645] However, such equitable doctrines are often used only residually and exceptionally, where required in order to avoid cases of 'shocking' injustice being sanctioned by law.[646] Broad standards have the vices of their virtues. To encompass a wide diversity of possible applications, the 'rule' may have to be articulated in terms so broad as to be virtually

[643] Colin Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 Yale LJ 65.
[644] Colin Scott, 'Standard-Setting in Regulatory Regimes' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2012).
[645] *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 (Ch App) 490.
[646] *Alec Lobb* (n 169).

meaningless.[647] It might in fact encompass incongruous meanings in different contexts—the common articulation obscuring and encouraging normative incoherence. These features may, in turn, prevent consistent and predictable adjudication, thus thwarting the rule's capacity to guide behaviour—undermining the effectiveness of the regulation.[648] The UCTD's 'good faith' requirement,[649] for example, has confounded many and attracted much criticism.[650] The Law Commission concluded that it was 'confusing,' not 'easy to apply,' and 'likely to mislead.'[651] The high degree of certainty required by markets[652] counsels against vague standards of that kind, as the Law Commission recognised, in recommending (to no avail) that the CRA omit any express reference to good faith.[653] A vague formulation is particularly unsuited to the regulation proposed in this work, whose primary reliance on incentivised preventive self-regulation by drafters places a premium on predictability.

By contrast, an approach which formulates rules in precise terms could articulate meanings of fairness that are clear, and consistent in different contexts.[654] An example would be a rule that, in order to be fair, terms must comprise an exchange of promises of equal substantive value. A precise rule like this would, however, be incapable of consistent adjudication in the many cases where there is some degree of subjectivity involved in the appreciation of the values at issue, or where different values that must be weighed against one another are incommensurable.[655] This problem might be avoided if, instead of a single precise rule, *a set* of precise rules were used which expressed how such a weighing should come out

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[647] Scott, 'Standard-Setting' (n 644) 109.
[648] Diver 1983 (n 643) 72.
[649] (n 13) art 3(1).
[650] Law Commission, *Unfair Terms in Contracts* (n 361) ss 3.86–3.87; Hugh Collins, 'Good Faith in European Contract Law' (1994) 14(2) OJLS 229, 249–251.
[651] Law Commission, *Unfair Terms in Contracts* (n 361) ss 3.87, 3.89.
[652] ibid ss 4.10–4.12.
[653] ibid ss 3.86, 3.91.
[654] Scott, 'Standard-Setting' (n 644) 108; Diver 1983 (n 643) 69.
[655] Cass Sunstein, 'Incommensurability and Valuation in Law' (1994) 92(4) MichLRev 779.

in various instances of unfairness: i.e., those terms are unfair which do either A, B, C… or N. However, bright-line rules such as this cannot account for all of the factors which might, if there were more room for discretion, be considered relevant to whether a term is unfair.[656] Consequently, in certain instances they will be either overinclusive or underinclusive of terms that should be judged as unfair.[657] In addition, in the cat-and-mouse-game of regulatory compliance, their narrow articulation allows the mouse to plot routes by which to escape capture—weakening the regulation's effectiveness.[658]

The third option above, of guiding principles, seems most apt in this context.[659] Earlier chapters assumed a general conception of unfairness as substantive disproportion, reflecting this being a central theme in common concerns about unfair terms.[660] The 'substantive' element expresses clearly and coherently what type of unfairness the regulation here is principally meant to address, encompassing any manifestation of unfairness of that type identifiable in the form terms of adhesion contracts. It simultaneously distinguishes that meaning from others. This would include procedural unfairness (assuming the consent to adhere has relieved the current procedural fairness of imposition[661]). This is an important distinction, as lack of clarity on it has plagued doctrines such as unconscionability,[662] and contributed to the confusion surrounding the good faith element of EU-directed regulation.[663] It also represents, at least in part, a different meaning than surprise, addressed in some

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[656] Scott, 'Standard-Setting' (n 644) 110.
[657] ibid 108.
[658] Ford, 'Principles-Based Regulation' (n 639) 261, using another metaphor: 'loophole behaviour'.
[659] Ford, 'Principles-Based Regulation' (n 639).
[660] §2-III-B.
[661] §2-III-C.
[662] Chen-Wishart, *Contract* (n 199) 364.
[663] ibid 459; *Director-General of Fair Trading v First National Bank* [2001] UKHL 52; Collins, 'Good Faith' (n 650) 249–251.

regulations' requirement of terms 'transparency'—which was rejected as a feature that the regulation here should concern itself with.[664]

The 'disproportion' element refers to the relative impact of the terms on parties like those involved in the transaction.[665] Thematically, it implicates a concern with inequality, as in the hypothetical precise rule discussed above, but focused on impacts rather than the abstract content of the terms, and assessed only at an approximate level of precision as is genuinely possible to weigh incommensurables.[666] Restraining the weighing to a realistic degree of precision further allows it to be judged consistently from case-to-case,[667] thus providing sufficient predictability for drafters to self-regulate as the scheme intends.

Together, the two elements comprise an integral principle that: in order to comply with the duty of fairness in deciding the form terms, a drafter must effectuate at least a proportionate accommodation of the parties' conflicting substantive interests.[668] This principle resides at enough of a level of generality to diminish the prospect that was of concern with more precise rules—of drafters being able to devise how to circumvent the rules. At the same time, the principle better guides adjudicative discretion than standards comprising terms with a plurality of meanings, or that express vague ideals like good faith, or that supply mere conclusory labels like fairness itself.[669]

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[664] §3-II-B.
[665] Text to n 521.
[666] Marcus Moore, 'R v KRJ: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects' (2018) 82 SCLR (2d) 143, 160–164.
[667] ibid.
[668] Collins, 'Good Faith' (n 650) 251. The duty also requires that a drafter pursue in a reasonably appropriate manner the parties' non-conflicting interests in the transaction, consistent with the parties' purposes for making the contract, since a contract is a purposive legal instrument meant to enable the parties to pursue certain interests. A drafter could not, for instance, omit clauses essential to adherents' reason for making such a contract, or include clauses wholly irrelevant to the purpose of the transaction: §2-III-B, 3-II-C-I, text to n 219. However, this aspect of the duty of fairness is not central to the regulation, as it is not how unfairness is perceived to have typically been manifest in form terms, within the widely-discussed problem of unfair terms in adhesion contracts, per §2-III.
[669] Marcus Moore, 'Justice as Harmony' (2018) 87 SCLR (2d) 3, 52–54.

Similar reasoning would apply to how to approach the contextual aspect of fairness assessments, called for by the preceding chapters: For instance, to merely allow terms to be appreciated 'taking into account…at the time of conclusion of the contract, all the circumstances,' is too broad.[670] It insufficiently directs the mind of the adjudicator to the sorts of factors that should be canvassed before drawing a conclusion on the terms' fairness. It would leave the adjudicator's discretion so open-ended that the factors might vary from case-to-case more or less arbitrarily, producing inconsistent and unpredictable results. On the other hand, specifying a closed list of contextual rules, with respective weights, or even requiring they be mechanistically consulted as a checklist of factors, would impose too much rigidity on an aspect of the assessment that is meant to be flexible in order to allow the test to be responsive to widely varying contexts. In between these options, a principles-based approach to adjudicative guidance again seems most suitable.[671] The disproportion would be assessed, therefore, in the light of a set of typical considerations such as: the rest of the contract; the industry; the transaction-type; the purpose of the contract and of the term in question; the term's impact on legitimate interests of a business like that of the drafter, of reasonably foreseeable adherents, and of third parties and society.[672] Each of these implicitly invokes a 'principle' that what it references will often be relevant and significant, and should therefore be taken into account. They are principles, not rules, to accommodate the reality that there will be cases where some of them are not relevant or significant.[673] There should also be a

[670] UCTD (n 13) art 4(1).
[671] Moore, 'Justice as Harmony' (n 669) 52–54.
[672] As alluded to in §6-II-C. The inclusion into this appreciation of potential impacts on third parties and society is intended to capture, for example, situations where: a secondary contract (or chain of contracts) could be used to circumvent the regulation, including by making it a third party that suffers the substantive disadvantage resulting from the term that extracts an unfair profit for a drafter (cf CRA (n 154) s 72); terms that would have a discriminatory impact on an identifiable but minority subclass of adherents, and thus damage society; or situations that would not adversely impact an affected party but would diminish the trust in the market that society members rely on Contract Law for: Collins, *Regulating Contracts* (n 24) 3. On the public interest, also cf Irish UTCCRs (n 13) s 8(5).
[673] Scott, 'Standard-Setting' (n 644) 108; Diver 1983 (n 643).

residual principle that the above factors are not exhaustive, and that circumstances may arise which justify the recognition of additional factors.[674] In enabling needed flexibility—particularly the ability to adapt and evolve without impracticably re-regulating—such a principle does not trivialize the others, but reminds the adjudicator that her overarching duty remains to assess the term's fairness in its general context.[675] The general context, as explained in Chapter 6, excludes more specific contextual factors such as the litigants' unique situations that are not in-common with similar types of parties engaged in similar transaction-types, as well communications between the parties, and the particular sequence of events.

For these reasons, a principles-based formulation of the fairness test, as described above, seems to operate at the optimal level of precision for the task, combining the various interests of 'legality' (certainty, flexibility, generality, applicability, etc.) implicated by decisions about unfair terms.

B. Allocating the Benefit of the Doubt

The suggested use of disproportionality as a standard, as the preceding section explained, is an acknowledgement that the fairness of terms cannot be assessed in a consistently accurate manner more precisely than whether the impact on the parties' conflicting interests is proportionate.[676] The question then follows of which party should enjoy the 'benefit of the doubt' in those cases where the terms may be substantively imbalanced, but not disproportionately so. If, as stated above, the test is formulated as requiring the drafter to effectuate at least a proportionate accommodation of the parties' conflicting interests, it is the drafting party that would benefit in cases of doubt. What makes this appropriate?

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[674] Moore, 'Justice as Harmony' (n 669) 54.
[675] ibid.
[676] Moore, 'Oakes' (n 666) 160–164.

As set out in Chapter 5, the scheme of unfair terms regulation proposed here places the primary responsibility for self-regulation on drafters. That responsibility is achieved through significant liability-based incentives. In order for firms to be willing to draft under those conditions, and not have the regulation deter adhesion contracting altogether as opposed to just unfair terms, drafters should not be held liable in cases where there is a substantive inequity that is less than what could consistently be identified as such—in other words, than what is disproportionate. This approach provides more certainty, as well as preserving the capacity of expedient resolution, both of which markets require,[677] as compared to the approach of a stricter but more discretionary obligation, or one that expressly inquires into the intentionality of the wrong.[678] In practice then, from the standpoint of substantive equality, drafters would have a certain margin of appreciation in crafting the terms. Apart from properly calibrating liability incentives under the regulation, there is another reason why it may be appropriate that the drafter be the party that enjoys the latitude of this margin. As discussed in earlier chapters, the drafter typically has a special interest in the standard form terms of those transaction-types for which it invests in developing a form and takes the risk of adhesion's take-or-leave stance over those terms.[679] By contrast, the party that contracts by adhesion in the role of adherent typically has a more limited interest in the standard form terms of that transaction-type.[680] Thus, once more in order for the regulation to be properly tailored to deter unfair terms and not deter adhesion contracting altogether, it is appropriate that the party with the special interest rather than the limited interest in the terms enjoy the benefit of the doubt in less-than-clear cases.

[677] Law Commission, *Unfair Terms in Contracts* (n 361) ss 4.10–4.12.
[678] For example, unconscionability does not apply if the advantaged party was unaware of the weaker party's disability: *Hart v O'Connor* [1985] UKPC 17.
[679] §2-I-A-ii-a, 3-I-C-ii.
[680] ibid.

C. Concretising Application of the Principles

A general principle of substantive disproportion, assessed within a frame of further principles reflecting the general context in which the contract operates, helps guide the discretionary appreciation of fairness required of adjudicators under the regulation.[681] In the common law system, the deductive reasoning this relies on—applying the general principle to specific cases—is complemented by the analogical reasoning enabled by the doctrine of precedent, leveraging already-decided cases as a resource on how the law should apply to new cases.[682] But this is only possible to the extent that there is a body of already-decided cases, which would take time to develop under a new regulation. The question, then, is whether a different analogical element can be drawn on by the regulation, to help concretise the general principle's application to specific cases, whilst waiting for a body of precedents to gradually accumulate?

Earlier, the idea of formulating the unfairness test as a prescribed list of case-types, being the set of those deemed unfair, was rejected as too rigid to take into account all of the different ways that substantive unfairness can arise, and all of the different considerations relevant to assessing it. However, a similar list might be useful to the regulation, in the form of *examples* of term-types which can *often* be unfair.[683] By making the list suggestive rather than determinative, and illustrative rather than exhaustive, the rigidity of the list-approach is mitigated, enabling it to potentially serve as a useful 'horizontal' reasoning complement to the 'vertical' reasoning of general principles, in guiding the fairness test's application to specific cases.[684] The UCTD incorporates in an Annex such a list of terms (commonly

[681] Moore, 'Justice as Harmony' (n 669) 52–54.
[682] Cass Sunstein, 'On Analogical Reasoning' (1993) 106(3) HarvLRev 741.
[683] Collins, 'Good Faith' (n 650) 251. Weatherill, *EU Consumer Law* (n 378) 149.
[684] Sunstein, 'Analogical Reasoning' (n 682).

referred to in the UK as the 'greylist'[685]). The ACL has a list as well (summarised in §2-III), as does the Israeli Standard Contracts Law (as terms presumptively unfair).[686] Listings such as these call adjudicators' attention to terms which merit a high degree of scrutiny as potentially unfair, and help adjudicators identify by analogy other terms that should be treated as suspect. Besides enhancing predictability for drafters, thus making effective self-regulation easier, a greylist would secondarily boost regulatory efficacy by reducing the chance of dubious terms slipping through adjudication without proper scrutiny. It would thus help counteract, in cases where this finer recalibration is warranted, the otherwise risk of potential undue deference on the basis of drafters' margin of appreciation.

If there are term-types which can be pre-identified in the abstract as certain to be unfair, notwithstanding the context, it would further enhance the clarity and certainty of the regulation, upon which drafters depend in their primary role of self-regulation, to separately list those as such. In the UK, both the CRA and the UCTA incorporate such 'blacklists' of terms, which regulation deems *a priori* as always unfair.[687]

Conversely, terms which are outside the scope of the regulation because of their approval under other more specialised law or treaties should be listed as immune from attack under unfair terms regulation.[688] This would make the status of these terms clear to drafters, in their role of primary self-regulation. As cases are decided under the unfair terms regulation itself, including cases where the terms are judged as fair, patterns may emerge which enable identification of certain features of terms that were once questioned but which consistently emerge from adjudication as fair, so that the status of these features can conclusively be declared fair. In ways such as these, a 'whitelist' could be compiled, which the regulation

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[685] Collins, 'Good Faith' (n 650) 251.
[686] Israel SCL (n 474) s 4.
[687] CRA (n 154) ss 31, 65; UCTA (n 364) s 2(1).
[688] cf CRA (n 154) s 73; UCTA (n 364) s 29(1).

recognises *a priori* as fair, and immune from attack. However, to avoid the tribunal being indefinitely trapped by a decision that it later doubts, yet also preclude market-disruptive uncertainty, the whitelisting of approved terms should expire, subject to possible relisting, after a fixed period of time. Under Israel's Standard Contracts Law, the approval period is five years.[689]

In all, then, the formulation of the regulation's fairness test would incorporate, besides the general principles from §A-B, specific lists of: (i) prohibited terms which are definitely unfair ('blacklist') (ii) terms which are definitely fair ('whitelist'); and (iii) terms which are suggestive but not determinative, and illustrative but not exhaustive, of unfairness ('greylist'). The lists (along with precedents, as they gradually accumulate) should aid consistent adjudication of the duty of fairness, and thus predictability for drafters, whom the regulation primarily relies on to effectively self-regulate.

D. Formulating a Process for Weighing Impacts

Proportionality not only represents, as discussed above, a particular (moderate) level of precision at which to formulate the duty of fairness as a legal rule; it also encompasses, as alluded to in Chapter 6, a distinct analytical framework which can be utilised to supervise this assessment. Proportionality, as an analytical framework, formalises the weighing of competing values as a particular evaluative sequence designed to methodically focus attention on the different ways in which a disproportionality generally might arise, thus reducing the chance of overlooking those potentialities.[690] Although most often used in Public Law, it has been used in Private Law.[691] And significantly, the legally-sanctioned power-relation between state and citizen that inspires its use in Public Law is replicated in the

[689] Israel SCL (n 474) s 14.
[690] Moore, 'Oakes' (n 666) 152, citing Dieter Grimm and others.
[691] See eg *Sierra Club of Canada v Canada* 2 SCC 522.

present context by the drafter's (state-sanctioned) unilateral discretionary power to decide the form terms, which affect the interests of adherents, to whom the drafter owes a duty of fairness (imposed by operation of law) in exercising that power, as explained in §3-III-C. This makes it appropriate to the adhesion context, beyond which it is commended by its general analytic rationales.

Whilst different variations of proportionality analysis exist, the evaluative sequence often takes the form of questioning whether the act at issue: (i) has a legitimate purpose; (ii) is a rational legal instrument by which to pursue such purpose; (iii) is reasonably tailored, as such an instrument, to avoid unnecessary detrimental impact to the claimant's legitimate interests; and (iv) does not have a net detrimental impact on the claimant (factoring in its benefits for the claimant) that significantly outweighs its net beneficial impact on the defendant (factoring in the burdens it imposes on the defendant).[692] If and only if all of these questions are answered in the affirmative, the impugned act is found to be proportionate.[693]

Applied in the adhesion context to a standard form term that is challenged as unfair, the proportionality analysis would proceed as follows. First, it would assure that the term serves a legitimate business purpose for the drafting firm, in making the contract. An example of terms that would fail this query would be those whose true intent is to make it virtually impossible for the adherent to avoid breaching the contract,[694] so that the drafter can use the adherent's breach to deter the adherent from taking legal action if the drafter itself breaches its obligations, and further to maximise the drafter's leverage in the post-breach negotiations

[692] Moore, 'Oakes' (n 666) 145–146. It might be noted that thematically, the final stage (iv) inquiry is not so dissimilar from cost-benefit analysis used in law & economics literature: Smith (n 98) 108. However, the former assumes that every value can be monetised, whereas proportionality assumes that (in most cases) incommensurables will have to be weighed—permitting only an imprecise comparison (proportionality): Moore, 'Oakes' (n 666) 160.

[693] Moore, 'Oakes' (n 666) 146.

[694] Rakoff (n 34) 1262.

that then ensue.[695] Being illegitimate, the substantive 'benefit' of such a term does not weigh in its favour, against the obligations that it imposes, thus making it disproportionate.

Second, the analysis would ensure that the term is a rational choice of instrument for pursuing the legitimate purpose—otherwise the fact it had a legitimate purpose is practically-speaking irrelevant. An example of terms that might fail here would be those in professional sports 'standard player contracts' that, for the purpose of avoiding injury to the player under contract, obligate the player to refrain from off-season physical activity, despite the fact that the player *must* engage in such activity in order to be 'fit' for the subsequent season, and indeed, unfit players are subject to indefinite suspension without pay. The ACL's fairness test also contains an element along the lines of this second inquiry—but going further, in requiring that the term be 'reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'.[696] Since the substantive benefit in this case remains illegitimate, again it does not weigh in the term's favour against the obligations that it imposes, and hence it is disproportionate.

Third, the proportionality assessment would consider whether the term, in pursuit of its purpose, is reasonably tailored to avoid unnecessary detrimental impact to the interests of adherents. An example of form terms that may not satisfy this requirement would be terms in health insurance contracts whose purpose is to permit the insurer to ensure a treatment is medically necessary, but in pursuing that purpose, require the insured to provide a blanket 'consent' which authorises the insurer to obtain all confidential personal medical records from all health providers that the insured has ever consulted for any reason. In terms of this kind, the portion of the adherent's obligation that goes beyond what is reasonably necessary

[695] Collins, *Regulating Contracts* (n 24) 229.
[696] (n 154) s 24(1)(b).

to obtain the given benefit to the business, produces no further substantive benefit that can be weighed against that detriment, and thus is once again disproportionate.

Fourth and last, the analysis would assess whether the term's net impact (positive and negative) on adherents is not disproportionate to its net impact (positive and negative) on the drafter. This inquiry lies at the conceptual heart of proportionality, weighing the relative impacts of the term on the parties.[697] It is the step that corresponds most straightforwardly and intuitively to the question of 'significant imbalance' under both the UCTD and the ACL, central to the test for unfairness under those unfair terms regulations.[698]

Because proportionality only requires assessment at a modest level of precision,[699] and because the margin of appreciation adds how to resolve cases of doubt,[700] and since the term listings provide concrete illustrations of the test's application,[701] and since the assessment is to be made contextually by a bench boasting experts on the context at hand,[702] such a determination is possible on its own terms (proportionality). In such case, it is neither necessary nor helpful to fall back on comparisons to state default terms,[703] or to the artificial question of what the adherent would have agreed, which is unanswerable and analytically useless,[704] serving only to mask whatever analytical process was used to reach the result.[705]

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697 Moore, 'Oakes' (n 666) 148.
698 Taken together, the first three steps are encapsulated by the suggestion of Scott and Black (n 355) 98 that in 'fleshing out' the test for whether a term is unjust, the adjudicator could have regard to whether a term is 'reasonably necessary for the protection of legitimate interests' of the drafting firm. To the extent it is not, it may be also be seen as disproportionate in curtailing the adherent's autonomy interest, thus indirectly impacting the 'opportunity interest' of the adherent outside the contract, including benefits under additional contracts it could have procured for the obligation needlessly imposed by the adhesion contract at issue: text to n 165. The copyrights claimed by academic publishers under many adhesion contracts supply a common example: Collins, *Regulating Contracts* (n 24) 232.
699 §A.
700 §B.
701 §C.
702 §A, 6-I-C.
703 §5-I; *Aziz* (n 168); Case C-226/12 *Constructora Principado SA v Menéndez Álvarez* (ECJ, 16 January 2014), para 21.
704 See eg Scott and Black (n 355) 78.
705 §2-III-B; *Aziz* (n 168). This point is elaborated on in comparing the approach here to that of the EU regime, in §8-V-B.

II. Translating Legal Provisions into Information Tailored to Different Regulatory Actors

The second overarching question of regulatory form to be addressed in this chapter concerns the forms, modes, and choice architecture in which to present the substance of the regulation to the various actors within the regulatory network. This network involves different kinds of actors, with different proficiencies, different frameworks of meaning within which information received is interpreted and acted upon, and different roles in the regulatory scheme as contemplated.[706] A formulation designed for members of the legal system may not, on its own, be well-suited to the needs of the subjects from whom the regulation expects specific but vital behaviours. It may not be communicated by modes which legally untrained subjects can be counted on to receive. And it may not be understood by them as accurately as by legal officials. Moreover, amongst different classes of legally untrained regulatory subjects, any single formulation may be problematic if each is accustomed to the presentation of information in a different form, or have different imperatives flowing from their role in the regulation. The regulation may therefore be more effective if it can provide the different classes with information tailored to their needs, transmitted by their channels, and translated into their 'language.' Something may be lost in translation; but as with international legal instruments or foreign lay speech, more is gained than lost by at least translating information for an intended recipient into language they are familiar with.

A. The Regulation as an Information-System

From a systems theory perspective,[707] what the regulation calls for, then, is a complete information-system which enquires into the situations of the different classes of actors

[706] Teubner, *Dilemmas* (n 642) 309–313.
[707] Morgan and Yeung (n 641) s 2.4.3.

making up the regulatory network, and customises the information it provides each, based on their circumstances and roles. The content, communication medium, and choice architecture of the information appropriate for each class can therefore only be determined by considering the regulation from the perspective of the class, and asking what information could be provided by what channel within what choice architecture for that subject class to understand and react to the information in the way the regulation contemplates?

i. Information for Members of the Legal System

In carrying out the functions expected of them by the regulation, members of the legal system would rely—for the legal system's purposes—on the legal test for fairness formulated in §I. More broadly, they would draw on information contained in the regulatory instruments themselves and precedential decisions of the regulatory tribunal (and reviewing court). These sources are geared to an audience with legal familiarity. That audience includes firstly legal professionals serving as officials under the regulation, for example as legal experts of the regulatory tribunal, as staff lawyers of the administrative arm of the regulator, or as licensed external regulatory compliance consultants. The audience for the legal materials secondly includes non-legal professionals serving as regulatory officials, such as the tribunal's context-experts, as well as staff of the administrative arm of the regulator who need full familiarity with the legal context that the regulation operates in. These officials may need training, under the regulation, to deal with the relevant legal material (and the regulation's legal context more broadly). However, that is already the case with other quasi-judicial tribunals under various existing regulations.[708] Thirdly, legal formats are appropriate for legal professionals who deal with the regulation as party-representatives. This would include lawyers hired by firms to draft their adhesion forms, serving as plaintiff or defendant class action litigators in

[708] Chapter 6.

regulatory proceedings, or advocating for intervening interest groups. In order to be fully conversant with their clients in the regulatory information and how to respond to it, lawyers representing parties must also have access to whatever special information the regulation gears to their clients, considered below.

ii. Information for the Parties

a. Information for Drafters

1. Surplus Information for Drafters

As the regulatory scheme proposed here relies primarily on self-regulation by drafters, it is crucial that drafters have such information as would best position them to be able to reliably identify fair terms, so that, incentivised to avoid liability under the regulation, they will choose those terms. The way in which it was proposed in §I that fairness be formulated as a legal test was designed to support this in the several ways discussed there. The immediate question here is whether providing drafters with any additional information would enhance the prospects of effective self-regulation?

Beyond the content of the regulation, drafters may benefit from being provided with authoritative discussion and explanatory comments of each element of the regulation relevant to the drafter's task of choosing fair terms. For instance, the CMA publishes guidance on unfair terms that is not geared to lawyers, but directly to business.[709] Also, UCC §2-302 on unconscionable clauses is accompanied by official commentary which explains its purpose, operation, and application.[710] There, the comments are principally intended for judges. Here, given the primary reliance on drafter self-regulation, the comments should be geared to

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[709] *Guidance* (n 10) ss 1.6-1.7.

[710] (n 145). As another example, the CCQ (n 237) also contains explanatory official 'Comments of the Minister (of Justice)'.

drafters. Such authoritative commentary could be crafted (and revised, as needed) by the administrative branch of the regulator.[711]

In the difficult task of applying general principles to concrete cases,[712] drafters would be aided, beyond the fairness test's term-listings, by access to a catalogue of instances of the test's application, serving to illustrate its operation in different contexts. As time goes on, the catalogue could comprise real case precedents. For example, in the UK, the Office of Fair Trading ('OFT') (as the initial regulatory authority on unfair terms, prior to this role being taken over by the CMA), published in a form geared to businesses a sampling of terms which it had challenged as unfair and were consequently amended or removed.[713] Whilst a body of precedent is gradually developing, the catalogue could comprise hypothetical applications crafted by the regulator. UCC §2-302 includes such hypothetical applications, adopting as fact-scenarios real cases that preceded the UCC, and specifying how the provision would have applied to them.[714] In an age of digital technology, it should be possible for the regulation here to go beyond this, and provide many more applications, catalogued in a database searchable by the sorts of questions that preoccupy drafters in the drafting process.

Earlier (§6-II-B), it was suggested that the regulatory tribunal give only brief reasons (which would greatly assist it in rendering decisions expeditiously, to keep pace with the market, keep proceedings proportionate to what is at stake, and thus help assure the regulation is effective). This does not mean, however, that a more fulsome explanation should not be made available to drafters. The administrative branch of the regulator should be responsible, as part of its publicity of decisions of the tribunal, for providing a full explanation of the reasons, and any necessary clarificatory notes. In complex cases, these

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[711] §6-I-D.
[712] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana 1951) 12.
[713] *Historic Annex A to Unfair Contract Terms Guidance* (CMA 2008).
[714] (n 145) Comment 1.

need not be issued at the same instant as the tribunal's decision, but could follow within a reasonable time, as with court judgments decided from the bench with reasons to follow. As compared with court judgments, the further reasons issued by the regulatory administrator would be more focused on explanation than justification, and would therefore be in a plainer form more accessible to businesses drafting forms. The reliability of these reasons could be enhanced by a confidential oral briefing from the tribunal once the case is decided, as part of the decision's recording by the administrative branch. Publishing explanations would also help drafters stay updated of any evolution in the regulation's interpretation evinced by newly-decided cases.

The preceding measures concern information provided to drafters at the regulator's initiative, based on the regulator's estimation of the information that would assist drafters in complying with the duty of fairness. However, it should not be assumed that the regulator has a monopoly on the information necessary to achieve its compliance objectives.[715] In that regard, the scheme set out in Chapter 5 included optional measures which, it should be noted, drafters can leverage as opportunities to take communicative initiative, asking questions and receiving answers that they have themselves identified that they need. Applying for a pre-determination of terms' fairness affords a drafter an utmost certain and reliable answer to the central question of whether terms it is considering introducing to the market are fair. Meanwhile, drafters seeking more general information, as well as more dialogue[716] and confidentiality than the tribunal's decision on a pre-approval application will avail, can be obtained via the private consultation mechanism.[717] If the regulator compiles anonymised data from these consultations, this would further enable a positive feedback loop which

[715] Scott, 'Regulatory Space' (n 462).
[716] Braithwaite, 'Essence of Responsive Regulation' (n 473).
[717] §5-VI.

would aid the regulator in modifying the information that the regulator considers it should provide to businesses.[718]

In sum, the regulation should afford surplus information of these kinds for drafters, to respond to their need for as much information as would help in self-assessing the fairness of terms that they are considering, so that they can choose fair terms, avoid liability, and assure the efficacy of the regulation.

2. The 'Language' of Drafters

The surplus information created especially for drafters should not be in the internal 'language' of the law, but in the external language of businesspeople and other legal laypersons involved in the creation of standard forms for use in adhesion contracting.[719] To identify the precise form in which the intended messages should be conveyed in order to be understood as intended, initially 'what is needed is a "hermeneutic" method' which looks at the information from the standpoint of how it appears to the businesspeople interpreting it.[720] Working backwards from there, it can be ascertained in what precise forms the messages should be communicated. Successfully doing so would decrease the dependency of the business that is the drafting party on its legal representatives.

It might be wondered whether this is unnecessary, since the regulation could leave it to parties to retain legal representatives to do the 'translation' for them, and moreover lawyers have expertise in legal compliance, so it would benefit their clients to defer to them. There are several reasons why such an approach, on its own, seems inadequate to the context here. For one thing, lawyers would only be hired by those parties that already knew enough about the regulation to know that they should hire lawyers, making it necessary that at least

[718] Scott, 'Regulatory Space' (n 462) 330–331.
[719] Colin Diver, 'The Optimal Precision of Administrative Rules' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (OUP 1998) 227–228.
[720] HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 13.

some message get through to drafters themselves. In that case, why not give them more? Also, for many drafting parties, like small-businesses, such routine legal advice is not affordable, and thus they may proceed without legal advice, placing themselves and the effectiveness of the regulation in peril. Even for firms that can afford these legal services, the high compliance costs it produces for activities as routine as drafting, revising, and making contracts could potentially outweigh the liability risk of breaching the regulation, or where margins can't absorb the costs, cause firms to forgo not just unfair terms, but contracting in that market segment at all.

By contrast, supplying information in a form geared to firms themselves would give businesspeople and other legal laypersons on the drafter-side of adhesion contracting greater command of the regulation in their own right. This would enable them to make business decisions as to when to seek legal advice, and about whether or not to proceed in using a form without it. Their superior expertise with respect to their business, the transaction, and its context (industry, market, etc.) also equips them to play an important role in figuring out *how* to comply. This is critical, since as discussed in §5-I, maximising the benefits of the drafter's expertise, constrained only by the duty of fairness, is a key rationale for contracting by adhesion. To respect that, firms must be sufficiently informed to recognise when legal advice they are getting goes beyond what is required for compliance, driven rather by the lawyer's moral hazard of benefiting from clients' over-compliance to reduce their own (already likely remote) risk of professional negligence.[721] Otherwise, if they follow such advice, it is to the detriment of the firm, the market, and the institution of adhesion contracting. If firms are able to play a more direct role in compliance decisions, this might also diminish legal officials'

[721] Text to n 182.

ambivalence about regulatory enforcement,[722] influenced perhaps partly by a feeling that firms in breach are in some sense 'victims' themselves, having relied on lawyers they paid to advise them how not to breach the regulation.[723]

3. Dissemination of the Information to Drafters

Surplus information geared for drafters cannot be disseminated through communication mediums of specialised legal system use, but should be transmitted by generally accessible mediums suited to businesses and other legally-untrained persons involved in creating adhesion forms.

In the digital age, the Internet is of obvious assistance. The CMA, for instance, publishes its guidance for business on the government's website.[724] Perhaps of greater potency would be to create a dedicated IT platform (e.g. website, and/or software application) for the regulation. This IT platform would contain all of the regulatory information geared to drafters detailed above. The information would be readily available whenever a drafter may wish to consult it for regulatory self-education or compliance-research purposes. It would be presented in a highly-accessible format, suitable for drafter-side personnel having no especial tech expertise. The presentation of the information should also be functionally-designed, based on how drafter personnel could derive the most benefit from it as part of their conduct of the activities that bring them to the platform. Such activities would include the requirement, discussed in §4-I, that drafters access the platform in order to register each form before using it. The platform would likewise be used by drafters when wishing to apply for pre-approval of terms, request private consultations, and for submissions or communications as part of proceedings before the tribunal. The platform would also contain a secure app in

[722] (n 328); CMA, *Guidance* (n 10) s 6.2.
[723] See eg Scott, 'Regulatory Space' (n 462) 343–344.
[724] ibid.

which drafters could, and would be encouraged to, do the actual work of drafting their adhesion forms.

Hosting all of these activities on the platform, where the information for drafters is present, enables the construction of a 'virtual' choice architecture around drafters' compliance-related choices, which could be framed in each case in ways that help nudge drafters in the direction of compliance.[725]

As much as possible, the platform would also leverage 'smart technology'[726] (as, for example, modern legal database platforms such as Quicklaw and Westlaw do). Suppose, for instance, that a drafter visits the platform in order to draft terms on it, or to upload a form for registration: The platform would process the form's contents, such as its terms and section headers, and compute data such as the transaction-type, industry, etc. Based on keywords and other data thereby derived, the platform would search its data-bank, comprising its initial setup knowledge, plus subsequent machine-learning from all past forms that were uploaded to the platform and processed into the bank, and terms which the tribunal has ruled on. Using algorithms, the platform would then identify and display for drafters the information and suggestions it expects would be most relevant to the specific content that the drafter is working on or reviewing on-screen at that moment. As the drafter moves through the form, this process would repeat in real-time, with the information and suggestions displayed by the platform changing in synch with the different parts of the form that the drafter is viewing at each step (or which pertain to related issues). In this way, the regulation would be proactive

[725] Richard Thaler, Cass Sunstein and John Balz, 'Choice Architecture' in Eldar Shafir (ed), *The Behavioral Foundations of Public Policy* (Princeton 2014); Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin 2009).

[726] Clickatell, 'How Smart Technology Trends Are Changing Our Lives' (*Clickatell*, 30 November 2017) <www.clickatell.com/articles/technology/smart-technology-trends-changing-lives/> accessed 20 September 2019.

in exposing drafters to the most salient aspects of the information made for them at the crucial time that they are engaged in the activities it seeks to regulate.[727]

These programmed elements of the IT platform might therefore allow drafters' regulation-related activity to be continuously housed within frames that further nudge drafters towards compliant choices.[728] The programmed information would also contain links to full or more detailed information for drafters. And they would anonymously track and aggregate data derived from drafter activity on the platform and feed it back to the regulator for analysis for the purpose of improving the information supplied to drafters (and potentially refining the regulation itself), in what would become a positive feedback loop.[729]

b. Information for Adherents

1. Surplus Information for Adherents

As the efficacy of the regulatory scheme proposed here relies on secondary enforcement by adherents if and when a drafter fails to self-regulate,[730] it is vital that adherents be in a position to initiate it. This in turn requires that adherents know of the regulation, the basics of what it provides, how to assess whether they have a plausible claim, and what to do about it. To achieve that, it would help for adherents too to receive surplus regulatory information tailored to them as another external group, beyond the content of the regulation in legal instruments. But the surplus information for adherents should be limited to the items just mentioned, that would empower them to initiate secondary enforcement where needed. Beyond that, more extensive information for adherents would be unhelpful for similar reasons as the enhanced informational duties rejected in Chapter 3, except here after the contract is made, rather than before. That is, it would conflict with adhesion contracting's

[727] §3-IV-B.
[728] Thaler, Sunstein and Balz (n 725); Thaler and Sunstein (n 725).
[729] Scott, 'Regulatory Space' (n 462).
[730] §5-IV.

rationale of facilitating a division of labour in which adherents' engagement is limited in accordance with their limited interest and expertise in the form terms. As a result, it was suggested that adherents' role should not encompass an expectation that they do much more than instigate proceedings.[731] Custom information for adherents should thus be confined to facilitating that limited role, and avert excess information that could burden or distract them from it, lessening the prospects of them fulfilling it within their limited scope of engagement.

At the stage of a contract's making, the limited surplus information tailored and provided to adherents should start, as mentioned, with requiring drafters to self-register forms (on the IT platform) before use, generating a label to be prominently displayed on the form (or a banner on a webform) when it is introduced to the market.[732] The label or banner would give notice to adherents that the proffered contract is an adhesion contract—that is, a contract in which the adherent does not consent to terms, but consents to the drafter unilaterally incorporating form terms supplemental to and not conflicting with the terms negotiated by the parties.[733] The label/banner would include an adhesion contract 'mark,' the sight of which would signal this to adherents. Simultaneously, the mark would communicate to adherents that the contract is governed by the regulation, which binds drafters to make form terms fair. The label/banner would indicate whether or not the form in question has been pre-approved as fair under the regulation (and when the period of approved use expires).[734] For forms not pre-approved, the label/banner would communicate to adherents that the regulation gives them a recourse if there is an unfair term, and refer them to further guidance. For that purpose, it would direct adherents to telephone a hotline or visit a website on the regulation's IT platform (which for online forms, should be hyperlinked to the banner itself), either of

[731] §6-II-A, B.
[732] §4-I.
[733] ie consent to adhere (§3-III-B).
[734] This is permitted, but not required, under the Israel SCL (n 474): s 15.

which would supply the further guidance needed for adherents to initiate secondary enforcement where called for in order to assure the regulation's effectiveness.

Suppose then, for instance, that an adherent to an insurance contract tries to make a claim for an urgent hospital visit, only to be told that the insurer will not reimburse costs that were not pre-approved—as specified in the fine print.[735] At that stage of an adherent being interested in the further guidance about regulatory enforcement, this further information would provide the basics of how the regulation works, and aim to equip the adherent to assess whether they have a credible claim, and if so, what to do about it. The guidance on how the regulation works could include a concise explanation, and simple examples of an unfair term and a fair term in that context, to assist the adherent in assessing the plausibility of her claim. The information would include the remedies potentially obtainable. If the adherent concludes that she has a credible claim, and wishes to act, the guide would invite the adherent to seek further assistance by reporting the form (using the form's unique registration number, from the label/banner) for review by a claimant-side collective redress lawyer who has signed up with the regulator to voluntarily provide such initial advice to adherents.[736] For adherents already familiar with the regulation, and ready to initiate enforcement action, the guidance would include an option to certify their familiarity, click through a series of steps containing a review of more detailed information on the regulation, and upon completion of this, initiate proceedings against the drafter for breach.

In these ways, the information supplied to adherents, given their limited interest and expertise in the form terms, would be focused on equipping them to initiate secondary

[735] The experience of the author with a private UK health insurance company, after fracturing his leg representing Somerville College in a football match during a rare 'break' from working on this project!
[736] Scott and Black (n 355) 110.

enforcement where needed, and avoid complicating details that could distract from this role that the regulation relies on them for.

2. The 'Language' of Adherents

As with the customised information for drafters, the surplus information specially-created for adherents should not be in 'legalese' understood only by legal insiders.[737] It should be in language that any citizen would understand.[738] This is crucial, because only if it is understood will adherents realize that they have legal protection, may have a claim, and in that case consider seeking legal assistance as the further guidance for adherents grants them access to. Thus, the regulation can only expect adherents to have legal assistance with their interests under the regulation *after* and *as a result of* receiving, understanding, and acting on the surplus information provided them, not beforehand with those initial basic steps.

What form should information for adherents take, in order to be accessible by any member of the public? It should be presented straightforwardly, in plain language, and require no advanced knowledge or skill that is specialised beyond common knowledge or skill. The examples of fair and unfair terms provided should be simple. For instance, a sample unfair term could be that an adherent ordered a red dress, and the term authorised the seller to substitute any other colour. The corresponding sample fair term could be that if the supplier runs out of stock of red dresses, the adherent shall be given the option either to select another colour, or to cancel her order and obtain a refund. In addition, as discussed further in the next section, the maximum effort should be made to make the examples relevant to any specific contract and/or term the adherent has a question about, so that it does not require extensive skill in analogising or extrapolating. Lastly, the information for adherents should also be 'action-oriented,' in light of adherents' role as secondary enforcers. The information should

[737] Teubner, *Dilemmas* (n 642).
[738] Diver 1998 (n 719) 227–228.

thus move as quickly as possible from explaining the regulation to guiding the adherent in assessing whether she has a credible claim, and then initiating secondary enforcement, should she wish to proceed.

3. Dissemination of the Information to Adherents

Just as the information for drafters was to be disseminated not through communication mediums of the legal profession, but through generally accessible mediums, so should the information for adherents.

This includes the 'product' label to be displayed on adhesion forms (or banner on webforms), and the telephone hotline and website/link where adherents could obtain further guidance on the regulation and access steps they might take to initiate secondary enforcement, as described above. With respect to the examples provided at the stage of the adherent seeking further guidance, the regulation should again make use of smart technology to assist in identifying examples which are most relevant and which minimise the need for analogising or extrapolation by the adherent. For example, as in automated information lines used by organisations for customer service or other purposes, the hotline could prompt the adherent to speak aloud the subject-matter of the contract and read aloud the term, and then using speech-recognition software, identify the most relevant fair/unfair terms examples from its databank to provide the adherent. Or if the adherent seeks further guidance via the website, it could prompt the adherent to upload the standard form or email a photo of it from a mobile phone, then the site would scan and process the information, and once again identify the most relevant examples of fair/unfair terms to supply to the adherent.

However, even these concise and 'user-friendly' formats leave the onus on adherents whether (and when) to inform themselves (apart from the label/banner notifying them that a form is subject to unfair terms regulation). Given adherents' limited interest, it may not suffice to rely solely on adherents' initiative to seek this information.[739] The efficacy of the regulation depends on adherents being informed so as to be in position to initiate secondary enforcement where needed. Consequently, the regulation should seize some initiative in reaching adherents to convey to them the information above.

How should this be done? One option would be to incorporate it into the adhesion process by, for instance, requiring drafters to include the regulatory information with the terms of the contract. But to require adherents to review considerable information about the regulation in the process of adhesion would constitute another variety of the already-rejected idea of enhanced informational duties.[740] Whether the information is about the terms themselves (as previously considered), or the regulation supervising them (as here), it is unrealistic to expect adherents to comply in the midst of adhering to a standard form. If they were forced to, it would undermine the logic of contracting by adhesion.[741] Hence, it was suggested above that minimal information (a label/banner) be provided in the adhesion process—information merely sufficient to signal the existence of further information and where it can be found, if and when needed.

Another option would be to follow the model of social activities that require licences or permits, which citizens must complete basic training in and pass a minimum threshold test which confirms that the information was absorbed, prior to engaging in the activity. Driver's licences would be one example. The water and boat safety training and tests required by Oxford University Rowing Clubs in order to participate in intra-collegiate rowing are another example.[742] In the case of adhesion contracting, this approach would mean citizens would need a licence to contract as an adherent. In the long run, this might be a plausible option.

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[739] §1.
[740] ibid; §3-II-B.
[741] §3-II-B.
[742] 'Swim Tests' (*OURCs*) <https://ourcs.co.uk/safety/swim-tests/> accessed 21 September 2019.

However, at the outset of regulation, at least, a paternalistic approach such as this is likely to be too drastic a change in common law countries where the state has had limited *general* visibility in the activity of contracting, as the scope of adhesion contracting would entail; it therefore risks provoking a reaction that would undercut the viability of the entire regulation.

In between the two preceding approaches, one might look for a moderated approach. An option that is less of an informational burden, and less overtly paternalistic, might be viable and effective. What form might this take? Contemporary governance sees the state permit a number of important societal functions to be carried out by private enterprises, who deal with citizens, in turn, by means of (adhesion) contracts.[743] Some of these functions are closely associated with the market itself, such as banking and credit. For instance, to open an account in the UK, one must receive a 'checklist' of information, including interest rates, charges and fees, how to use and secure methods of making and receiving payments, and how to make complaints to the financial regulator.[744] As part of its own compliance, the bank then requires the customer to review the information, and takes steps to verify it was absorbed, for instance by listening to an audio recording that cannot be skipped, or reviewing digitised text that generates a unique code once completed which must be supplied in order to complete the process. A similar process is repeated at periodic but infrequent intervals when, for instance, the bank or the customer wishes to make some material change. In short, activities such as these, dealing with important societal functions carried out by private ordering, are likely to already be highly regulated. As a result, a parasitic approach may make sense, whereby unfair terms regulation conveys the information it creates for adherents as part of other regulatory information provided to citizens generally through such existing processes.

[743] Zumbansen (n 7).
[744] Financial Conduct Authority, 'Opening a Bank Account' (*FCA*, 16 March 2016) <www.fca.org.uk/consumers/opening-bank-account> accessed 21 September 2019.

These measures would aid the regulation in seizing initiative to convey essential regulatory information to adherents, rather than merely provide adherents an opportunity to request it, and hope that they do despite their limited interest as an adherent to a transaction.

c. Adjustment for Cognitive-Behavioural Biases

Ultimately, the regulation here is concerned with is results: It is little consolation if parties are informed of the regulation but do not conduct themselves as the scheme relies on, in order for it to effectively cleanse the market of unfair terms.

Hence, if studies by the administrative branch of the regulator find that, despite information being 'translated' into language geared to drafters and adherents, these parties nevertheless react to the information in a way that is unexpected and limits regulatory effectiveness, then the regulatory information system should be adjusted accordingly. Indeed, the regulation should approach this as a 'recursive' process, that will need to go through a series of iterations until the precise forms and mediums are found that result in the reactions contemplated by the regulation.[745]

This may involve, notably, studies which identify cognitive-behavioural biases that 'distort' (from rationalist assumptions[746]) how the parties respond to information (despite it already being in their 'language).'[747] The regulatory information would then be adjusted to compensate for these 'distortions.' For example, suppose at the stage of further guidance for adherents, the smart technology recognises the contract-type as one which commonly contains unfair terms *other than* the term the adherent is wondering about, which are of a type underreported due to adherents incorrectly assessing the risks as more remote than they

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[745] Collins, *Law of Contract* (n 17) 2.
[746] Richard Posner, 'Rational Choice, Behavioral Economics, and the Law' (1998) 50(5) StanLRev 1551.
[747] Faure and Luth (n 384) 338.

really are, due to the 'availability heuristic'.[748] The website could include such terms in the fair/unfair terms examples given the adherent, and in so doing, inform the adherent how many times more likely that risk is than risks not discounted by adherents due to the heuristic.

Other adjustments might be needed as psychological patterns evolve or the external environment changes, such as the culture of the social system (e.g. business community, etc.) of which the subject is a member, to the extent that these influence the subject's reactions.[749]

Overall, the point of these additional measures is that since regulatory compliance entails certain behaviours by subjects, it is helpful to revisit the question of the form that regulatory communications should take from a behavioural perspective: suitable tailoring is confirmed by the result of subjects' behaviour matching compliance-based expectations.[750] Findings might dictate as possible adjustments, for instance, that certain bits of information be emphasised or exaggerated either in their form (e.g. large font), manner (e.g. a pop-up window), or frequency (e.g. oft-repeated) of communication to subjects, whilst other pieces of information found to be meaningless to subjects might be omitted in the future. If conservative measures such as these prove insufficient, measures might be considered which target rather what Richard Thaler and Cass Sunstein refer to as the 'Automatic System' of human thought.[751] Specific measures would have to be conceived based on the behavioural findings of the regulator.

In time, it might even be possible to compensate for more intractable behavioural cognitive-behavioural challenges by leveraging more advanced forms of artificial intelligence

[748] ibid 344.
[749] Dan Kahan, 'Social Influence, Social Meaning, and Deterrence' (1997) 83(2) VaLRev 349, 350.
[750] If informational adjustments cannot accomplish that, thought would have to be given to refining the substance of the regulation to address the findings.
[751] Thaler and Sunstein (n 725) 19–20.

('AI') technology than the smart technology discussed earlier.[752] For example, it might become possible that, when an adherent uploads a form for scanning, the platform will itself identify terms that should be reported to class action lawyers for scrutiny and possible enforcement action because the AI sees patterns in those terms which are similar to known examples of terms that are black or greylisted or that were found in precedential cases to be unfair. The same technology could assist drafters, in using the IT platform, by providing them a warning flag that the AI system has identified certain terms they drafted/uploaded as potentially unfair, and recommend that the drafter seek legal advice, a compliance consultation, or a pre-approval application before using those terms.

d. Handling Discrepancies Arising from the Tailoring of Information

The proposals above call for drafters and adherents, as external groups, to each receive some different information than is included in what is relied upon by legal insiders.[753] The main purpose of these proposals was to 'translate' the information into the parties' own 'language,' and communicate it via channels familiar to them, so that they are informed of aspects of the regulation relevant to them, just as legal officials are by the law's internal forms and channels. Nevertheless, creating different sets of information entails an inevitable risk (as with treaties or legislation promulgated in multiple languages) of a substantive conflict or discrepancy (produced, for example, by an 'error' in translation) that will have legal significance. How should this risk be dealt with, in this context?

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[752] Julie Sobowale, 'How Artificial Intelligence Is Transforming the Legal Profession' (*American Bar Association Journal*, 1 April 2016) <www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession> accessed 28 September 2019.

[753] Diver 1998 (n 719) 227–228.

To begin with, the 'smart' technology of the IT platform on which the information for the parties is hosted can be expected to use its activity-tracking and feedback loops to progressively refine the information to minimise such discrepancies.[754] Likewise, the recursive adjustments for cognitive-behavioural patterns identified by the administrative arm of the regulator could help with this.[755] Initially, however, the risk of a discrepancy of significance might be greater. Hence, the regulation must have a means of resolving a potential discrepancy.

If the information geared to drafters and adherents conflicts, the regulation's aim of protecting adherents in the market from unfair terms suggests that the drafter should bear the initial loss of a term that is unfair per the information available to adherents, and thus be liable to adherents. However, unless the drafter acted with knowledge of the discrepancy, the drafter's liability should be limited to adherents' aggregate loss—not its own gain, even if greater. Subject to the same proviso, the drafter should benefit from a corresponding recourse against the regulator, in order to protect drafters' ability to rely on guidance given to them in their role as primary self-regulators, as is essential to the regulation's efficacy and legitimacy. Hence, in such cases the regulator would be liable to the drafter in negligence, provided that the drafter acted reasonably in relying on the errant regulatory information, and that the regulator's error caused the adherents' loss for which the drafter was initially liable under the regulation, as mentioned.

This would all be limited to cases where the tribunal (or reviewing court) conclude that there was an actual conflict—not just different formulations whose meaning the tribunal can reconcile (bearing in mind 'language' differences for the different party-types). In other words, it is not enough that individual parties to the litigation prove that they actually did

[754] Text to n 729.
[755] Text to n 745.

interpret the information differently. Drafters and adherents, as classes, would have to interpret the information they respectively received in ways that are in irreconcilable conflict. After all, it is the point of the regulation's informational provisions to deliver *different* information to parties, reflecting their different circumstances, supplemental to and furthering their appreciation of the common central information that the legal system intends to rely on.

III. Other Regulatory Considerations

A. Integrity of the Legal System

As argued in §I-A, a principles-based approach to transforming the duty of fairness into unfair terms regulation best-serves the set of virtues commonly associated with the Rule of Law. For example, unlike rigid rules, it permits greater generality, which preserves a normative integrity across varying instances.[756] Likewise, it offers more flexibility, maintaining coherence between the regulation's purposes and its provisions, rather than letting its purposes be frustrated by excess formalities.[757] Conversely, unlike open-ended discretion, the principles-based approach reduces arbitrariness and improves consistency and transparency in adjudication,[758] which in turn enhances certainty and predictability for legal subjects seeking to manage their compliance and plan their surrounding activities.[759] By promoting the Rule of Law in these ways, this approach supports the legal system's integrity. The various elements of the proposed legal formulation of the duty of fairness in §I also, together, more specifically facilitate the development of a coherent jurisprudence on unfair terms under the regulation—further contributing to system integrity.

Allocating the benefit of the doubt to drafters respects private ordering, as a fundamental idea associated with Contract, and prevents state scrutiny from effectively

[756] Scott, 'Standard-Setting' (n 644) 108.
[757] Diver 1983 (n 643).
[758] Moore, 'Justice as Harmony' (n 669) 52–54.
[759] (n 532).

operating to substantially dictate the terms of contracts, as for example in past scholarly proposals reviewed here but rejected on that basis.[760] It is true that drafters having the benefit of the doubt thematically runs counter the usual contractual doctrine of interpretation *contra proferentem* (included in some unfair terms regulations[761]). However, it is consistent with adhesion contracting's defining division of labour,[762] and affords drafters the margin of error they need if they are to draft at all whilst subject to potential liability.[763] The provision thus protects the integrity of the institution of adhesion contracting, and its place among the legal practices by which parties can (and overwhelmingly do) contract. It also resonates theoretically with other legal principles such as the presumption of innocence, and more generally claimants bearing the burden of proof.

The suggested listings of term-types could be seen as unusual in a common law context.[764] On the other hand, they could be viewed as similar—and a precursor—to the emergence of a body of precedent, in which 'categories' crystallise which call for a certain treatment or have an established status.[765] Guidance in the form of lists occurs in other regulation, including areas closely-related to Contract Law.[766] This even extends to some existing unfair terms regulations.[767] The listings help concretise the general principles, supporting at the point of application, the virtues associated with the Rule of Law mentioned earlier.

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[760] §3-II-C-i.
[761] See eg UCTD (n 13) art 5.
[762] Text to n 216.
[763] §I-B.
[764] Collins, 'Good Faith' (n 650).
[765] UCC (n 145) §2-302, Comment 1. Hugh Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73(1) MLR 89, 110–111, referring to: UCPD (n 453); Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277.
[766] ibid.
[767] §I-C.

The use of proportionality as an analytical framework is on one hand familiar and widespread.[768] On the other hand, to date it has been associated more often with Public Law adjudication. Nevertheless, as noted earlier, it has been used in Private Law, and the unilateral power-relation within adhesion contracting resembles the conceptualisation of Public Law relations attracting its use there, so that coherence exists at the level of rationales, beneath the Public-Private distinction.[769]

As for the information-system proposed to help parties fulfil their roles in the regulatory network, the customised party information would not displace the legal system information, nor detract from its uniformity or legal authority. Indeed, these selective 'translations' are to *extend* understanding and responsiveness to the regulation to other social systems (drafting businesses, citizen-adherents) where it might otherwise fail to penetrate due to the foreignness of legal formulations[770] and the prohibitive cost of relying on legal expertise in every routine activity of drafting, revising, making, or reviewing contracts. Meanwhile, the inclusivity of the tailored information-system strengthens parties' moral agency, so that it is more legitimate to hold drafters liable for unfairly drafted terms, and to permit adherents to retain restitutionary damages that exceed their own loss, as a reward for taking enforcement action that benefits the market as a whole.

It should be noted that, in the exceptional case where a drafter's liability is due to a discrepancy in the information provided to the external systems, this would not derogate from the authority of the legal system information, but reinforce it: The drafter's liability to adherents, as described, is vicarious Tort liability for the regulator's negligence—for which the regulator is liable in Tort to indemnify the drafter.

[768] David Beatty, *The Ultimate Rule of Law* (OUP 2005).
[769] §I-D.
[770] Teubner, *Dilemmas* (n 642).

Provision for adjusting the information based on cognitive-behavioural studies by the regulator is only a proactive acknowledgment of the conventionally-recognised need for administrative agencies to revise regulations over time, based on experience, with perhaps a notable interest in approaching that in the most proactive and systematic way possible. Tasking the regulator with monitoring and adjusting based on how subjects interpret and behave in response to the regulation seems consistent with the broader decision to delegate regulatory functions to a dedicated administrative body.[771]

B. Efficiency

The measures suggested in this chapter serve the legal system by giving form to the substance of the regulation, so that subjects' compliance can be assessed. The efficiency of the measures therefore lies in them enabling the substance of the regulation to be effective. This was assumed, as part of the assessment of the efficiency of the substance of the regulation in Chapter 5, which concluded that it would further efficiency on the whole.[772] However, the measures in this chapter also help inform regulatory subjects about their rights and responsibilities under the regulation. Their efficiency in that regard is what remains to be assessed here.

The first level at which to consider this is in the efficiency of the proposed tasks. It takes time and resources to create surplus information tailored and translated for regulatory subjects, and to disseminate it via extra-legal channels that they are attuned to. Thus, at this level on its own, the proposals in this chapter impose a significant resource burden.

The question is whether that burden is made up for by efficiency gains that these tasks may yield in the practice of adhesion contracting (including, particularly, regulatory

[771] §6-I-D.
[772] §5-VIII-B.

compliance) and in the market transactions that adhesion contracting itself regulates with important regard for efficiency.

Within the practice of adhesion contracting, it is in processes of regulatory compliance that the primary impact would be felt of providing this information to parties. Tailored information for drafters would assist them in determining for themselves, within the drafting process, what is required in order to comply. It thus alleviates the need for every drafter to retain a legal professional of their own in order to obtain similar guidance. Whilst this would obviate a large supply of elementary work for lawyers that the regulation would otherwise create, it is an enormously more efficient way of providing the information to drafters. Work for lawyers would still be created when drafters need more precise information, via private consultations with compliance experts licensed by the regulator and applications to the tribunal for pre-determination of the fairness of terms being considered. Because those recourses are optional and at drafters' expense, drafters would only pursue them when they are cost-justified, thus furthering efficiency. Most importantly, all of these measures enhance drafters' self-regulatory capacity, by enabling them to more reliably ascertain terms' fairness prior to introducing them to the market. This, in turn, averts the extreme inefficiency of the system having to resort more regularly to secondary enforcement proceedings in order to procure compliance.

Meanwhile, tailored information for adherents maximises the prospects of them initiating secondary enforcement, where needed in plausible cases of breach. Like drafters, adherents can thereby get the general information they would need in order to be put in that position, without each having to individually retain legal assistance. This would save tremendous resources. In addition, leveraging existing public information processes related to market regulation (e.g. required for certain types of banking or credit transactions) as a vehicle for also informing subjects about unfair terms regulation saves the costs and burdens of a dedicated process (such as a process to obtain a licence to adhere).[773] Conversely, informing adherents also equips them to efficiently cast aside implausible cases, without incurring costs of legal advice, or especially the burden of proceedings.

What of the impact on the efficiency of the underlying market?

For terms that are plausibly in breach, equipping adherents to proceed helps avoid underenforcement, which leaves the underlying market rife with inefficient unfair terms.[774] Also, information geared to drafters enables their expertise in the context of the transaction[775] to be leveraged to craft the most efficient terms that would comply with the regulation—a huge benefit to the efficiency of the underlying market transactions. All of the party information is meant to influence behaviour towards the end of more effective regulation, with the notable benefit of helping cleanse the market of inefficient unfair terms, as stated.

In cases where fairness is difficult to determine precisely, allocating drafters the benefit of the doubt assures that they will not be deterred from drafting.[776] This preserves the efficiency inherent in adhesion contracting, including drafters' ability to scale fixed transaction costs,[777] and adherents ability to ration finite transaction costs among all their market activity, expending them most efficiently on matters of greatest interest.[778]

For the foregoing reasons, the informational measures proposed here, despite their own costs, seem a very profitable investment in multiple significant efficiencies thereby advanced within the underlying regulated activities.

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[773] §II-A-ii-b-3
[774] §5-VIII-B.
[775] §5-I, 3-I-C-ii.
[776] §I-B.
[777] §2-I-A-ii-b.
[778] §2-I-A-i.

C. Significant Collateral Social Effects

One of the features suggested as a possibility in this chapter was using nudging techniques to deal with cognitive-behavioural biases in reacting to regulatory information, in order to help elicit conduct that conforms to regulatory expectations.[779] Rising interest in these techniques' potency in confronting regulatory challenges is an important recent trend in regulatory theory and practice.[780] However, it comes with risks.[781] Commonly cited concerns include its potential to tread on human dignity, and its abuse to manipulate individuals and groups in society.[782] As Sunstein acknowledges:

> Any fascist government might well (and almost certainly does) nudge. Terrorists nudge. Even truthful information (for example, about crime rates) might fan the flames of violence and prejudice…Groups or nations that are committed to violence sometimes enlist nudges in their cause, often in the form of propaganda, which can be counted as a (bad) kind of nudge. And even if nudges do not have illicit ends, it is possible to wonder whether those who enlist them are treating people with respect.[783]

Hence, in considering any possible uses under the regulation here, careful consideration[784] of potential collateral social effects is recommended. This includes direct ones, in the impact of the specific application proposed, and indirect ones such as encouragement of other applications, including by rogue officials.

Another measure proposed in this chapter was the use of 'smart' technology within a reflexive regulatory feedback loop.[785] A similar function has long been performed by (human) legal officials, in the sense of drawing on past regulatory experience to revise legal solutions. However, the systematised approach proposed, leveraging modern data-collection

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[779] §II-A-ii-c.
[780] Cass Sunstein, Lucia Reisch and Julius Rauber, 'A Worldwide Consensus on Nudging? Not Quite, but Almost' (2018) 12(1) Regulation & Governance 3.
[781] Cass Sunstein, 'The Ethics of Nudging' (2015) 32 Yale Jon Reg 413.
[782] ibid 420.
[783] ibid.
[784] Sunstein, Reisch and Rauber (n 780) 15.
[785] §II-A-ii-a-3.

technologies and computational processing power, offers additional possible insights that would improve regulatory quality, and enormously quicken the pace of the feedback cycle. Growing use of these technologies is another notable recent societal trend.[786] But it too is one that also gives rise to concerns, the signature example being their use by powerful IT businesses—so-called 'Big Tech'.[787] Concerns are wide-ranging, but include for example: invasion of privacy; using data for nefarious purposes if it falls (intentionally or not) into ulterior hands;[788] or tech platforms simply coming to 'know too much' and thus being in a position which compromises individual human liberty and state sovereignty.[789] As with nudging, particular applications of these technologies under the regulation must be carefully managed to minimise such risks,[790] so that collateral social concerns do not arise which will outweigh the regulatory benefits they confer. The same is true, and all the more important, if the regulation comes to incorporate more advanced AI technologies,[791] as mentioned in §II-A-ii-c.

A third regulatory feature which arose in this chapter was translating legal forms into forms geared to members of other social systems that are key to the regulatory scheme's effectiveness.[792] Once again, this suggestion is not new. It may also be seen as part of wider trends that include, for instance, plain-language drafting,[793] regulatory publication of public guidance and policy documents,[794] and third-party websites that summarise basic legal information for the public (such as the UK's Citizens Advice charity,[795] and on a more

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[786] Clickatell (n 726).
[787] Valerie Brannon, *Regulating Big Tech: Legal Implications* (Congressional Research Service LSB10309, 2019).
[788] ibid.
[789] Julie Cohen, 'Law for the Platform Economy' (2017) 51 UCDavis LRev 133, 177–203.
[790] ibid 203.
[791] Sobowale (n 752).
[792] §II-A.
[793] Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th edn, LexisNexis 2014) ss 8.17–8.18.
[794] CMA, *Guidance* (n 10); CMA, *Prioritisation Principles* (n 10).
[795] Citizens Advice <www.citizensadvice.org.uk/> accessed 21 September 2019.

piecemeal basis for marketing purposes, private law firms). Here, such considerations have been treated as equally important as the substantive scheme (Chapter 5), and procedural plans (Chapter 6). If the approach of recasting legal forms into forms geared to relevant external groups and redistributing them via channels that typically reach those groups, came to be used more widely than it has to date, it might extend the law's reach, so that these groups which are important to regulatory prospects would be much more 'in the loop. Their conduct would be more likely to conform to regulatory expectations, and they could contribute their native insights to reforming regulation.[796] This would help the law better-realise its social ordering purposes, by reducing its alienation from the external realities it hopes to regulate.[797]

Some might worry about the impact on the legal profession of having the legal system communicate more directly with subjects. It is true that it would diminish the need for lawyers to serve as local distributors or 'retailers' of legal system information. However, in combination with streamlined procedures (recommended in Chapter 6) it would make it more realistic for subjects to actually take legal action (of various kinds) where it is called for, rather than being impeded by the barriers that these measures address. And for that, they would require lawyers' assistance. Thus, by contributing to the law being more accessible, it may actually increase demand for legal services overall, with less energy spent on repeated translation of common general information and advice, and more energy devoted to helping clients take action that furthers their legal interests (and answering associated questions). Examples of possible such action in the scheme proposed here included compliance consultations, pre-approval applications, and where appropriate, secondary enforcement proceedings.[798]

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[796] Scott, 'Regulatory Space' (n 462).
[797] Teubner, *Dilemmas* (n 642).
[798] §5-VII.

In sum, the features described here entail several significant potential collateral social effects. If used cautiously—which in some cases may mean being themselves subject to regulation to ensure that—they have many benefits to offer.

Chapter 8. Conclusion: A Recommended New Approach for Dealing with Imposed and Unfair Terms in Standard Form Contracts

Introduction

This chapter draws together the regulatory proposals from Chapters 3-7 in order to show the big picture of the regulation of adhesion contract that together they comprise. This picture represents a new approach to regulation of adhesion contracts' issues of imposition and unfairness. For Canada and the USA, which thus far have declined to adopt regulatory models seen elsewhere, this new approach is recommended as a potentially attractive alternative, should they undertake comprehensive regulation.[799]

The latter part of this chapter (§V) then compares this new option to the prominent existing model of unfair terms regulation embodied by the UCTD. The discussion highlights differences between the two models, and some potential advantages the new approach proposed here could offer in the event of future reforms in EU Law,[800] or in the UK alone in the event of Brexit. This comparison may also be relevant to the Australian approach, with respect to what features the ACL has in common with or similar to the UCTD/CRA model.

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[799] §1-I.

[800] As noted earlier, the reforms currently underway (Commission, 'Proposed Directive on Better Enforcement and Modernisation' (n 13)) are already moving the EU scheme closer to the scheme here on certain points: see (n 453, 457).

I. A New Regime Applicable to Adhesion Contracts' Standard Form Terms

The first issue which regulation of adhesion contracts had to address was imposition. The form terms of such contracts are enforced by courts on the basis that they were agreed, whereas the facts suggest rather that they are imposed by drafters on adherents. The pretence that they were agreed was damaging to the integrity of the legal system, and deprived Contract Law of justification for a distinct and operative control of form terms' fairness.[801]

In the negotiation context, consent to terms could fulfil the key functions of implementing the idea of Contract as the law of voluntary obligation, and of assuring the state that private exchange it is asked to sanction was subject to an operative fairness control.[802] But fulfilling these functions in the adhesion context required a new doctrine adapted to its distinct features.[803] The new doctrine had to maintain respect, however, for fundamental understandings of contractual obligations as private ordering and as personal obligations governed by party sovereignty.[804]

Thus, firstly, a new doctrine of 'consent to adhere' was proposed, which would give effect to the idea of Contract as the law of voluntary obligation in the adhesion context.[805] It would give effect to this idea at a societal level, in the evident consensus to permit contracting by adhesion in many situations.[806] And it would give effect to the idea at the level of the parties, through the law overtly authorising contracts to be made without consent to terms but with the mutual consents that parties typically do genuinely express through the practice of adhesion, and which reflect the logic of its division of labour. These consents

[801] §2-II, 2-III-C, 3-0-A.
[802] §3-I-C-i.
[803] §3-I-C-ii.
[804] §3-I-B.
[805] §3-III-B.
[806] §3-I-D (c.3).

were: (i) to make a contract; (ii) to do so via a standard form containing terms supplemental to the 'core' terms negotiated by the parties; (iii) that the drafter unilaterally decide the form terms; and (iv) that the form terms not undermine the terms expressly negotiated.[807] These consents could be inferred from conduct typical of parties engaged in adhesion contracting. And the inference would be drawn on an all-or-nothing basis, so that consent to adhere would preclude any purported intent by either party to exclude any of its constituent consents.[808] This would help restore the law's integrity, as form terms would be valid based on the consent to adhere which is present, not on consent to terms which truthfully is absent.[809]

Secondly, to fulfil the function of assuring operative control of terms' fairness, a duty of fairness was proposed which would tether the unilateral discretion that drafters hold over the form terms, presently as a *de facto* reality, and as would be overtly authorised under the consent to adhere.[810] This legal duty to make the form terms fair could restrain drafters from choosing the one-sided self-interested terms that give rise to the other widely-held concern about adhesion contracting, addressed in this work: unfair terms.[811] As a fairness control mechanism, the duty's asymmetric allocation of responsibility for controlling the fairness of form terms was suited to the asymmetry (of interest, expertise, and self-identifiability) characteristic of adhesion—much as the bilateral responsibility of mutual consent was suited to parties' sharing of a significant interest, familiarity, and possibility of engagement with terms that parties choose to negotiate.[812] The predominance of adhesion contracting in moderns society evinced a conviction that this asymmetric division of labour and responsibility, according to the roles which define the practice of adhesion, is fairest to

807 §3-III-B.
808 §3-III-B.
809 §3-III-E-i.
810 §3-III-C.
811 §2-III.
812 §3-III-C.

parties once transaction costs are accounted for, including each party's opportunity cost of directing its finite attention resources to other matters of greater or lesser interest.[813] For any given transaction-type, the parties self-select the role (drafter or adherent) which reflects their interest-level. Hence, the duty of fairness is a fairness control operable in the adhesion context. Its use as a distinct control is justified by consent to terms' inoperativeness in the adhesion context. And its use as a particular mechanism is justified, as in relations elsewhere in law having a similar geometry, by the law's need to tether a party's unilateral discretionary power to affect interests of another party which are vulnerable to the abuse of that power.[814]

As the proposals just mentioned represent a departure from longstanding precedent in courts' handling of adhesion contracts, it was recommended that these developments be implemented via legislation. This also had the advantage of allowing greater flexibility in the details of arrangements that might be selected to best operationalise the duty of fairness.[815]

Standard form terms would then be subject to a distinct regulatory regime, operating in parallel with the traditional doctrine of consent to terms' continued governance of negotiated contracts and negotiated terms in adhesion contracts.[816] The regime applicable would be reinforced by the requirement that adhesion forms be registered before use.[817]

II. Scope of Unfair Terms Regulation

The ensuing question of how to best implement the duty of fairness gives rise to subordinate questions which allow a specific regime of unfair terms regulation to take shape.

[813] §3-I-D (c.8).
[814] §3-III-C.
[815] §3-III-D.
[816] §3-III-A.
[817] §4-I.

A. The *Prima Facie* Scope of Regulation

In that exploration, the threshold question is: to which contracts and terms would the unfair terms regulation apply? As detailed in Chapter 4, the general scope of the regulation proposed is to the standard form terms of all adhesion contracts. That scope is what would allow the duty of fairness operationalised through the regulation to provide adhesion contracting the fairness control expected of private exchange seeking state sanction, which is otherwise missing since the device relied on to fulfil this function in negotiated contracts (the doctrine of consent to terms) is inoperative in adhesion contracting, as discussed above. This general scope of control therefore does not encompass the few terms of adhesion contracts which are negotiated (typically the subject-matter, price, etc.). Terms whose status as 'negotiated' is questionable would be presumptively treated as standard form terms subject to control.[818] This would also aid the regulator and market participants in readily and reliably distinguishing standard form terms from negotiated terms, along with the requirement that drafters certify which terms are of which type, as part of their obligation to register forms before placing them on the market, as mentioned.[819] Drafters who defy these requirements would be subject to criminal sanction.[820] This approach also helped avoid the need for exhaustive inquiries into adjudicative-type facts in routine actions over enforcement of the duty of fairness.[821]

B. Exceptions and Accommodations

Chapter 4 considered a number of possible restrictions of the aforementioned general scope of the regulation, based on the possibility that other principles might in some cases

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[818] §4-I-B.
[819] ibid.
[820] ibid.
[821] ibid.

override the rationales for the *prima facie* scope of regulation.[822] A few of these were accepted as justifying exceptions or accommodations from the usual application of the regulation.

Exemption from the regulation was accepted as merited in the case of terms approved by other more specialised law, either where those terms are mandatory or where they are only permitted but the approval under the more specialised regulation is for reasons that substantially overlap, in their concern, with the fairness concerns at issue under unfair terms regulation.[823] Also exempt would be terms which lie in a field covered by more specialised field regulation (e.g. insurance, credit, tenancies, etc.) and whose subjection to unfair terms regulation would frustrate an important purpose of that field regulation.[824] All of these exemptions from unfair terms regulation were accepted on the basis of striving to avoid repugnancy with other law, so that the law does not provide legal subjects inconsistent guidance that leaves them unable to plan their affairs.[825] Based on the legal principle that the specific prevails over the general, unfair terms regulation does not apply where it is the more general of the conflicting laws. Hence, terms could be excluded which were approved by other legislation, tribunal decisions, or international treaties.

Other scenarios did not justify exclusion from the regulation, but did warrant accommodations under the regulation. Factors that could be relevant to fairness, but whose details and significance might vary between cases, it was recommended be dealt with as part of the context which the regulation takes into account in assessing fairness. Thus, in cases of regulatory overlap but not repugnancy, the scheme of the other regulation, and the extent to which it already addresses fairness concerns of the kind at issue under unfair terms

[822] §4-II.
[823] §4-II-A-vi.
[824] ibid.
[825] Fuller, *Morality of Law* (n 401) 65.

regulation, would be among such factors to be taken into account.[826] Cases in which it is alleged that the drafting of the form was preceded by stakeholder consultations or negotiations which included fair representation of the interests of the adherent would likewise be dealt with in a parallel way.[827] So too would cases in which the defendant claims that the terms at issue are in reality part of the subject-matter or price that adherents understood themselves (in negotiations) to be contracting for.[828] Meanwhile, a different regulatory mechanism would accommodate parties having an especial need for certainty in their contractual arrangements. They would be able to take advantage of the option, detailed in §5-VI, to apply for a pre-determination of the fairness of terms prior to making contracts in reliance on those terms.[829]

Outside of these variations, the regulation would conform to the *prima facie* scope discussed above.

III. The Primary Means of Regulating Unfair Terms

A. Incentivised Self-Regulation

The goal of the unfair terms regulation sought here—cleansing the marketplace of unfair terms—represents a high degree of compliance with the duty to make fair terms.[830] That, combined with the volume of adhesion contracts constantly being made in modern society, meant that it would be unrealistic to rely routinely on external enforcement of the duty of fairness.[831] External enforcement might play a vital secondary role. However,

[826] §4-II-A-vi-b.
[827] §4-II-A-vii.
[828] ibid.
[829] ibid.
[830] §5-III.
[831] §5-II.

enforcement would primarily have to be achieved through self-regulation by drafters in their existing process of deciding the form terms.[832]

The regime of adhesion contract regulation outlined in this work legally accepts and authorises drafters' unilateral discretion over the form terms—subject to a duty to make the terms fair. But that duty does not self-enforce. It is the consequences of breach of the duty, detailed in Chapter 5, that supply the necessary incentives for drafters to self-regulate in fact. To accomplish this, the incentives were designed specifically to neutralise drafters' existing self-interested incentive to profit by selecting one-sided terms in their own favour.[833] That behaviour was made possible by the shelter of courts treating them as having been agreed. And where regulation exists that merely renders unfair terms unenforceable, this was not sufficient to deter the behaviour, as drafters would profit unless and until they are challenged, and even then retain what gains they had made, continue using the term in other instances of the same standard contract, and similar terms in subsequent contracts.[834] To neutralise this incentive to make unfair terms, it was therefore proposed that drafters be subject to monetary liability for breach of the duty of fairness, more precisely in the form of restitution of the drafter's improper gain from use of the unfair term.[835]

However, this would still be insufficient, if this liability was only in respect of individual claimants through individual actions, whilst the drafter meanwhile gained from the unfair term's mass use market-wide. Thus, consistent with the mass nature of adhesion contracts, and of the wrong of unfair terms, it was suggested that the standard claim should be

[832] ibid.
[833] §5-III.
[834] Collins, 'Circulate Documents' (n 11) 793–794.
[835] §5-III.

collective, aggregating liability for all adherents to a given form, and enjoining continued use of the violating term or a similar term.[836]

Since procedural impediments to justice could distort these substantive incentives, and undermine the substantive strategy of the regulation, the secondary enforcement process had to be highly accessible,[837] as well as certain, by precluding post-breach opportunities for drafters to evade liability.[838] Adherents' ability to retain equitable compensation, even if their actual individual loss in many cases is small, also supported access to justice, and served to increase the chances that adherents would pursue secondary enforcement where it is needed, in order to reinforce the reality of the incentives underwriting the regulation's primary reliance on drafter self-regulation.[839]

The regulatory scheme proposed here was thus designed to neutralise, at each step of the regulatory process, the incentives that drafters otherwise would have to choose unfair terms. Since drafting firms could be expected to make rational business decisions, the regulation's neutralisation of their existing self-interested incentive to profit from unfair terms enabled confidence that the scheme's primary reliance on self-regulation could effectively minimise the number of cases that would require recourse to a secondary external enforcement mechanism.[840]

B. Preventive Focus of the Regulation

The regulatory objective of keeping the market cleansed of unfair terms also necessitated a primarily preventive, rather than corrective, approach to the wrong of unfair

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[836] §5-V.
[837] §6-II.
[838] §5-VI.
[839] §5-IV.
[840] §5-VIII-B.

terms.[841] Repairing the harm caused by an unfair term to one adherent of one form at a time would leave the market, as a whole, pervaded at all times by unfair terms. Such a response was too little too late. To be successful, the regulation would instead largely have to prevent the market from being contaminated by unfair terms in the first place.

As noted in the preceding section, the primary mechanism intended to achieve this was incentive-driven self-regulation by drafters as part of deciding the terms of forms they plan to place on the market. To support that regulatory approach, other provisions were recommended which would maximise the prospects of effective preventive self-regulation.

Some of those provisions were addressed to drafters. These included an opportunity for drafters to apply for pre-approval of the terms as fair—so long as this was done prior to placing them on the market.[842] And even before that, drafters were to be permitted to seek private consultations with compliance experts licensed by the regulator—again, so long as this was done before any proceedings were initiated (whether by drafters for pre-approval or by adherents for breach).[843] Where needed, drafters could be expected to avail themselves of these compliance-aids, as it would reduce their liability risk. By contrast, once a drafter breaches the duty of fairness, liability would be inevitable: compliance undertakings would not relieve liability; and in the usual case, private settlements would not be permitted.[844] It would thereby be clear to drafters—consistent with the regulation's object of preventing markets' contamination by unfair terms—that *compliance* must occur before placing the form on the market.[845] But in the event an unfair term is made, the remedial scheme recommended here would continue to incentivise the drafter to withdraw it from the market as soon as possible: there is no incentive to leave it on the market, since at a minimum whatever a

[841] §5-VI.
[842] ibid.
[843] ibid.
[844] ibid.
[845] ibid.

drafter gains from it would be disgorged; and meanwhile, if during the time it is on the market, adherents suffer a loss which exceeds the drafter's gain, the drafter would be liable for the greater sum.[846]

Additional measures, detailed in Chapter 7, provided for the delivery of surplus regulatory information specially-geared to drafters (e.g. lay-language explanations, sample cases), in order to assist them with self-regulation. This was to be available to them in association with the drafting process itself, as well as the additional required step of self-registering forms before placing them on the market. This custom information was to be hosted on a dedicated IT platform, created to support the regulation, which would make use of 'smart' technology to proactively analyse drafter activity on the platform, and refine the tailored guidance for drafters based on what it 'learns' about drafters' needs from drafter activity.[847] Thus, a set of measures would combine to provide drafters all assistance possible with the task of preventive self-regulation during the crucial period prior to form terms' placement on the market.

Other provisions were addressed to adherents. As detailed in Chapter 7, all adhesion contracts would be required to carry a prominent label (or online banner) identifying them to adherents as subject to unfair terms regulation. The label/banner would direct the adherent where to obtain further guidance on whether and how to initiate secondary enforcement in the event of an unfair term. That guidance would include access to plaintiff-side class action lawyers, to whom the term could be referred for more expert scrutiny, or point them to how to proceed directly with enforcement action where called for. Because the regulation cannot rely solely on adherents informing themselves, it would also take the initiative to inform citizens of the basics of what it provides through periodic market-related regulated activities

[846] §5-V.
[847] Scott, 'Regulatory Space' (n 462).

such as key banking and credit arrangements, which already require citizens to be informed about other market regulation. These measures geared to adherents would help prevent the market's contamination with unfair terms by leaving drafters in no doubt that adherents will be aware of the regulation and able to enforce it if a drafter fails to self-regulate.

In sum, the regulation would include a number of provisions designed to influence drafters, prior to placing a form on the market, in a way that reinforces and facilitates the primary compliance mechanism of incentivised *ex ante* self-regulation by drafters.

IV. The Secondary Means of Regulating Unfair Terms: External Proceedings

A. Substantive Elements

i. Secondary Right of Action for Breach

The conceptual basis of the proposed unfair terms regulation, as mentioned, is a duty of fairness, applicable to drafters by operation of law. It was suggested that breach of this duty result in a secondary right of action under the regulation,[848] through which claimants could seek a monetary remedy. Typically, the right of action would be exercised by an adherent to the contract, whose interests the contract affects.[849] However, a group with a related interest (e.g. a consumer group for a consumer contract, or employee association for an employment contract) would have subsidiary standing to act, as would the administrative branch of the regulatory authority.[850]

a. Aggregation of Claims

[848] §5-IV.
[849] ibid.
[850] ibid.

The standard action under the regulation would not be individual, but a class action on behalf of all adherents to the form containing the term at issue. The mass character of the wrong required a mass recourse and mass remedies: aggregate liability to all adherents. and market-wide injunction of the term.[851] Otherwise, as noted in §III-A, drafters' net incentive would still be to make unfair terms. A collective standard action also helped by creating a (derivative) interest for class action lawyers retained on a contingency-fee basis, who as a cohort of 'private attorneys general,' could significantly boost enforcement when dealing with an issue as otherwise pervasive as unfair contract terms. For any given standard form contract, a single class action lawyer could oversee action which would cleanse the entire market of that unfair term and similar ones.[852]

ii. Elements in Determining Fairness Under the Regulation

a. Substantive Disproportion

As discussed in Chapter 7, the duty of fairness was best formulated as a legal test based on the principle of the drafter not making form terms substantively disproportionate in their impact on the parties' relevant interests.[853] To meet this requirement, the drafter in deciding the form terms, would need to effectuate at least a proportionate accommodation of the parties' conflicting substantive interests.[854] This formulation of the duty operated at the optimal level of precision: a more precise rule would create opportunities for circumvention by drafters; conversely, a more open-ended ideal like good faith or outcome like fairness would fail to provide adjudicators adequate guidance to be able to apply it consistently, and fail to provide drafters sufficient predictability to be able to self-regulate successfully.[855]

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[851] §5-V.
[852] ibid.
[853] §7-I-A.
[854] ibid.
[855] ibid.

b. Limited Contextual Appreciation

It was further suggested that terms should not have their fairness weighed as abstract propositions, ignorant of their purpose. Rather, their fairness was to be weighted based on their real-life impact on the interests of parties like those involved in the dispute.[856] However, due to the regulation's public interest aim of addressing unfair terms as a collective and systemic, not individualised and particularised, problem, this contextual appreciation of terms' fairness should be limited to the general context, and not include peculiarities of the parties.[857] The assessment would therefore typically take account of factors such as: the rest of the contract; the industry; the transaction-type; the purpose of the contract and of the term; and the term's impacts on legitimate interests of a business like that of the drafter and of reasonably foreseeable adherents.[858] The contextual inquiry would not embark on individualised factual inquiries, with unpredictable consequences for the mass market, such as communications between the parties, the sequence of events preceding the contract's formation, or unique features of the litigants' situations that distinguish them from what is typical of parties to the transaction-type at issue.[859]

c. Margin of Appreciation

The use of proportionality as a standard is in part an acknowledgment, as mentioned, that the fairness of terms cannot be assessed in a consistently accurate manner more precisely. This was one reason why it was thus proposed that the 'benefit of the doubt' be allocated to drafters, given the regulation's primary reliance on self-regulation by drafters.[860] Otherwise, the regulation would risk deterring not only unfair terms, but adhesion contracting

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[856] ibid.
[857] ibid.
[858] ibid.
[859] §6-I-C, 6-II-C.
[860] §7-I-B.

altogether.[861] It was also suggested that it might make sense to resolve marginal cases in favour of drafters because a party typically drafts when it has a special interest in the terms, which motivates its investment in crafting a form for the transaction-type in question, and is reflected in the risk of its take-or-leave stance to contracting on those terms.[862] Meanwhile, the party adopts the role of adherent typically in transaction-types in which it has a limited interest. Hence, as a result of this asymmetric interest in the terms as between drafter and adherent, it could advance the general welfare to allocate the benefit of the doubt to the drafting party.[863]

d. Listing of Terms

The principle of substantive disproportion, and the contextual factors to be considered in assessing it, help guide the application of the fairness test to specific cases. However, the guidance available through deductive reasoning from general principles is limited, and so it was suggested that the regulation provide further guidance through term-listings which indicate the status of a number of concrete terms or term-types, as several existing regulations do, including the UCTD, ACL, and Israeli SCL.[864] This would include a 'greylist' of term-types which will often be unfair, and hence merit close regulatory scrutiny. Close scrutiny of greylisted term-types would also help minimise, in relevant cases, the risk of undue deference to drafters, as a result of their margin of appreciation.[865] The listings would also include a 'blacklist' of terms that are always unfair, and whose blacklisting serves to make this clear *a priori,* without the need for adjudication—thus facilitating and expediting the removal of

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[861] ibid.
[862] ibid.
[863] ibid.
[864] §7-I-C.
[865] ibid.

unacceptable terms from the market.[866] Lastly, the listings would include a 'whitelist' of terms that are immune from attack as unfair. This could be because they were approved as fair in precedential decisions under the regulation, or because they are outside the scope of unfair terms control due to their approval under other more specialised law or treaties, for example.[867]

e. Analytical Framework

Using proportionality to assess the fairness of terms was also intended to provide a useful and widely-tested analytical framework for conducting the necessary assessment.[868] Its distinct framework proceeds through an evaluative sequence designed to methodically consider different ways in which disproportionality could arise, thus reducing the chance of unfair terms slipping through. Whilst proportionality is more commonly used in Public Law, it was noted that it has been used in Private Law. Moreover, the adhesion relation, as constructed here, comprises drafters having state-sanctioned unilateral power and responsibility for the fairness of form terms which affect the rights of adherents, similar in those respects to the power-relation between state and citizen that inspires use of proportionality in Public Law.[869] To assess a term challenged as unfair, the proportionality test in this context would ask whether the term: (i) serves a legitimate business purpose for the drafting firm, in making the contract; (ii) is a rational choice of instrument for pursuing that purpose; (iii) is reasonably tailored to avoid unnecessary detrimental impact to the interests of adherents, in pursuing that purpose; and (iv) has a proportionate impact on the drafter and adherents.[870]

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[866] ibid.
[867] ibid.
[868] §7-I-D.
[869] ibid.
[870] ibid.

iii. Secondary Right of Action for Pre-Approval

Besides a right of action for breach of the duty of fairness, the regulation also created an optional right of action for drafters to apply for pre-approval of form terms they are contemplating using, before introducing them to the market.[871] Interested parties (and subsidiarily, the administrative branch of the regulator) would be notified, in order to be able to resist the application. In all cases, the regulatory tribunal would be required to scrutinise the fairness of the terms before it might approve them.[872] The costs of this action were to be borne by drafters, to ensure that the recourse is used judiciously, in support of and not in lieu of drafters' primary responsibility of self-regulation.[873] A successful application was to result in the terms being approved for a fixed period of time, during which they would be immune from attack as unfair in breach of the regulation.[874] After that, the approvals were to expire in order to ensure that determinations that were errant or relied on a snapshot of the context that becomes increasingly dated, do not trap the market. Yet, they were not to expire so quickly as to undermine the much-valued certainty that the pre-approval process was meant to supply the market. At the sunset of an approval period, drafters could also apply for terms' re-approval. Meanwhile, terms which fail pre-approval would be declared unfair under the regulation, and be enjoined from use on the market. However, there would be no liability, since the pre-approval action is only available prior to placing terms on the market.[875]

iv. Remedies for Breach of the Duty of Fairness

a. Monetary Liability

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[871] §5-VI.
[872] ibid.
[873] ibid.
[874] ibid.
[875] ibid.

The first major element of the regulation's remedial regime in secondary enforcement of the duty of fairness was to consist of monetary liability.[876] As alluded to above, this monetary liability served to incentivise drafter self-regulation in compliance with the duty, since drafters' use of unfair terms is typically motivated by anticipated profit. A remedy was needed which would engage that motivation, and change the calculus, by eliminating the opportunity to profit from making unfair terms. This could be accomplished by using restitutionary damages as the principle upon which the monetary liability would be quantified. Thus, the drafter was liable to make restitution to adherents of the form that contained the unfair term, in the amount of its wrongful gain from using the term. Assuming adherents' losses were small, this was the quantum of liability.[877] However, where adherents' aggregate losses exceed the drafter's gain from the unfair term, the drafter was instead liable for adherents' losses. In all, drafters' monetary liability would be the greater of its own gain, or adherents' aggregate loss, as a result of its use of the unfair term.[878] This remedy ensured that drafters could no longer stand to gain from at least trying to get away with unfair terms, as much as they can, as long they can, as they do where unfair terms are unregulated or merely declared unenforceable in individual contractual instances.[879] By virtue of the remedy proposed here, they could only lose through such behaviour. Hence, drafting firms would be effectively incentivised to self-regulate, as the scheme here relies on, in pursuing its goal of market-cleansing, amidst realities that include the pervasiveness of adhesion contracting in modern society and the prohibitive burden of external enforcement processes.[880]

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[876] §5-III.
[877] It was added, in §5-III, that if behavioural studies conducted by the regulator found a lower percentage of drafter profit sufficient (or a higher percentage necessary) to induce substantially all drafters to make fair terms, then the regulation could quantify liability using that percentage.
[878] §5-III.
[879] ibid.
[880] §5-III-B.

It was considered whether the liability described might be too harsh on drafters. However, other aspects of the regulation served to alleviate that concern. Unlike some existing laws and regulations that resolve uncertainties about terms *contra proferentem*, the scheme here, as mentioned, allocated a healthy margin of appreciation to drafters in less-than-clear cases.[881] Moreover, a drafter could avoid any risk of liability whatsoever by obtaining pre-approval of terms as fair before introducing them to the market.[882] Even before that, the drafter could obtain advice via private consultation with compliance experts licensed by the regulator.[883] Implicit in this pre-market front-loading of the graduated elements of the 'enforcement pyramid' was the expectation that drafters utilise these recourses in cases where they are in doubt as to a term's fairness. The imposition of monetary liability, then, is best seen as a last resort that is a necessary backstop to ensure the effectiveness of the scheme in the rare cases where all else (self-regulation, cooperative compliance recourses, etc.) fails.

b. Injunctions

Another key element of the regulation's remedial regime in secondary enforcement of the duty of fairness was injunctions.[884] To attain the regulatory object of market-cleansing, a standard term found to be unfair had to be unenforceable not only against the individual claimant before the tribunal, but in all instances of the term's use market-wide. Hence, the drafter would be enjoined from continuing to assert or incorporate the term, or any similar term.[885] Competitors employing similar terms could also be joined as co-defendants, further

[881] §7-I-B.
[882] §5-VI.
[883] ibid.
[884] §5-VIII-A.
[885] ibid.

ensuring that the use of injunctions is not capricious, but consistent, and in line with the objective of market-cleansing.[886]

On a case-by-case basis, with the agreement of interested parties, the tribunal was able to go a step further in guiding future compliance, by combining the injunction with approval (on a motion from the drafter) of a modified version of the term that *is* fair, instead of just sending the drafter back to the drawing board. However, so as not to weaken or defeat the regulation's preventive self-regulatory incentives, this would not relieve the drafter from past liability, and the modified term would only be enforceable in contracts made subsequently.

c. Rules Relating to Settlement of Claims and Remedial Aspects of Collective Redress

Whilst the detailed content of contract terms primarily affects private interests, Chapter 6 observed that on the other hand it is a matter of public interest whether standard terms are unfair in breach of a duty imposed by law in order to protect the market. Thus, although the regulation relies on the parties whose interests are affected by the contract to instigate secondary enforcement actions, the actions themselves are proceedings in the public interest, not focused on correcting individual private wrongs but on cleansing the market of unfair terms.[887]

Rules affecting remedies should reflect this. And thus, for instance, it was suggested that in the ordinary case, the remedy could not be pre-empted by a party settlement.[888] Nor would the remedies ordered by the tribunal be limited by what was requested by the claimant. Also, in class proceedings under the regulation, the distribution of monetary damages to

[886] §6-II-A.
[887] §6-I-A.
[888] §6-II-B. And where appropriate, the tribunal would be able to authorise a substitute claimant or have the action continued by the administrative branch of the regulator.

adherents would be a process disconnected from, and subsequent to, the enforcement action. Thus, possible disputes among claimants would not imperil or delay enforcement, and in no event would unclaimed funds from a damage award by the tribunal be permitted to flow back to the drafter who breached the regulation.

B. Procedural Elements

This section draws together notable procedural aspects of the proposed regime.

i. The Regulatory Institution

A preliminary question to address was how the regulator would take shape institutionally.

a. Mandate

The appropriate shape of the regulatory institution flows from its mandate. Under the regulation here, its mandate was chief responsibility for the successful implementation of the regulation, including the fulfilment of most functions necessary to that.[889]

Those functions were wide-ranging. They included expertly adjudicating enforcement proceedings in cases of claims against drafters for breach of the duty of fairness or by drafters for pre-approval of terms.[890] They also included a variety of 'administrative' functions.[891] For instance, short of adjudication, the regulator was to license and supervise compliance experts who would be available to offer drafters optional pay-per-service private consultations.[892] More generally, the regulatory institution had to communicate information about the regulation, not only to members of the legal system serving as officials or party representatives, but also to subjects, in forms tailored to the needs which derive from their

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[889] §6-I-D.
[890] §6-I-A.
[891] §6-I-D.
[892] §5-VI.

roles within the scheme—especially: to facilitate drafter self-regulation, and to assist adherents in identifying when and how to instigate secondary enforcement action.[893]

Further, the regulator was expected to generally monitor and refine the implementation of the regulation with a view to its effectiveness and other impacts, represented here by other important general governance considerations (the integrity of the legal system, efficiency, and other significant collateral social effects) taken into account in recommending the features of regulation outlined in this work.[894] To do this, the regulatory institution was authorised to conduct such activities as research, stakeholder consultation, tracking of results, statistical analysis, etc. Compliance with decisions of the adjudicative body also had to be monitored, leveraging tools such as investigation, orders of disclosure, and coercive enforcement measures where needed. In response to insights gleaned from such activities, regulatory implementation would be progressively refined (and the regulation itself potentially adjusted, within the bounds of the regulator's authority). To assure public accountability, the regulatory institution also had to be bound by a duty to report on its activities to the legislature or executive branch from which it derives its authority.[895]

b. Public Body

It was further specified that the regulatory institution should be designated by and primarily responsible to the state, rather than to the parties (as in say, a private mediator or arbitral tribunal). A public body could be expected to abide by norms of impartiality, procedural fairness, and of decisions guided by law rather than by parties' wishes. It also facilitated coordination, so that the regulation could give rise to a coherent jurisprudence of

[893] §7-II.
[894] §6-I-D.
[895] ibid.

unfair terms, capable of guiding the behaviour of subjects (particularly drafters, given the scheme's primary reliance on self-regulation).[896]

c. Hybrid Body

The regulator was to be structured as a hybrid body, comprising semi-independent adjudicative and administrative branches. To assure the adjudicative body's independence, and its impartiality given the administrative body's potential partisan role in proceedings, the two bodies had to be separate. Separation could also help firewall the adjudicative body in the event of (even partial) regulatory capture of the administrative body, until such time as the corruption could be rooted out.[897] However, the bodies' shared authorisation, jurisdiction, and subject-matter specialisation suggested benefits from bureaucratic coordination. For example, administrative tasks such as publicising and explaining the adjudicative branch's judgments, monitoring and enforcing compliance with its decisions, intervening or acting subsidiarily in cases under adjudication, and researching new issues that may affect adjudication in the future, would all be aided by the two bodies' bureaucratic integration.[898] This arrangement would also benefit the adjudicative branch by facilitating the administrative branch being well-attuned to the tribunal's needs when conducting activities like publicity of decisions, research, intervention, and revision of the regulation—particularly pertaining to matters of procedure before and by the adjudicative branch.[899]

The resulting hybrid regulatory institution therefore comprised integrated bureaucratic organisation, but independent funding and control, and autonomous functions for its administrative and adjudicative arms.[900] The dedicated adjudicative arm was to comprise a

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[896] §6-I-A.
[897] §6-I-D.
[898] ibid.
[899] ibid.
[900] ibid.

new specialised tribunal tasked with presiding over and deciding actions for breach of the duty of fairness and for pre-approval of terms.[901] The administrative branch was responsible for all the other functions mentioned here as within the mandate of the regulatory institution.

d. Specialised Tribunal

The adjudicative tribunal created by the regulation was to be a specialised body, whose only jurisdiction is applications under the regulation for pre-approval of terms and claims for breach of the duty of fairness.[902] This specialisation enabled the incorporation of expertise in answering the central question of the fairness of terms, as detailed in the next section. Specialisation would also tend to foster continuous enhancement of the tribunal's expertise in making fairness assessments, through dealing repeatedly and exclusively with such cases, and by maximising the prospects for information-sharing and coordination among adjudicative personnel.[903]

Specialised jurisdiction was possible in this context because the fairness of a term could normally be resolved separately from other potentially related issues of dispute spanning a broad field or wide range of different areas of law.[904] Indeed, the scope of regulation excluded terms whose subjection to unfair terms regulation could conflict with other law or frustrate a core purpose of specialised field regulation.[905]

In contrast to a regular court, a specialised tribunal would also facilitate the use of streamlined procedures for assessing fairness under the regulation (discussed further in §ii-b).

Encouraging precedent for relying on a specialised body to deal with unfair terms regulation existed, for example, in the form of Israel's Standard Contracts Tribunal.

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901 §6-I.
902 §6-I-B.
903 ibid.
904 ibid.
905 §4-II-A-vi.

e. Mixed-Bench

It was further recommended that the regulatory tribunal have a mixed bench, including tenured legal experts along with *ad hoc* experts in the underlying subject-matter and social impact of the terms.[906]

Legal expertise was deemed important for a number of reasons. Given the regulation's fundamental concern with fairness, it was appropriate that decisions be presided over by experts steeped in the values of 'legality' associated with procedural fairness. Also crucial was it that decisions be capable of guiding regulatory subjects' behaviour, a common legal concern. In making fairness assessments, more specific legal capabilities such as contract interpretation, expert knowledge of contract drafting, and experience with judging the relative weight of incommensurable interests, would often be key.[907] Adjudication also required expert appreciation of the implications of various contract terms, in light of their status as legal instruments. This was especially important for the many term-types commonly perceived as being unfair because of how they reverse or distort presumptively fair background rules of other fields of law (Tort, Civil Procedure, Consumer Law, Employment, etc.). This meant legal expertise would also be needed to ascertain when a term's subjection to unfair terms regulation would conflict with or frustrate a core purpose of more specialised law (e.g., sectoral legislation), such that the tribunal should disclaim jurisdiction.[908]

Meanwhile, it was concluded that the tribunal would also benefit from inclusion of other (non-legal) types of expertise. In particular, expert appreciation of an impugned term's general context—not just the rest of the contract, but the underlying subject-matter, transaction-type, industry, etc.—was vital to assessing terms based on their real-life impacts

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[906] §6-I-C.
[907] ibid.
[908] ibid, §4-II-A-vi.

on parties like the disputants, rather than as mere abstract propositions.[909] The unprecedented reach of Contract in the age of adhesion, with its asymmetric division of labour which prioritises the contextual expertise of the drafting firm, reflects the value of that expertise. Regulation should not undermine that, but perfect it, through contextually-sensitive scrutiny for cases where self-interest may have unfairly biased the drafting. Incorporating experts on this general context into the bench also helped avoid reliance on party experts, whose concerns would tend to be more particularised to the individual client, and who often come with problems of bias and expense which can subvert proceedings. Although the contexts would vary widely for terms of different contracts, the necessary contextual expertise could be incorporated via *ad hoc* members of the bench, varying case-by-case with the context.[910]

It was also suggested that, if one context expert covered subject-matter expertise, the other (in a three-member panel with the legal expert as chair) could be someone with expertise in the wider social context, such as an expert in regulatory impact assessment.[911]

ii. Procedure for Adjudication of Cases Before the Regulatory Tribunal

a. Network-Driven Procedure

On the question of who would drive procedure before the regulatory tribunal, a ‘network governance’ approach was recommended in which responsibilities would be shared among different actors within the ‘regulatory network.’[912] The parties were primarily relied on to initiate proceedings, because the best assurance of these occurring where they are

[909] §6-I-C.
[910] ibid.
[911] ibid; Weatherill and others (n 10); (n 546).
[912] §6-II-A.

needed was to align responsibility for that with those holding the interest in it.[913] This included drafter applications for pre-approval of terms, and claims by adherents for drafter breach of the duty of fairness. The drafter could also be called on to identify all adherents to its form, and to know its improper gain from the unfair term, whilst claimant-side class action lawyers would hold an interest in obtaining this information from drafters, so authorised by the regulation. The parties were further to be permitted to explain why they believe the term is fair or unfair, with reference to the general context (on which drafters, and claimant-side class action lawyers invested in a case, were expected to have useful expertise).[914]

Beyond the above tasks, the regulatory tribunal would take the lead in directing proceedings—adopting a proactive stance, unlike customary adversary court procedure. Hence, as part of its overall responsibility to decide a case, the regulatory tribunal could order production of information, order a market investigation by the administrative branch of the regulator in support of the case's adjudication, and order special remedies (apart from those mentioned above) where needed in order to assure the regulation's efficacy.[915] The administrative branch also played an ancillary role in proceedings in, for instance, being able to petition the tribunal to add or remove parties to a case, in support of the regulatory aim of market-cleansing rather than mere selective enforcement.[916]

b. Streamlined & Flexible Procedure

In contrast to the complex and formal procedure of ordinary court litigation, the regulatory tribunal was to employ a streamlined and flexible procedural approach, as often

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[913] But, as noted, where the regulator believes a form contains an unfair term, and no adherent or related interest group steps forward, the regulator has a subsidiary power and responsibility to initiate action for breach or resist a pre-approval application.
[914] §6-II-A.
[915] ibid.
[916] ibid.

used by administrative tribunals.[917] This approach allowed the tribunal, in directing proceedings, to get to the bottom of cases most effectively and efficiently, thus helping adjudication keep pace with the market and ensuring proceedings are proportionate to what is at stake so that they do not distort the incentives intended by the substance of the regulation. This procedural approach also reduced the risk of parties being able to weaponise procedure to abuse one another or subvert the course of justice.[918] Israel's Standard Contracts Tribunal provided an example of unfair terms regulation using a streamlined procedural approach.[919]

Chapter 6 provided a sketch of how the procedural regime might take shape here. As noted, the parties would typically instigate proceedings and provide short written submissions regarding the merits, the context (relevant market, etc.) to use in assessing terms' fairness, and the appropriate remedy (scope of injunction, quantum of liability). But there would be no party discovery, interrogatories, depositions, etc. The tribunal would incorporate expertise by its own composition, and would have the power to obtain additional necessary information through the flexible tools mentioned in the preceding section. In cases falling comfortably within the knowledge and expertise of the tribunal, the decision would principally be a matter of reviewing the contract's terms. A live/oral hearing would only take place in cases of exceptional complexity or significance (novel legal issue, major market impact, etc.). The tribunal's reasons for judgment were to be short, and it was to be left to the administrative branch of the regulator, as part of its responsibility to inform subjects about the regulation, to provide fuller information to them in order to help guide their behaviour.[920]

Beyond these specific suggestions, vital to appreciate was the provision of overarching discretion to the tribunal to adapt its own procedures where the special needs of

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[917] §6-II-B.
[918] ibid.
[919] ibid.
[920] ibid.

given cases so require.[921] This extra layer of flexibility would help assure that procedures remain responsive to the market and proportional to what is at stake in a case, so that procedural arrangements achieve rather than subvert the regulation's substantive intentions.

c. Tailored Rules of Evidence

The evidentiary framework was to be tailored to the nature of proceedings, as influenced by the broader procedural and institutional arrangements already discussed. Thus, the tribunal was to avoid the rigorous and exhaustive system used in ordinary court litigation, in favour of a more relaxed and restrained system, as often used in administrative tribunals.[922] Since it was intended that the central item of evidence in any given case be the terms themselves, and since the need to assess the terms in context was to be accomplished through the bench's incorporation of contextual expertise, a restrained approach to evidence was appropriate. Israel's Standard Contracts Tribunal provided an example of unfair terms regulation employing a relaxed evidentiary approach.[923]

Under the regime proposed here, matters such as the sequence of events preceding the contract's formation, peculiarities of an adherent that affected the terms' individual impact on them, or steps that a drafter took to try to comply with the duty, would be inadmissible, since these are unhelpful to assessing the fairness of terms made for mass contracting.[924] Moreover, the burden of inquiring into them in each case could subvert the regulation's substantive aims. With the focus on the contract itself, and its impartial and expert appreciation internalised within the composition of the bench, the tribunal would also not depend very heavily on external sources of evidence selected by interested parties (fact-witness testimony,

[921] ibid.
[922] §6-II-C.
[923] ibid.
[924] ibid.

vast amounts of party documentary or material evidence, party experts), of uncertain reliability, whose centrality in ordinary litigation calls for a rigorous system of testing.[925]

Chapter 6 offered a sketch of the proposed evidential system. Within it, the parties were permitted to file limited evidence supporting their position (on the matters noted in §b). Beyond this and the key evidence of the contract itself, the tribunal was to use its broad powers (e.g. production orders, searches or summons, commissioning research reports or investigation by the administrative branch, consulting external impartial experts, etc.) to itself obtain the bulk of any additional evidence particular cases might require.[926]

This restrained and relaxed evidential framework would go hand-in-hand with the streamlined and flexible procedure, discussed in the preceding section.

iii. No Appeals & Limited Judicial Review

It was proposed that the regulation not grant appeal rights, and that judicial review be limited.[927] These restrictions were intended to ensure respect for the tribunal's specialised expertise, for which jurisdiction was granted to it in the first place, and to keep proceedings streamlined through to a final outcome, in the interests of finality. This would give markets the certainty they need, including regarding the status of standardised terms in widespread actual or planned use. Generalist courts would not be invited to second-guess the tribunal's decisions. However, limited judicial review would be necessary in order to assure the tribunal's proper conduct of its obligations.[928]

Accordingly, the grounds of review were to be restricted to matters such as lack of jurisdiction, procedural unfairness, and error of law (in the narrow sense of applying the

[925] ibid.
[926] ibid.
[927] §6-II-D.
[928] ibid.

wrong legal standard).[929] Review would be subject to showing a *prima facie* likelihood of an issue falling under one of the recognised grounds, and which issue would have affected the outcome of the judgment by the tribunal. In order to prevent abuse of requests for review, whose associated proceedings could distort the incentives intended by the substantive regulation, requests for review were to be subject to special cost rules under the regulation.[930] In particular, the full cost of review proceedings would initially be borne by the applicant, including a high fee paid to the regulator. Only if the reviewing court finds that the *prima facie* case is made out would the regulatory fee be cancelled, and the parties bear their own costs in review proceedings. The regulator would be the main respondent in those.[931]

C. Formal Elements

Beyond the substance and procedure of the regulation remained the question of the form in which the regulation should be presented to the various actors in the regulatory network. As noted in Chapter 7, these actors differ in their proficiencies, frameworks of meaning for interpreting and reacting to information, and roles within the regulatory scheme. Hence, it was suggested that the regulation would be wise to include an information-system designed to provide each class of actor with information tailored to their needs, transmitted via their channels, and translated into their 'language.'[932]

i. Information for Members of the Legal System

In performing their functions under the regulation, members of the legal system were to rely, for the legal system's purposes, on the legal formulation of the unfairness standard, summarised in §IV-A-ii above. More broadly, they were to draw on information contained in the regulatory instruments themselves and precedential decisions of the regulatory tribunal

[929] ibid.
[930] ibid.
[931] ibid.
[932] §7-II.

(and reviewing court). These sources are geared to an audience with legal familiarity, such as regulatory officials and party legal representatives having roles in the regulatory network.[933]

ii. Information for the Parties

a. Information for Drafters

1. Surplus Information for Drafters

Given the proposed scheme's primary reliance on self-regulation, it is crucial that drafters have such information as would best equip them to be able to reliably identify fair terms, so that in seeking to avoid liability, they will choose those terms. The way in which fairness was to be formulated as a legal test was designed to support this, as discussed. But it was suggested that drafters would be aided by surplus information geared to them, in light of their important self-regulatory role.[934]

This included authoritative discussion and explanatory comments for each element of the regulation relevant to drafters' task of choosing fair terms. To assist with the difficult task of applying general principles to concrete cases, drafters were to be provided (in addition to the fairness test's term-listings) access to a catalogue of real and/or hypothetical instances of the test's application, serving to illustrate its operation in different contexts.[935] And this was to be searchable by the sorts of questions that arise in the drafting process. Also, to supplement the brief reasons issued by the tribunal in releasing decisions, the administrative branch of the regulator was to provide fuller explanations and clarificatory notes, tailored to a lay audience, as part of its role in publicising tribunal decisions.[936]

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[933] §7-II-A-i.
[934] §7-II-A-ii-a.
[935] §7-II-A-ii-a-1.
[936] ibid.

These measures entailed information that the regulator expected would assist drafters, which the regulator would take the initiative in providing to them. But it was also concluded that drafters should have formal opportunities to proactively convey and seek information they feel is important in facilitating their compliance, and more broadly in attaining the object of the regulation. Mechanisms for this included compliance consultations (for more dialogic purposes) and pre-approval applications (for definitive pre-market guidance).[937]

2. The 'Language' of Drafters

The surplus information created specifically for drafters was not to be in 'legalese' but in language geared to businesspeople and other legal laypersons involved in creating adhesion forms.[938] This would diminish the dependency of these key actors on legal advice. It would increase access to justice for them (especially for small-business). And it would further the efficiency of adhesion contracting, which is central to its rationales as an exchange practice.

By allowing drafting firm personnel to develop, in their own right, greater command of the regulation's implications for their business, they would be in a better position to make business decisions about when to seek legal advice, and about *how* to manage their regulatory compliance. That is, it would empower them to determine *how* they will comply, drawing on the market expertise that underpins adhesion contracting's characteristic division of labour, rather than having to blindly defer to legal advisors who lack their specific market expertise, and whose exposure to professional liability risk creates some divergence in incentives that was seen as influencing the advice given to firms regarding contract terms.[939]

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[937] §7-II-A-ii-a-3.
[938] §7-II-A-ii-a-2.
[939] §7-II-A-ii-a.

A more direct role for drafters in compliance decisions might also reduce the risk of legal officials underenforcing regulation because of misgivings about the extent to which the drafter's breach stemmed in part from it being itself a victim of flawed legal advice.[940]

3. Dissemination of the Information to Drafters

The surplus information for drafters was not to be transmitted through communication mediums of specialised legal system use, but through ones generally accessible to businesses and drafting firm personnel.[941] This was to include, notably, the regulation's creation of a dedicated IT platform (website and/or software application) containing the drafter information in a highly accessible format, and that is functionally-designed based on how drafters could most benefit from it amidst the regulatory activities that bring them to the platform.[942] Such activities included compulsory registration of form contracts before use on the market, and optional activities of applying for pre-approval of terms, requesting private consultations, filing submissions or communications regarding tribunal proceedings, and even drafting the actual terms (using a secure app) on the platform.[943] Hosting all of these activities on the platform, where the drafter information is present, served to construct a 'virtual' choice architecture for drafters that could help nudge them in the direction of compliance.[944]

Meanwhile, the platform was also to leverage 'smart technology' to analyse a drafter's activity on the platform and display specific informational content or suggestions it computes would be most relevant to the drafter at the step that it is engaged in.[945] As the drafter moves through a form, for example, the information highlighted by the platform

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[940] ibid.
[941] §7-II-A-ii-a-3.
[942] ibid.
[943] ibid.
[944] ibid.
[945] ibid.

would correspondingly change in real-time. In this way, the regulation would proactively deliver the most salient aspects of the regulatory information whilst drafters are engaged in activities sought to be regulated. It was also proposed that the platform could anonymously track, aggregate, and analyse drafter activity in order to progressively 'learn' how to improve the information it supplies drafters (and in some cases, refine the regulation itself).[946]

b. Information for Adherents

1. Surplus Information for Adherents

When drafters fail to self-regulate, the scheme relies on adherents to initiate secondary enforcement. To do so, adherents must know of the regulation, the basics of what it does, how to assess whether they have a plausible claim, and what to do about it. This could be aided by the regulation providing surplus information tailored to adherents as well. Such information was to be limited to adherents' aforementioned needs, given their limited interest in adhesion contracts' form terms.[947]

Prior to contracting, drafters had to self-register forms (on the IT platform), generating a label (or online banner) to be displayed on forms on the market. This label/banner was to contain an adhesion 'mark,' notifying adherents at the contracting stage that the proffered contract is an adhesion contract—i.e. in which the adherent does not consent to terms, but consents to the drafter unilaterally incorporating form terms supplemental to and not conflicting with the terms negotiated by the parties (the consent to adhere: §3-III-B).[948] Simultaneously, the label/banner would notify adherents that the contract is governed by unfair terms regulation. The label/banner was to indicate if the form in question had been pre-approved (and if so, when the approval expires). For forms not pre-

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[946] ibid.
[947] §7-II-A-ii-b-1.
[948] ibid.

approved, the label/banner would communicate to adherents that the regulation gives them a recourse if there is an unfair term, and refer them to further guidance on that via a telephone hotline or a webpage on the regulation's IT platform.[949]

If an issue later arises between the parties, for which the adherent becomes interested in the further guidance about regulatory enforcement, that further information was to explain the basics of how the regulation works (including possible remedies), with simple examples to help the adherent assess whether she has a credible claim. Then if the adherent wishes to proceed, the guidance would invite the adherent to report the form (using the form's registration number) for review by claimant-side collective redress lawyers who signed up with the regulator for that purpose.[950] Adherents already familiar with the regulation could go further, and follow the guidance to initiate enforcement action against the drafter for breach.

2. The 'Language' of Adherents

The information created for adherents could not be in a legalistic form, but had to be in 'language' any citizen would understand.[951] Hence, information for adherents was to be presented straightforwardly, in plain language, and assume only common knowledge and skill. Examples of fair and unfair terms would be simple and familiar. The information would be action-oriented, to minimise the barriers to adherents accessing enforcement where warranted. [952]

3. Dissemination of the Information to Adherents

The information for adherents was to be transmitted through non-legal mediums generally accessible to ordinary citizens.[953] The 'product' label on adhesion forms, mentioned

[949] ibid.
[950] ibid.
[951] §7-II-A-ii-b-2.
[952] ibid.
[953] §7-II-A-ii-b-3.

in §1 is one example. The telephone hotline and website/link containing further guidance were additional examples.

However, given adherents' limited interest, it was suggested that the regulation could not rely solely on adherents to proactively seek regulatory information. To ensure adherents are sufficiently informed to be in position to initiate secondary enforcement where needed, the regulation had to take greater initiative. In order to avoid an overly-paternalistic approach, it was proposed that this not be done (at least in the short run) through a 'license to adhere' process. Rather, it could be accomplished through a moderated approach of bundling it with information given to citizens via existing regulated market-related private processes, such as opening bank or credit accounts. This would also be more efficient, and thus mindful of adherents' limited interest.[954]

c. Adjustment for Cognitive-Behavioural Biases

It was further suggested that the administrative branch of the regulator, as part of its research and overall responsibility for the effective implementation of the regulation, monitor regulatory subjects' reactions to the custom information provided, and adjust the information until the reactions match the objectives of the information's provision.[955] In particular adjustments might be necessary to compensate for cognitive-behavioural biases.[956] Subjects' reactions might also evolve over time, due to changes in psychological patterns, or the culture of the social system that influences the subject's behaviour.[957] For all these reasons, the regulation should anticipate making recursive adjustments based on the results of its studies,

[954] ibid.
[955] §7-II-A-ii-c.
[956] ibid.
[957] Kahan (n 749) 350.

if subjects' behaviour is to continue to correspond to regulatory expectations as social patterns change which affect regulated activities.[958]

Such adjustments might not be confined to the information itself, but also pertain to aspects of the way it is presented to subjects, which change the choice architecture of their decision-making.[959] In time, they might also include greater assistance from AI technologies in areas where behavioural studies reveal more intractable challenges.[960] However, such techniques and technologies should be used cautiously, due to ethical and practical concerns about their potential misuse.[961]

d. Handling of Discrepancies Arising from the Tailoring of Information

Providing partially different information to drafters and adherents entails a risk (as with treaties or legislation promulgated in multiple languages) of a discrepancy that could have legal significance. Over time, that risk would diminish as the reflexive capacity of the IT platform on which the party information is hosted feeds back insights that facilitate rectifying problems of that kind. The regulator's behavioural studies would also aid with this.[962] Initially, however, the risk of a discrepancy might be greater.

It was therefore proposed that, in the event of an objective conflict, the drafter bear the initial loss, and be liable to adherents, in order to maintain public confidence in the integrity of the system.[963] But the drafter's liability would be limited to adherents' loss, not its own gain (even if greater), unless the drafter acted with knowledge of the discrepancy. To protect drafters' reliance on the information given them to assist them with self-regulation,

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[958] §7-II-A-ii-c.
[959] ibid.
[960] ibid.
[961] §7-III-C.
[962] §7-II-A-ii-c.
[963] §7-II-A-ii-d.

the drafter would then have a corresponding recourse against the regulator in negligence, provided the drafter's reliance on the affected information was reasonable and caused adherents' loss. These conflict provisions were to apply only where drafters and adherents, as classes, would interpret the information they respectively received in ways that irreconcilably conflict.[964] After all, it is the point of the regulation's information-system to provide them *different* information, reflecting their different circumstances and roles, supplemental to the common central information that the legal system intends to rely on.

V. Comparison to EU Regime of Unfair Terms Regulation

The remaining part of this chapter compares the proposed scheme of unfair terms regulation summarised above to the existing scheme embodied by the UCTD.[965] This comparison reveals the similarities and differences between the two approaches, and thus draws attention to some distinctive features of the model here. Highlighting these features helps make clear their potential benefits, for consideration by Canada and the USA, which thus far have not followed the EU approach or crafted a comprehensive regime of their own.[966] These features might also be considered by the EC, in its ongoing refinement of EU regulation, or by the UK in the event of Brexit, if it opts to pursue its own approach.[967]

A. Overall Scheme of Regulation

The first table below (Table 8-A), provides an overall comparison of the regulatory scheme here versus that of the EU.

OVERALL SCHEME OF REGULATION		
Aspect of Regulation	**Scheme Proposed Here**	**EU Scheme**

[964] ibid.
[965] Referring, again, to the scheme based on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29 (n 13). The proposed changes currently making their way through the system are not considered here: see (n 13). For consideration of these, see Loos (n 458).
[966] §1-I.
[967] ibid.

Foundation of and Justification for Regulatory Control of Unfair Terms	Contract Law	Consumer Law
	An essential function of Contract's doctrine of consent to terms is to assure, assuming a process of negotiation, an operative fairness control over the terms of private exchange that the state is asked to sanction. In the adhesion process, consent to terms cannot fulfill this essential function. Thus there is a need for an alternate control. To avoid courts having to overturn longstanding precedent, and to gain the flexibility needed to be able to tailor enforcement procedures and remedies to distinct features of the adhesion context, this control is best supplied via regulation.	• Inequality of bargaining power between consumers and traders (recs 9, 16); • Rational ignorance/apathy towards the information (rec 20, art 5); • Isolation (recs 16, 23); and • Cognitive bias (rec 13)
Scope of Regulation	All adhesion contracts (whether they be consumer contracts, employment contracts, etc.)	Consumer contracts only (arts 1-2, rec 10); thus excludes employment contracts, *inter alia* (rec 10)
	All standard form (i.e. unnegotiated) terms	Terms defining main subject-matter and price are not subject to the regulation, even if they are unnegotiated standard form terms (so long as they are in plain and intelligible language) (art 4(2))
	Excludes terms provided by law or treaty, if mandatory, or if merely permitted under more specialised legislation but for a purpose which substantially overlaps with the fairness concern at issue under unfair terms regulation	Excludes terms provided by law or treaty (art 1)
	Excludes terms that, although not provided for by more specialised law, would frustrate an important purpose of more specialised law if declared in breach of the unfair terms regulation	
Regulatory Objective & Instruments	Cleanse market of unfair terms	Cleanse market of unfair terms (recs 4, 6)
	Incentive-driven self-regulation by drafting party	• Defence by virtue of the regulation in individual action for contract enforcement by a drafter of an unfair term • Review by state regulator of complaints of unfair terms, with recourses available if it chooses
Preventive	• Provision to drafters of detailed	• Under the EU Directive: none

Enforcement Measures	information on the regulation, specially geared to them, whilst they are in the process of deciding form terms • Offers drafters optional private consultation with experts on regulatory compliance, licensed and supervised by the regulator • Offers drafters the opportunity to apply for a pre-determination of the fairness of form terms they are considering, prior to placing them on the market • Takes away drafters' economic incentive to at least try to get away with unfair terms, using monetary liability matching or exceeding what drafters would gain from the unfair term were it not for the regulation--and by removing various barriers to enforcement that would otherwise operate so as to significantly 'discount' their liability exposure from the level meant to be set by the substantive law just noted • Market-wide injunctions in event of any unfair term (including as result of unsuccessful application by drafter for pre-approval of terms)	specified • As implemented in the UK by the CRA: • If CMA somehow becomes aware of an unfair term not on the market, and is able to prove that a party is 'proposing' or 'recommending' to use the term, it can apply to court to enjoin the party from using it (Sch 3 para 3(1)) • Prescribed neither by EU Directive nor CRA, but the practice of CMA as the UK regulator: • Publishes detailed information on gov.uk website to explain the regulation to drafters and encourage them to comply with the regulation
Consequence of Breach	Monetary liability, unenforceability, injunction in all cases	• Unenforceability of the term in the contract at bar, in individual case involving enforcement of the term • Injunction only where granted by court in rare suits brought by consumer group or public regulator for purpose of seeking that remedy

One key difference, evident from the table, is the basis of the two regimes. The regulation proposed here is founded on a justification lying at the heart of Contract Law, whilst the EU regime is founded on a Consumer Law justification[968] (and associated with the broader EU goal of completing the 'internal market'[969]). This distinction is significant. It

[968] Text to n 370; *Oceano Grupo* (n 370); Weatherill, *EU Consumer Law* (n 378) 147.
[969] Collins, 'Good Faith' (n 650).

affects the scope of regulation, as discussed in §4-II-A-iv. Although it does not preclude individual nations from regulating a more extensive set of contract-types, the UCTD is confined to consumer standard forms.[970] By comparison, the regulation outlined here covers all adhesion forms.[971] As discussed in Chapter 4, the EU regime despite its narrower overlap with regulation of contracts by Private Law, conflicts more extensively with Contract Law than the scheme here at the level of foundational assumptions and core philosophical commitments: rationales of consumer contract regulation such as inequality of bargaining power, isolation, informational asymmetry, rational ignorance, and cognitive bias could all apply beyond consumers to other routine contractual circumstances, which Contract Law has thus far not endorsed as general matters.[972] Inequality of bargaining power, for instance, has been rejected several times by courts in England as a general basis for regulating the fairness of contract terms because it is present *too commonly* to be a viable exception to the rule of freedom of contract.[973] The EU regime's rationales pose a more fundamental challenge to freedom of contract, and underlying liberal assumptions about autonomy and responsibility (upon which negotiated contracting rests), well beyond the practice of adhesion.[974] With that scale of conflict, perhaps unsurprisingly the result seemed to be an unprincipled compromise: On one hand, EU regulation seems too narrow (even as minimum harmonisation) for its own rationales, which justify extension at least to other adhesion contracts, and indeed beyond those.[975] Meanwhile, even with the scope of application limited to consumer standard forms, the EU regime's reliance on those rationales fits uneasily within the common law of Contract,

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[970] (n 13) recitals 2–13, 16, 20–24; ibid arts 1(1), 2(b). In the UK, some non-consumer standard forms are covered by the UCTA (n 364). However, despite its broad name, the UCTA is focused on exemption clauses.
[971] Chapter 4.
[972] §4-II-A-iv, v.
[973] *Pao On v Lau Yiu Long* [1979] UKPC 17; *Alec Lobb* (n 169); *National Westminster Bank v Morgan* [1985] UKHL 2; Moore, 'Denning's Lead Balloon' (n 195); Spencer Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 OJLS 17.
[974] §4-II-A-iv.
[975] ibid; §4-II-A-v

as noted. This conflict is no doubt a factor in patterns of underenforcement in the UK, and the lack of even comprehensive *consumer* unfair terms regulation in Canada and the USA.[976]

Another overarching question is of the correspondence of regulatory ends and means. Both the EU regime and the regulation proposed here share a goal of cleansing markets of unfair terms.[977] However, the EU regime cannot be expected to achieve that. It is unrealistic to routinely expect adherents to prospectively resist complying with unfair terms that are valid contractual obligations unless and until a lawsuit arises over its enforcement and reaches a conclusion in which the term is declared unfair and thus unenforceable. And it is implausible to attain that objective relying primarily on external enforcement proceedings, with their associated costs for parties and burden for courts, to retroactively cleanse markets one term of one contract at a time.[978] This is all the more so the case when just a single instance of the standard term's use is rendered unenforceable, whilst the drafter can still enforce other instances against different adherents (as can other firms using similar terms).[979] The EU does permit collective remedies: an interested group or public regulator may apply to an adjudicative body for such purpose.[980] As implemented in the UK, it is the CMA that holds that power.[981] In any case, these special lawsuits cannot be expected to sufficiently supplement individual cases where the regulation is used as a defence to enforcement, to cleanse the market of unfair terms. The constancy of adhesion contracting, compared with the limited external enforcement resources available (of courts, and in cases seeking injunctions, of regulators) are simply not on the same scale.[982]

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[976] §1-I.
[977] Collins, 'Good Faith' (n 650).
[978] §5-II.
[979] Collins, 'Circulate Documents' (n 11).
[980] UCTD (n 13) art 7.
[981] CRA (n 154) sch 3(3).
[982] §5-II; 6-III-B.

The scheme recommended here instead relies primarily on self-regulation by drafters, incentivised by monetary liability for breach, tailored so as to counter their existing incentive to make unfair terms.[983] This approach should deter reasonable drafting firms from trying to get away with unfair terms, and thus sharply reduce the frequency of external enforcement needed.[984] To further help prevent unfair terms from even reaching the market, the scheme included several provisions to support drafter self-regulation. These included special guidance geared to drafters, access to private consultations with licensed compliance experts, and the ability to apply for pre-determination of terms' fairness before use on the market.[985] Whilst pre-determination consumes similar types of resources as retroactive proceedings, there would be fewer issues prospectively, with no consequences having taken place and no liability at stake. More fundamentally, drafters' liability for the cost of this recourse incentivises them to self-regulate as much as possible, resorting to pre-determination only where the value of the terms, along with the drafter's level of uncertainty about their fairness, make it worth the cost. Moreover, unlike the EU regime, the *standard* action of the scheme here is collective. Thus, if a term is ruled unfair (whether in proceedings for breach or pre-approval), there is always a market-wide injunction, thus re-cleansing the market as much as possible for each expenditure of adjudicative resources.[986] Overall, the scheme proposed here has an approach better-suited to achieve the regulatory objective of market-cleansing.

B. Substantive Elements

Looking in more detail at the substantive elements of the unfair terms regime proposed here as compared with the EU regime, Table 8-B below provides a helpful overview.

[983] §III-A.
[984] ibid.
[985] §III-B.
[986] §IV-A-i-a.

SUBSTANTIVE ELEMENTS		
Aspect of Regulation	**Scheme Proposed Here**	**EU Scheme**
Enforcement Proceedings for Breach	Claim which can be made by an adherent, a related interest group (e.g. consumer group for consumer contract, employee association for employment contract, etc.), the administrative branch of the regulator	• Under the EU Directive: action can be taken by a representative group or public regulator before an adjudicative body (art 7) • As implemented in the UK by the CRA: the group which can take action is the CMA, and the adjudicative body is an ordinary court
Assessment of Fairness	Standard of substantive disproportion (where the parties' interests conflict)	Standard of significant imbalance contrary to the requirements of good faith
	Fairness test assesses the impact of the terms, in their general context: e.g. the rest of the contract; the industry; the transaction-type; the purpose of the contract and of the term; the term's impact on legitimate interests of a business like that of the drafter, reasonably foreseeable adherents, etc.	Fairness assessment is of the terms themselves (or the contract, given account for rest of contract, related contracts, nature of goods or services contract is for (art 4(1))
	Non-generalisable adjudicative fact context (e.g. sequence of events leading to contract formation, party peculiarities, etc.) inadmissible, given that regulation is concerned with standardised terms of mass contracts	Full adjudicative fact context to be taken into account: 'all the circumstances attending the conclusion of the contract' (art 4(1))
	Benefit of the doubt goes to drafters, given their special interest in the standard terms	Requirement of 'significant' imbalance advantages drafters. However ECJ guidance (*Aziz*) on test's application effectively changes the standard. Also, any doubt regarding meaning of term is resolved *contra proferentem* (ar. 5)
	Requirement of disproportion, combined with drafters' margin of appreciation, reinforced by use of proportionality analytical framework, allow for consistent and predictable adjudication	Possibility of consistent adjudication enabled by requirement of 'significant' imbalance undone by confusion around 'good faith' requirement, and jurisprudential tests based on unanswerable hypotheticals and comparisons to background law which often do not make sense in common law context (e.g. trespass in *ParkingEye*)
	Term listings to aid application of general standard	Term listings to aid application of general standard
Remedies	Primary remedy is monetary liability	Primary remedy is unenforceability of the unfair term
	Monetary liability of the drafter is	No monetary liability

	based on the greater of what drafter's improper gain from using the unfair term, or loss suffered by adherents due to the unfair term	
	Standard action is class action pursuing aggregate liability on behalf of all adherents to a form (with no other requirements for certification, no private settlements permitted, and a completely isolated process for distribution of funds among claimants)	No provision for class actions, selective public action for injunction
	Judgment that a term is unfair always results in unenforceability of the term in all instances of the standard contract market-wide	In regular private proceeding over enforcement of the unfair term, unenforceability of the term only in that single instance of the standardised contract
	Judgment that a term is unfair always results in market-wide injunction preventing continued use of the term or any similar term	• Under the EU Directive: If a consumer group or regulator take action, the adjudicative body may grant an injunction preventing continued use of the term or any similar term (art 7) • As implemented in the UK by the CRA: action to be taken by CMA, rare use of recourse
Application for Pre-Determination of Fairness of Terms by the Adjudicator	Claim which can be made by the drafter prior to placing the standard form on the market. Pre-approval results in the terms being immune from attack as unfair for a fixed period of time (renewable upon a successful re-application)	Recourse not available
	Notice must be given to potentially interested groups who, along with the regulator, may oppose the request. Regardless of whether the application is resisted, the adjudicator is required to scrutinise the terms' fairness, before granting an approval	N/A

As can be seen from the table, one notable difference between the two regimes is in who is given the principal power to instigate external enforcement. The EU approach relies more heavily on interest groups,[987] and regulators.[988] For example, in the UK, adherents can

[987] UCTD (n 13) art 7(2).

complain to the CMA, but alone the CMA can seek an injunction under the regulation, which as noted in §6-III-B, it only does selectively due to resource shortages, *inter alia*.[989] By contrast, the scheme here focuses more on empowering the parties, as key actors in compliance (even at the external enforcement stage), because of their existing involvement and personal stake in enforcement. By providing meaningful rights of action to them, the scheme here aligns the power to enforce with the position of already being involved (at the self-regulatory stage) and having an interest in enforcement. For example, it enables drafters to seek a pre-determination of prospective terms' fairness.[990] This recourse—not included in the EU scheme—is an important tool for nipping unfair terms in the bud, whilst allowing firms to obtain the certainty they need to protect the major investments they (and the economy as a whole) make in and upon adhesion contracts' form terms.[991] The scheme here also allows adherents to instigate collective proceedings for breach, leading to market-wide injunctions, with the assistance of class action lawyers.[992] Empowering the parties (and private class action lawyers) multiplies the number of potential enforcers, whilst widely distributing the enforcement burden.[993]

The monetary liability proposed by the model here helps incentivise primary self-regulation and thus reduce the need for burdensome secondary external enforcement.[994]

Providing it on a basis of restitutionary damages disincentivises drafters from self-interested abuse of their unilateral discretionary power over the form terms to choose unfair

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[988] ibid 7(1); CRA (n 154) sch 3(3). In the event a consumer contract happens to end up in court for some reason other than a dispute about the terms' fairness, yet the court nonetheless has an adequate record to assess that (CRA s 71(3)), the judge effectively becomes another regulator, bound to consider, of its own motion (CRA s 71(2)), the terms' fairness: Weatherill, *Internal Market* (n 387) 115.
[989] CRA (n 154) sch 3(2)–(3).
[990] §5-VI.
[991] §2-I-A-ii.
[992] §5-V.
[993] Scott, 'Regulatory Space' (n 462).
[994] §5-III.

terms, whilst simultaneously helping subsidise the adherent's cost of secondary enforcement, given that the adherent-class representative's *individual* loss will often be small.[995] Parasitic on adherents' legal interest in restitution, it also becomes possible to provide a 'derivative' contingency-fee interest making it economical for the adherent to retain a lawyer to pursue a class action. Thus, once adherents initiate actions, plaintiff-side class action lawyers could take charge from there, as a cohort of private attorneys-general that again multiplies enforcement resources and distributes enforcement burdens.[996]

The scheme here does not rule out a backup role for interest groups or regulators in pursuing enforcement; but neither does it marginalise the parties' own role in favour of these. It sees the parties as vital to any scheme that can realistically attain the high degree of regulatory compliance embodied by the regulations' goal of market-cleansing.

Turning to differences in how the EU and the model here assess fairness, the conceptual basis is similar: despite the EU regime's inclusion of the ambiguous 'good faith,' this has been interpreted as covering substantive imbalance.[997] The EU's further requirement that the imbalance be 'significant' makes it proximate to the concept used here of 'substantive disproportion.' The use of term-listings to help guide the application of the general principle is also a common element among the two approaches. However, one aspect on which they diverge is in the role of context in assessing terms' fairness. The EU scheme measures imbalance 'in the parties rights and obligations arising under the contract'.[998] The fundamental concern is therefore in what the contract itself provides. By contrast, the approach here was concerned with disproportion in the terms' *impact* on relevant interests of typical parties to a transaction like that in question. Thus, the approach here considers not just

[995] Chapter 5.
[996] ibid.
[997] *First National Bank* (n 663).
[998] UCTD (n 13) art 3(1). The directions to take into account the rest of the contract and any dependent contract in art 4(1) may be included in this.

what the terms themselves do, but their consequences for the parties, given that contracts are not abstract exchanges of legal terms, but vehicles by which parties seek to further their overall personal interests in ways that are often inseparable from their interest in the terms.[999] At the level of the general context, the EU regime takes into account the nature of the goods or services, whilst for the reason noted, the scheme here seeks a fuller picture of this general context: the industry, the transaction-type, the purpose of the contract, the purpose of the term, the impact the terms would have on parties typical to contracts like that at issue, etc. But at the level of the specific context of individual parties and the making of their contract, the receptiveness of the two regimes reverses: The EU regime directs that 'all the circumstances attending the conclusion of the contract' be taken into account.[1000] By contrast, the scheme here would disregard the circumstances attending the conclusion of the contract, as facts such as these which are particular to individual contractual instances interfere with the ability to assess the fairness of the term in general, reflecting the basis of the regulation being public interest concern with unfairness in standardised mass contracts. Taking account of such factors also reduces predictability for market players, and complicates mass remedies, whilst exhaustively consuming adjudicative resources, so that only selective enforcement is possible, as the CMA's approach to enforcement reflects.[1001]

Another difference in the regimes' respective assessment of fairness is that the proposal here was that drafters enjoy the benefit of the doubt in marginal cases.[1002] This would improve market predictability, facilitate self-regulation, and avoid frivolous claims. Although the UCTD's requirement that the imbalance be 'significant' tends to similar effect, it is undermined by other aspects of the EU regime. For example, the 'good faith'

[999] §7-I-A.
[1000] UCTD (n 13) art 4(1).
[1001] Chapter 6.
[1002] §IV-A-ii-c.

requirement forces the drafter to have to justify a departure from background law, effectively reversing the benefit of the doubt.[1003] Similarly, the test of whether the adherent would have agreed the term, had it been negotiated, effectively reads out from the Directive the word 'significant,' assuming—as the common law of Contract long has in using consent to terms as a fairness protection—that parties would negotiate fair terms, not terms that are less-than-significantly imbalanced against them.[1004] In addition, if the court finds that there is 'doubt about the meaning of a term,' then the EU regime resolves it *contra proferentem*.[1005] Since contractual interpretation is far from being possessed of scientific precision, this once again effectively makes the test more stringent.[1006]

The analytical frameworks employed by the two schemes to conduct the fairness test also differ. The question posed under the EU regime of whether the adherent would have agreed to the term, had it been negotiated, is unanswerable, since adhesion contracts' form terms are precisely those that adherents ignore. It is analytically useless, and serves only to restate the adjudicator's pre-determined conclusion.[1007] This is evident, for example, in *ParkingEye*[1008]: The majority judgment of Neuberger and Sumption LJJ and the dissent of Toulson LJ come to opposite conclusions as to what the adherent would have agreed.[1009] In addition, Lord Mance notes that the question is not 'easy to answer,' and he seems to abandon it in suggesting that the adherent would not have agreed the term, yet ruling that the term is fair.[1010] Meanwhile, Lord Toulson observes that there is 'an artificiality in postulating a hypothetical negotiation,' and accuses the majority of having ' substituted their judgment of

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[1003] *Aziz* (n 168).
[1004] ibid; §2-III-C.
[1005] UCTD (n 13) art 5.
[1006] §4-II-A-vii.
[1007] §7-I-D.
[1008] (n 328).
[1009] ibid [108]–[109], [309]–[315].
[1010] ibid [209], [212]–[213].

the reasonableness of the clause for the question whether… the customer would have agreed with the term'.[1011] Also problematic is the EU regime's call for the impugned term to be compared to what background law provides in its absence, given that the common law lacks a civil code containing books on nominate contracts containing legislated default terms for most common transactions.[1012] As a result, the question can turn into nonsense, as demonstrated in *ParkingEye* by the Supreme Court using the tort of trespass as the background law for the term specifying the late parking fee.[1013] The default law approach also undermines Contract as private ordering, and the specialised expertise that contracting by adhesion prioritises.[1014] The scheme proposed here relies instead on proportionality as an analytical framework.[1015] The adhesion process by which the form terms are made involves a unilateral power relation, similar in shape to relations of Public Law, where proportionality is widely used to weigh whether that power has been abused.[1016] Proportionality analysis' methodical sequence helps discipline the assessment, reducing in significance the inevitable subjective aspect of it, thus furthering predictability for market participants.[1017] It is a tried and tested method of tackling the difficult task of weighing incommensurable values in a wide range of contexts, as unfair terms regulation requires.

C. Procedural Elements

Table 8-C below shows a comparative overview of the regimes' procedural aspects. Since the UCTD leaves much procedural detail to national law, the comparison in this section also looks at provisions of the CRA in the UK as an instance of its implementation in the EU's largest common law jurisdiction. As the table reveals, in some respects the CRA goes

[1011] ibid [309], [315].
[1012] §2-III-B.
[1013] *ParkingEye* (n 328) [107], [208], [307].
[1014] §3-II-C.
[1015] §IV-A-ii-e.
[1016] ibid.
[1017] §7-I-D.

farther than the UCTD requires, in crafting procedural devices meant to help make the regulation more effective. Nevertheless, deficiencies are apparent in the combined UCTD-CRA regime, which the proposals here would hope to avoid.

PROCEDURAL ELEMENTS		
Aspect of Regulation	**Scheme Proposed Here**	**EU Scheme**
Regulatory Institution-Type	Hybrid body, comprising (1) an Administrative Branch, and (2) an Adjudicative Branch, independent from the Administrative Branch	• Under the EU Directive: an body to perform adjudicative function required (art 7(2)) required; select administrative functions referred to (e.g. art 7(2), rec 23) • Under the CRA: administrative body is CMA; no dedicated adjudicative body (ordinary courts used)
	Adjudication by specialised expert tribunal constituted by the regulation	• Under the EU Directive: adjudication 'before the courts or before competent administrative bodies' (art 7(2)) • Under the CRA: CMA decides complaints, ordinary courts decide suits brought by CMA (or private suits where enforcement of term in issue)
	Adjudication by mixed-bench, combining in each case legal experts (one of whom is Chair) with legally-untrained experts in the underlying context (e.g. experts in the industry or market of the contract, in regulatory impact assessment, or such other dimensions as a case may call for, decided by the Chair)	Adjudication by bench consisting exclusively of lawyers appointed as judges of ordinary courts
Administrative Duties of Regulator	• Publishes and distributes various sets of regulatory information geared to different stakeholder groups (see table on Formal Elements) • Licenses and supervises external experts available to provide private regulatory compliance consultations to drafters • Has broad enforcement powers including investigation, orders for production of information, monitoring compliance • Monitors implementation and effectiveness of the regulation, through research, stakeholder consultation,	• Under the EU Directive: not specified • Under the CRA: • May publish 'advice and information' about matters relating to the regulation's enforcement (Sch 3 para 7(5)) • May order production of information to investigate regulatory compliance (Sch 5 Part 3)

	tracking and analysing results, etc. • Refines the regulation, regularly reports on all activities, and refers more substantial reform recommendations to its supervising authority	
Adjudicative Duties of Regulator	• Administrative Branch: Has no jurisdiction to settle disputes • Tribunal: Has jurisdiction to decide proceedings under the regulation, notably applications for pre-approval of terms, and actions for breach of the duty of fairness	• Under the EU Directive: an adjudicative body shall decide individual cases over enforcement (art 6(1)) and collective actions seeking discontinued use of unfair terms (art 7(2)) • Under the CRA: • CMA receives public complaints of unfair terms, and decides whether to pursue them (Sch 3 para 2) • CMA (with or without receiving a public complaint) may settle a dispute with a drafter through a voluntary undertaking (Sch 3 para 6) • Court: decides applications by CMA to enjoin drafter's continued use of unfair term, that were not settled (Sch 3 para 5) • Court: has duty to review, of its own motion, and where it considers there to be a suitable record, the fairness of consumer contract terms which happen to be in court for another reason (s 71)
Nature of Primary Proceedings	• Private specialised litigation under the regulation instigated by the drafter for pre-approval of terms, may be resisted by private interest groups, regulator; tribunal under duty to scrutinize terms before approval • Private specialised litigation under the regulation instigated against the drafter for breach of the duty of fairness, on behalf of all adherents to the standard form	• Under the EU Directive: For individuals, conventional litigation under the Private Law of Contract, in which regulation can be invoked as a defence against enforcement of the unfair term (art 6(1)); public recourse for injunction (art 7(2)) • Under the CRA: • Same • Complaint to the Regulator • Negotiations between Regulator and drafter for voluntary undertaking, to avoid Regulator recourse to suit for injunction via conventional litigation
	Class action is standard proceeding	Individual (collective used selectively)
Party Roles in Proceedings	• Actions for breach would be primarily initiated by parties to the contract (drafters for pre-approval actions, adherents for actions for breach). Interest groups and the regulator can	• Under the EU Directive: adherent using regulation as defence to enforcement plays usual party role in in conventional individual Private Law litigation

	act subsidiarily. • In claims for breach, claimant-side class action lawyers would pursue an aggregate claim on behalf of all adherents to the contract in question • Once proceedings are initiated, control of procedural and evidentiary matters is principally in the hands of the tribunal. The parties and groups intervening can make limited submissions relevant to their interests in the case. • Administrative Arm of the Regulator can also apply to the tribunal to join other parties to an existing action (e.g. firms using similar terms, etc.)	• Under the CRA: • Same • For complaint process, any person can make complaint to CMA, then have no further role, although they have a right to be informed (Sch 2 para 3(3)) • Public recourse may be taken by regulator against drafter for injunction, in ordinary courts
Rules of Procedure	• Streamlined: No discovery, party interrogatories, depositions, cross-examinations etc. Party submissions limited. Typically no oral hearing. Decision on review of written record, especially the contract, and expert bench knowledge of context. Tribunal gives only limited reasons for decision as part of proceedings (left to Administrative Branch to further explain as part of publicity of decision, based on briefing from Tribunal) • Flexible: Tribunal has flexibility to adapt its own procedures where a case so requires.	• Under the EU Directive: Ordinary court procedure in Private Law actions over enforcement of the term in which adherent raises the regulation as a defence • Under the CRA: • Same • For complaint process, procedure not specified, but CMA must give reasons if it declines to act (Sch 2 para 3(3)) • For public action by regulator, ordinary court procedure in litigation seeking injunctive relief
Rules of Evidence	Restrained: Usually no witness testimony, no party experts, no evidence on adjudicative facts that are immaterial to term's general context (e.g. events preceding formation, party peculiarities are inadmissible).	Ordinary courts' exhaustive approach to evidence, based on assumption central task is search for the truth of what happened that led to party dispute
	Relaxed: Tribunal directly obtains most evidence it needs. Relaxed approach given its expertise and impartiality. Tools include production orders, summons, ordering market study. Limited party evidence permitted supporting party submissions.	Ordinary courts' rigorous approach to evidence, based on lack of native expertise, assumption of unreliable sources of evidence (i.e. external and thus unknown, and interested parties thus not impartial)
Rights of Review and Appeal	No appeals. Judicial review limited, and subject to special cost rules to incentivise parties to only request review where reasonably clear something awry in Tribunal decision.	Ordinary rules

There are some differences in the institutional arrangements of the two schemes. The UCTD does not overtly direct the creation of an administrative agency, although the recitals mention the possibility of an administrative authority deciding complaints and/or initiating proceedings. The CRA assigns administrative functions to the CMA.[1018] The scheme here goes further, proposing a dedicated agency. The institution proposed here would have more powers and responsibilities in assuring the effectiveness of unfair terms regulation than the CMA, including extensive general research, refinement of the regulation in response to such studies, and the compliance consultations program.[1019] The UCTD does require an adjudicative body.[1020] The CRA implements this via ordinary courts.[1021] The scheme here instead follows Israel's approach of constituting a specialised tribunal.[1022] Further, it was suggested that the tribunal not consist exclusively of legal experts, but that it comprise a mixed bench, which includes legal experts but also experts on the context in which the fairness of the terms are to be assessed under the regulation proposed here.[1023] This would enable a more realistic and accurate assessment of fairness than would typically be possible in generalist courts—and without the cost and bias concerns associated with party experts.[1024]

Under the EU/CRA regime, the procedural burden of adjudication in ordinary courts is mitigated by the CRA restricting to the CMA the right of action created under art 7(2) UCTD, and by authorising the CMA to negotiate the settlement of disputes with drafters.[1025] As noted in the preceding section, the scheme here sees enforcement as better-served by enabling interested parties to play a greater role themselves. The CRA's centralised approach

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[1018] CRA (n 154) s 70.
[1019] §IV-B-i-a.
[1020] (n 13) art 7(2).
[1021] CRA (n 154) s 71.
[1022] §IV-B-i-d.
[1023] §IV-B-i-e.
[1024] ibid.
[1025] CRA (n 154) schs 3(3) and 3(6).

is hindered by the resource shortages of approaches which rely heavily on a public body, as CMA documents confirm.[1026] Concentrating enforcement power in this way also increases the potential grain from, and thus the likelihood of, regulatory capture.[1027] The CRA attempts to address transparency concerns by requiring the regulator to disclose its decisions and reasons whether or not to take regulatory action.[1028] What this gives to complainants falls clearly short of the extent of their empowerment under the scheme here, as one of its most significant distinguishing features.[1029]

As discussed in §IV-B-ii, typical enforcement proceedings also differ under the respective regimes. Rather than the regulation being invoked as a defence to enforcement of an unfair term, or in occasional public suits taken by the regulator seeking an injunction, the scheme here incentivises and equips the parties that hold interests in regulatory compliance to initiate compliance proceedings.[1030] This includes applications for pre-approval of terms by drafters, and private actions for breach of the duty of fairness by drafters, for which monetary damages are available to adherents.[1031] Also, whilst the CRA, in implementing the UCTD, allows for the CMA to pursue the collective remedy of an injunction,[1032] the scheme here goes much further in the way of collective proceedings: It makes class actions the standard proceeding. These can be privately pursued by any adherent (with the assistance of class action lawyers). And the result of proceedings would always have market-wide effect, through aggregate restitutionary damages and injunctions.[1033] These differences in the nature of typical proceedings are crucial, given the nature of unfair terms in adhesion contracts as a

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1026 §6-III-B.
1027 Baldwin, Scott and Hood (n 444) 9–10. Weatherill, *Better Regulation* (n 389) 7.
1028 CRA (n 154) s 3(2)(1).
1029 §5-II, IV.
1030 §V-B.
1031 ibid.
1032 CRA (n 154) sch 3(3).
1033 §IV-A-i-a.

mass 'wrong.' That aspect of them is sheltered by the flawed assumptions embedded within systemic features of regular common law proceedings, and incapable of more than sporadic enforcement via public action. By contrast, proceedings under the scheme here are designed to match that aspect of unfair terms with enforcement arrangements tailored to this. [1034]

As far as rules of procedure and evidence, the CRA's reliance on ordinary courts carries with it courts' onerous approach to these matters, where proceedings are too often disproportionate to the compliance payoff.[1035] The scheme here seeks to avoid this outcome by employing, as mentioned, a specialised tribunal with an efficient self-driven procedure. Once action is initiated, party participation is streamlined, and party evidence restricted, with the aid of the tribunal's possession of expertise incorporated in its bench and its broad powers to obtain any additional evidence needed.[1036] This approach was designed to deliver expeditious decisions, based mainly on the tribunal's expert review of the terms themselves in light of their general (and not particular) context.[1037] Moreover, the collective nature of the proceedings means their result would be collective remedies which maximise the compliance benefit secured for each enforcement expenditure—including the forward-looking deterrent value of aggregate restitutionary liability. By contrast, the UCTD/CRA approach invites drafters to redraft new unfair terms and restart the regulatory enforcement sequence. As a result, the regulation is constantly a step behind unfair terms as a generalised issue, and cannot achieve its goal of market-cleansing, which requires a more preventive focus.[1038]

For related reasons, the proposal here was to foreclose appeals and limit judicial review.[1039] This departs from the more permissive usual approach of courts, unrestricted by

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[1034] §5-VIII-A.
[1035] §IV-B-ii.
[1036] ibid.
[1037] ibid.
[1038] Collins, 'Circulate Documents' (n 11) 793–794.
[1039] §IV-iii.

the UCTD/CRA. Through cost rules, the scheme here also incentivised parties to only pursue judicial review where they are quite certain of being able to establish that something improper afflicted the tribunal judgment, hence fostering finality as the market requires.[1040]

D. Formal Elements

Below, Table 8-D compares the formal elements of the EU regime and the scheme here. Since neither the UCTD nor the CRA prescribe much on this front, but since the CRA does designate the CMA as the unfair terms regulator, the table additionally looks at measures taken by the CMA. It also takes note of information provided to UK consumers through the 'Citizens Advice' charity association, which government webpages direct them to in order to obtain information on the law and their rights.[1041]

FORMAL ELEMENTS		
Aspect of Regulation	**Scheme Proposed Here**	**EU Scheme**
Information Provided to Regulatory Subjects	Customised based on their roles within the regulatory scheme: • For drafters, surplus information, to assist their self-regulatory role of drafting fair terms in compliance with the regulation, including: explanatory comments on the regulation; searchable catalogue of actual and hypothetical cases applying the regulation; lay explanation of reasons for judgment of the tribunal; optional private consultations with licensed compliance experts; option to apply for binding pre-determination of fairness of potential terms prior to using them on market. • For adherents, surplus information highlighting bits they need as key secondary enforcers, including: Initially, label/banner serving notice it is an adhesion contract, subject to unfair terms regulation, whether form	• Under the EU Directive: not specified • Under the CRA: not specified • However, for drafters, gov.uk website provides information created to assist drafters in complying with the regulation, broadly similar to the types of information recommended by the scheme here, except no provision for licensed consultations or pre-approval determinations • For adherents, the citizensadvice.co.uk charity association website is suggested by the government website as the resource to consult, but has limited information that is difficult to find and follow. The site does, however, have means of contact (including phone) for consumers to get more information

[1040] ibid.
[1041] Citizens Advice (n 795).

	is pre-approved or not, where to find further guidance. Further guidance available on web/by phone helps them assess whether they have a plausible claim, and if so, how to act to refer it to claimant-side class action lawyer for review, or initiate a complaint for breach of the regulation.	
Form of Information	Information for each 'social system' of regulatory actors is 'translated' into language geared to them	• Under the EU Directive: not specified • Under the CRA: not specified • However, information referred to above available at gov.uk website is in language geared to legal laypersons
Means of Dissemination of Information Specially Geared to Regulatory Subjects	• For drafters: use of IT platform as hub of their regulatory activity, including: registering forms; applying for approval of terms; filing submissions for tribunal proceedings; optionally even drafting their standard forms. Platform deploys smart-technology to identify and display the information most relevant to what issues they are engaged with at any given time, and collects anonymous data used to continuously improve the information system (and potentially to refine the regulation itself) • For adherents: clearly recognisable adhesion contract 'mark' on required label/banner, along with phone hotline/website easily accessible to obtain further guidance. Also, citizens must receive periodic basic info on the regulation as part of other regulated market activities such as key banking transactions that already involve similar requirements for other types of market regulation.	• Under the EU Directive: N/A • Under the CRA: N/A • However, for drafters, gov.uk website has posted information geared to drafters, and citizensadvice.org.uk charity association website has posted information geared to drafters along with contact methods
Cognitive-Behavioural Adjustment	Ongoing refinement of information (and potentially details of the regulation) based on findings from cognitive-behavioural studies by Administrative Branch of regulator, so that subjects' reaction to regulatory information matches expectations inherent in the regulatory scheme	No formal provision for tracking or taking account of cognitive or behavioural variances from regulation's expectations

Neither the UCTD nor the CRA specify informational duties of note of the regulator towards the parties, although the CRA does provide that the CMA may publish 'advice and information' about regulatory enforcement.[1042] Looking at the situation on the ground, the CMA provides significant information to drafters through the gov.uk website, with a similar general aim as the proposals here, *viz*., helping guide regulatory compliance. One notable difference is the opportunities that the scheme here affords drafters to take initiative in identifying and seeking from the regulatory authorities information they feel they need.[1043] These included the compliance consultations program, and applying for pre-determination of the fairness of terms a drafter is considering placing on the market.[1044] These measures are crucial, as they provide a means of eliminating whatever 'penumbra of uncertainty'[1045] is left by the combination of the guidance contained in the fairness test, the surplus compliance information prepared by the regulator for drafters, and drafters' own expertise (including market-research and business experience in knowing the interests of the adherent-class of its form) in their task of identifying which potential terms would be fair.[1046] These are therefore important elements of a regulatory plan capable of attaining the regulation's preventive object of keeping markets cleansed of unfair terms.

The scheme here also makes a concerted effort to inform *adherents* of aspects of the regulation relevant to them as secondary enforcers. In the UK, the Citizens Advice charity's website, which the government recommends for consumers wishing to inform themselves, does not sufficiently achieve this: consumers could be provided more useful information in a more consumer-friendly form. It may be that this is viewed as less of a priority under the UCTD/CRA model, since adherents play a less important role in enforcement, and the

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[1042] (n 154) sch 3(7)(5).
[1043] §IV-C-ii-a-3.
[1044] ibid.
[1045] Hart, *Concept of Law* (n 532) 12.
[1046] §3-I-C-ii-b.

regulator a more direct role, than under the scheme outlined here. Nonetheless, the choice not to invest more in informing adherents has costs. The CMA has limited enforcement capacity, as noted, whilst adhesion contracts are ubiquitous. The CMA is directed to receive complaints from consumers.[1047] However, consumers' capacity to do so is compromised to the extent they remain ignorant of the regulation, or of when and how to complain. And consumers are meanwhile under pressure from drafting firms to comply with terms that they are told are their legal obligations. As a result, a significant presence of unfair terms on the market is effectively tolerated, frustrating the regulation's goal of market-cleansing.

Another important difference between the regimes is that the scheme here is insistent about drafters and adherents being informed. For example, it creates an IT platform where the information is displayed, and requires drafters to conduct various regulated activities (including registering forms) on that platform.[1048] Not only is custom information for drafters available there, but the site uses smart technology to proactively identify and display the most relevant aspects to whatever step the drafter is engaged in at a given moment.[1049] For adherents, the most basic information (including where to get further information) reaches them through the label/banner that form contracts are required to prominently display.[1050] Beyond that, all citizens were to be informed of the basics of the regulation as part of regulated private activities in which they already periodically receive information on other market regulation such as in opening bank or credit accounts.[1051] Through its greater initiative to inform market participants, the scheme here makes it possible to draw on them in order to exponentially multiply its regulatory capacity, versus relying primarily on a public regulator

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[1047] CRA (n 154) sch 3(2)(1).
[1048] §IV-C-ii-a-3.
[1049] ibid.
[1050] §IV-C-ii-b-1.
[1051] §IV-C-ii-b-3.

with limited resources. This it must if the regulation is to achieve the high degree of compliance inherent in its goal of cleansing markets of unfair standard contract terms.

The scheme here also places a priority on reflexive tools, such as the IT platform's smart-technology and the duties of the administrative arm of the regulator to continuously monitor and study subject behaviour.[1052] These build into the regulation engines of ongoing self-improvement, and an inboard capacity to adapt to any change in the underlying social context. Conversely, the EU regime relies on periodic 'fitness checks,' which take considerable time, and lead to discrete refinements, through the EC legislative process, producing new directives, and then legislative amendments at the national level.[1053] At the time of this work's completion, in progress are proposed refinements to the 1993 Directive, which would move it closer to the model proposed here.[1054] Perhaps by the time of its next cycle, or in the event that the UK chooses a different regulatory path, additional aspects of what is recommended here will be of interest to jurisdictions having existing regulation, besides those that do not, including particularly Canada and the United States.

[1052] §IV-C-ii-c.
[1053] Commission, 'Fitness Check' (n 11); Commission, 'New Deal' (n 10).
[1054] (n 800).

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