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Various Approaches to Unfair Terms and Their Background Philosophies

1. The importance of the principle of fairness — and of its background philosophies

The issue of regulating unfair terms has occupied an important position on the European contract law agenda ever since the agenda was formed in the late 1980s. The first piece of European secondary legislation stepping into the core areas of contract law was the Unfair Contract Terms Directive.^{*1} The issue is, of course, dealt with both in the Principles of European Contract Law^{*2} and in the recently published preliminary version of the Draft Common Frame of Reference.^{*3}

It is to be expected that this issue will be one of the most debated in the further discussion on the development of European contract law. The reasons are of both a practical and theoretical nature. How law should react to contract terms that appear one-sided, unbalanced, or unfair is certainly a practical problem both in general contract law and in consumer contract law specifically. However, the controversies also relate to the position of the fairness principle in the basic understanding of contract law as such. The approach to unfair terms is an important, perhaps even the most important, reflection of the various ideological-theoretical underpinnings of thought on contracts. Therefore, the issue attracts great interest, despite the fact that fairness rules even in the most fairness-friendly jurisdictions are applied relatively seldom.

Questions like the following are at the core of the debate on what the European fairness rules should look like in future:

- What scope should a fairness rule have? Should it include individual contract terms or only standard terms (or, as an intermediate position, terms that have not been individually negotiated^{*4})? Should it be applied to the main subject matter of the contract and the price, and to what extent? Should it relate to consumer contracts only, or to business-to-business contracts as well?

¹ Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 95, 21.04.1993, pp. 29–34.

² PECL: O. Lando, H. Beale (eds.). Principles of European Contract Law. Parts I and II (The Hague, Kluwer Law International, 2000) as well as O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Principles of European Contract Law. Part III (The Hague: Kluwer Law International 2003). On unfair terms see article 4:110.

³ DCFR, published by Sellier 2007. On unfair terms see articles II.–9:401–411.

⁴ As in the Unfair Contract Terms Directive.

- What kinds of arguments should primarily be used in assessing the unfairness of a contract? Should one mainly look at the possible one-sidedness of the procedure when the contract was made (procedural unfairness), or should one instead consider the outcome of the procedure — that is, the content of the contract (substantive unfairness) — or, rather, what interrelationship should the procedural and substantive arguments have in the assessment of fairness?

Various answers, in various combinations, can be given and have been given to these questions. I claim that those answers are not primarily legal-technical but relate to more general conceptions of justice as well as to our understandings of human beings, society, and law.

In this paper, I will present and discuss some of the background variables. My purpose is not to defend any particular solutions to the contract law issues mentioned above but, rather, to make explicit some fundamental reasons that in the debate often remain hidden behind more concrete surface-level reasoning.

2. Unfair terms and four conceptions of justice

The issue of how to guarantee or promote fairness of contracts is often described in terms of dichotomies like freedom of contract versus fairness or freedom versus paternalism. However, this easily oversimplifies the issue. For example, to position procedural fairness rules opposite freedom of contract can be misleading. Rules that require a party who uses standard terms to let the other party acquaint itself with the terms and even to particularly ‘flag’ onerous terms can equally well be understood as devices to make sure that the decision-making of the party receiving the terms is sufficiently informed and ‘free’. The term ‘paternalism’ in a similar fashion has been combined even with libertarianism.⁵ In addition, the term — often used to discredit regulation in this area — is misleading. It is intended to convey a picture of the state ‘paternalistically’ intervening in private relationships against the will of the parties. However, even if mandatory private law rules may prevent one party from relying **in court** on terms conflicting with those rules (that is, in fact, to use the state — the *pater* — to enforce those terms), the parties are free to do what they want as long as they agree and there is no dispute between them. Only administrative or criminal law’s collective control of contract terms could be called paternalistic in the true sense of the word.

So, the issue of fairness is certainly more complex than is often appreciated. The rules to be found in this area have many possible purposes that reflect different forms of justice.

Firstly, in contract discourse, the problem of unfair contract terms is often raised in connection with regulation concerning standard-form conditions. The use of such conditions poses obvious problems for traditional contract thinking, which emphasises autonomy and the will or consent of the parties as basic legitimating factors behind the binding force of contracts. How can one, with such a starting point, accept that a party, who might not even have read the conditions and knows nothing about their content, can be bound by them? If this is the perceived problem, the purpose of regulation that attempts to remedy the problem is to safeguard the actual consent of the party or, in more general terms, the actual freedom of contract of that party. Rules that have this aim are focused less on the content of the outcome and more on the procedure for achieving a contract. They are based on a form of **procedural justice**. Procedures of negotiation and information are central in such an approach.

Secondly, the focus may be on the substance of the contract rather than on the procedure of making contracts. In contract law it is natural, as a starting point, to look at fairness with regard to the substantive relationship between the parties to a contract. Discussion often focuses on the balance between what the parties have promised to perform for each other. It is considered important that contracts be balanced, or, rather, that they not appear too unbalanced. To the extent that the purpose of the rules is the promotion of contractual balance with regard to the substance of contracts, the rules are based on the idea of **commutative justice**.

Thirdly, elements of **distributive justice** may occasionally become relevant in this context as well. Assessment of the fairness of the contractual obligation is then not primarily related to the balance between the parties. Rather, it is focused on enhancing the position of the weaker groups of citizens in comparison with other groups. A good example of such contractual social protection is the principle of **social force majeure** that has been used in the Nordic countries.⁶ According to this principle, the legal consequences of delays in payment and other performance may be mitigated if the ultimate reasons for the delay are unfavourable changes in the health, work, housing, or family situation of the debtor.

Fourthly, fairness rules in contract law may be used to **support other societal policies**. A typical example is regulation concerning racism and gender equality: contracts not in compliance with such regulation may

⁵ C. R. Sunstein, R. H. Thaler. Libertarian Paternalism is Not an Oxymoron. – The University of Chicago Law Review 2003, pp. 1159–1202.

⁶ See my paper “Social Force Majeure” — A New Concept in Nordic Consumer Law. – Journal of Consumer Policy 1990, pp. 1–14.

be considered unfair for this reason.⁷ Environmental concerns and human rights issues may influence the assessment of fairness as well.

In other words, fairness rules rest on a complex web of purposes and conceptions of justice. Most national and international solutions contain both procedural and substantive elements. Obviously, up-to-date legislation on fairness and standard-form contracting needs both elements. Depending on where the emphasis is put, there are different approaches to the issue in different countries.

3. Four models for approaching the issue

Differing assessments of the need for regulating unfair contract terms and standard-form contracts connected with various understandings of the purposes and conceptions of justice of such regulation, as outlined above, have led to different approaches to the issue in different countries. Acknowledging that there are many variations on the regulatory themes that surface in this context, one may perhaps group the ways of dealing with the issue into a couple of larger categories or models. Four models are distinguished here: **the ‘no particular problem’ model**, **the standard-form contract model**, **the consumer protection model**, and **the general fairness model**.

As the purposes mentioned usually are intertwined in practice, the models cannot directly be tied to the particular conceptions of justice analysed in the previous section, even though there are some obvious connections. I will note some such connections below. In most models one can find at least traces of all the conceptions of justice mentioned, but some conceptions come more to the fore in some models than in others.

The **‘no particular problem’ model** is based on the belief that the general rules on making contracts — based on certain safeguards of free will and consent of both parties, perhaps with additional rules related to the need to adjust the contract in the event of changed circumstances — basically produce just results. What the parties have agreed on, without fraud or force, has to be considered just precisely because they have agreed on it, and the law should recognise their agreement. Interference against unfair contract terms is warranted only in particular cases for particular reasons.

Prior to the Unfair Contract Terms Act 1977, the law of the United Kingdom could be viewed as an expression of such a model, as common law did not regulate unfair terms in any systematic way. Even though said act had a general clause on ‘reasonableness’ that covered both standard and individual terms in consumer contracts as well as standard terms in business contracts, one could even claim that the ‘no particular problem’ model continued to apply also after the adoption of this act, as it did not apply to terms imposing obligations and liabilities, but only covered exemption clauses. This situation continued until the implementation of the Unfair Contract Terms Directive, which required UK law to properly regulate terms imposing obligations and liabilities in consumer contracts. Today the domestic approach in the UK might be moving in the direction of an even broader fairness model, as the Law Commissions have proposed an extension of the scope of the general fairness control to cover both business-to-business relationships and individually negotiated terms in consumer contracts.⁸

The **standard-form contract model** is a more fully developed version of the general contract law approach, based on the assumption of rationally acting parties. In this model, the reality of contractual consent in relation to standard-form contracts is problematised. Therefore, problems of unfairness appear that cannot be remedied with the help of general contract law rules alone. Particular regulation of standard-form contracts is required.

The most well-known example of national regulation focusing on standard-form conditions is the German Act on General Conditions from 1976.⁹ This act, which dealt both with the problem of incorporation and interpretation and with the fairness problem, only applied to standard-form conditions (general contract conditions). It did not relate to consumer protection in particular but was based on the recognition of a partial market failure occurring when standard terms are used. It controlled standard terms in both consumer and commercial contracts.¹⁰ Later, in the German *Schuldrechtsreform*, these provisions were included in the Civil Code (*Bürgerliches Gesetzbuch*) in a specific chapter on general contract conditions.¹¹ Provisions on general conditions (*algemene voorwaarden*) have been included in a specific part of the modern Dutch Civil Code as well.¹²

⁷ See, e.g., D. Schiek. *Differenzierte Gerechtigkeit*. Baden-Baden: Nomos 2000.

⁸ See the joint Report by the English and Scottish Law Commissions (2005).

⁹ Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen.

¹⁰ See, e.g., R. Zimmermann. *Consumer Contract Law and General Contract Law: The German Experience*. – *Current Legal Problems* 2005, pp. 415–489.

¹¹ Gesetz zur Modernisierung des Schuldrechts, BGB, articles 305–310.

¹² See the Dutch Civil Code, articles 6:231–247.

The German act has had a strong influence on the content of the EC Unfair Contract Terms Directive. The preparation of this directive proceeded from the assumption that all consumer contracts, both standard-form contracts and individually negotiated contracts, should be covered.^{*13} However, this was criticised, especially in the German doctrine: the fairness control of individually negotiated contracts was said to be in conflict with private autonomy and the functioning of the market economy.^{*14} This criticism led to the scope of application of the directive as adopted being restricted to contracts that have “not been individually negotiated”.^{*15}

Obviously, the standard-form contract model, like the ‘no particular problem’ model, emphasises the importance of procedural justice. The use of standard terms is seen as bringing in an element of one-sidedness to the contracting procedure that has to be alleviated with the help of fairness rules. Possible other forms of justice only come into play at a second stage, when the applicability of the fairness rules, related to the use of standard terms, has already been determined.

By contrast, the **consumer protection model** looks at the typical imbalance between the parties in the consumer market. The basic ethos of such a model is consumer protection. The starting point is not the perceived conflict between contractual will and superimposed standard terms but, rather, the typical strength of the bargaining power possessed by businesses as compared to that of the consumers. The delimiting criterion for protective measures in this model is the consumer–business relationship rather than the way in which the contract was made (individually drafted or based on standard terms).

Admittedly, in practice it is not always easy to distinguish the models, and they can be combined. Such a combination has expressly been used in the EC Unfair Contract Terms Directive, as its scope is delimited by reference both to standard terms (more specifically, terms not individually negotiated) and to consumer relationships. However, as the directive was prepared solely with consumer relationships as its object of regulation, the content of the directive appears to be a good example of the consumer protection model.

The French approach has followed the consumer protection model even more clearly. It applies the control over unfair terms only to consumer contracts but includes individually negotiated (i.e., non-standard) terms within this control.^{*16}

The consumer protection model is often preoccupied with achieving commutative justice, even though it, of course, also contains strong elements of procedural justice, and sometimes traces of distributive justice.

Finally, the **general fairness model** is the most far-reaching, including both consumer relationships and business-to-business relationships within the scope of fairness rules, and extending those rules to cover not only standard terms but also individually negotiated terms. Such a model recognises that the contract mechanisms can lead to unfair results in all kinds of relationships and with regard to all kind of terms, and it underscores that the enforcement machinery of the state should not be made available to put into effect contracts that are considerably unfair. The principle of fairness therefore is not a principle limited to consumer relations or standard-form contracting; rather, it should permeate the whole of contract law.

A well-known example of legislation that is based on the general fairness model is that found in Nordic contract law. Probably the most (internationally) well-known provision in Nordic contract law is the general clause in § 36 of the almost identical Nordic Contract Acts^{*17}, according to which a court may set aside or adjust a term of a contract if its application leads to unfair results. As the general clause focuses on the consequences of the application of a term, the courts can make use of it both when a term was unfair already when the contract was made and when a change of circumstances has led to unfairness. Of course, even though the general clause is generally applicable, a considerable portion of the case law concerns consumer contracts. However, many interesting decisions concerning business-to-business contracts have been made as well.

The Nordic general fairness model eclectically includes all of the above-mentioned forms of justice and is based to some extent on a general understanding that courts should not be used to produce substantive injustice.

¹³ See the 1990 proposal OJ C 243, 28.09.1990, p. 2.

¹⁴ H. E. Brandner, P. Ulmer. The Community directive on unfair terms in consumer contracts: some critical remarks on the proposal submitted by the EC Commission. – *Common Market Law Review* 1991, pp. 652 ff.

¹⁵ Article 3.

¹⁶ Loi Scrivener 1978 and now Code de la Consommation, articles L 132.1–L 132.5.

¹⁷ In Sweden: Lag om avtal och andra rättshandlingar på förmögenhetsrättens område (1915:218), the general clause added by Act 1976:185, in Finland: Laki varallisuus oikeudellisista oikeustoimista (228/1929), the general clause added by Act 956/82, in Norway: Avtaleloven (1918/4), the general clause added by Act 1983/160, and in Denmark: Lov om aftaler og andre retshandler på formuerettens område (1986/600).

4. Four questions related to our understanding of human beings and society

It is not only our understanding of justice that determines how we approach the issue of contractual fairness. Our attitude is also deeply embedded in our interpretation and visions of the society in other respects. The design of the fairness rules relates to some extent to how we perceive typical human behaviour and how we picture a good society. Our perception of human beings, the economy, societal relations, and the functions of law may all contribute to the place fairness is given in the structure of contract law.

As to the understanding of **human beings**, the need for contractual fairness rules obviously depends on the strength of the rationality assumption that contract law is based on — i.e., **how rationally parties are presumed to act when making contracts**.

Traditional contract law, emphasising the autonomy of the parties, is based on a strong assumption of rationality. The idea of contracts having binding force and the related respect for freedom of contract are seen as justified not only because private autonomy is a value in itself but also because it is instrumentally just. As the parties are presumed to be the ones who best can take care of their own interests, their voluntary agreement must be seen as the most just compromise between their aspirations. However, this kind of reasoning presupposes that the parties are guided by a free and rational will and that this can have an impact on the contract in an equitable bargaining process.

Clearly, the ‘no particular problem’ model in regulating fairness, being the ‘traditional’ contract law model, is based on such a perception of the typical role of the parties. However, also models that accept a broader role for fairness thinking may be based on a strong rationality assumption. The more one emphasises procedural justice in the assessment of fairness, the more rationally one usually presumes individuals to act. Various kinds of pre-contractual information duties are typical examples of regulation that believes in the rationality of those who are supposed to use the information. Also the standard-form contract model builds on a rationality assumption at least as far as individual terms are concerned.

However, well-known behavioural research shows quite clearly that people in many situations act much less rationally than expected. Fairness problems in contracting are not only related to information imbalances. Even in cases where information is available, people often do not act on this information. For various psychological reasons, information may not be taken into account in contractual decision-making processes.^{*18}

The recognition of this fact obviously must give rise to a certain guard against purely procedural versions of fairness. Even relatively transparent procedures in contracting can lead to unfair results because of psychological factors. Only more general substantively focused fairness models — models that are not limited to standard-form contracting alone — can deal with such unfairness.

However, there is, of course, no necessary link between empirical facts and normative conclusions. Even though one recognises that a full-blown rationality assumption is empirically false, one may still want to stick to the assumption in a normative sense. One may still normatively assume that people have to act rationally — if they do not, they will have to bear the consequences. This is a tenable position, but, given the facts, some would consider it rather cold and unjust.

A second assumption on which the conception of justice of traditional contract law is based relates to the **economy** and its competitive structures. The mechanism of competition is understood to promote just outcomes of contracting in the marketplace. Market forces tend to guarantee a just balance between the rights and obligations of the parties. Therefore, if contracts become unfair, this is seen as a result of market failure. A relevant question with regard to the content of fairness rules therefore is the following: **To what extent does one believe that competition really leads to fair and balanced contracts?**

With regard to certain issues, it is obvious that such an effect is not achieved. It is common knowledge that the market mechanism primarily works with regard to the price and perhaps some other central features of contracts, such as guarantee periods. With regard to other parts of contracts, particularly of standardised contracts, there is little incentive for businesses to compete. As a result, even competition law to some extent accepts co-operation between businesses in this area.^{*19} The market mechanism often fails to have an impact on standard terms, which is an important explanation for the fact that fairness rules concerning standard-form contracts are common in most jurisdictions.

As to the more central parts of a contract, competition law recognises the possibility of unfairness caused by market failure in this area as well. One of the purposes of the prohibition of abuse of dominant position is to protect those contracting with a business in a dominant position against unfairness caused by the imbalance

¹⁸ See the very illuminating analysis by G. Howells. *The Potential and Limits of Consumer Empowerment by Information*. – *Journal of Law and Society* 2005, pp. 349–370.

¹⁹ See more closely my paper “Cooperation and Competition Regarding Standard Contract Terms in Consumer Contracts”. – *European Business Law Review* 2006, pp. 49–72.

created by this position.^{*20} However, the competition law approach to this issue is of an on/off nature. Either the business is regarded as in a dominant position and the competition law safeguards come into play or it does not have such a position and no safeguards are available. This seems to imply that competition works sufficiently well to guarantee fairness in the latter situation — of course, provided that there is no forbidden collaboration between the players in the marketplace.

It is, of course, possible to adopt such a position in contract law as well. For the price and other central parts of the contract (or, as in the Unfair Contract Terms Directive, the main subject matter of the contract^{*21}) competition is understood to adequately achieve just outcomes, and the relatively rare cases of abuse of dominant position are left for competition law to deal with. This kind of thinking obviously lies behind the restrictive attitude toward applying the fairness test to the price and to other central parts of the contracts in many jurisdictions.

Again, however, this is only one possible position. Rather than adopting a black-and-white attitude toward competition — it either functions or it does not — one may view the issue as much more complex. Perhaps one could see the impact of competition as varying along a continuum rather than being either full-blown or non-existent. The economic structure may be more or less competitive, depending on the line of business, on prevailing conditions, etc. This understanding of economy makes it easier to defend the need for contractual fairness rules with a broader scope than the competition law rules that are interested only in one end of the scale, the abuse of dominant position.

Thirdly, other visions concerning **society** than those related directly to the level of competition in the economy are relevant in this context as well. One may describe the issue in various terms; the concept of trust offers a good expression of what I am referring to. Obviously, in a society where people are generally used to trusting other members of the society and are expected to do so, the approach to the regulation of contractual fairness must differ from the attitude toward the issue in a society that is built on an attitude of suspicion. The more parties trust each other in the society and the marketplace, the less need there is to analyse contract terms in detail. Thus, our third question will be this: **How well do members of the society trust each other, and how much should they trust each other when contracting?**

For example, English business and contractual practices are said to be of a more adversarial nature when compared with the more co-operative features of Continental and Nordic market processes.^{*22} This is reflected in law as well: in English law and business practice, a party has a relatively limited obligation to inform the other party about negative circumstances when a contract is concluded.^{*23} Therefore, parties in this environment should take adequate precautions when contracts are concluded. As there is less room for trust both in the other party and in legal safeguards against potential actions of the other party, business parties are expected to look after their own interests. It is no wonder, therefore, that English law traditionally has been reluctant to give courts broad powers to interfere in contracts, and that it has adhered rather more to the ‘no particular problem’ model of regulation.

In the same way, also consumer decision-making can be assumed to relate to the level of trust that consumers have with regard to the other players in the marketplace. This relates to the level of trust in the overall honesty of the marketplace, including the system of consumer protection, as well as to the trust in the relative moral integrity of the business sector, or at least of the businesses the consumer is dealing with. The more trustful consumers are, the less they will feel a need to be on guard against unfair contract practices. A higher level of trust therefore implies a need for or a reliance on more efficient consumer protection. Consumers behave differently in a marketplace that they regard as well regulated and supervised than in one where they feel more unsafe. In relation to regulation of unfair contract terms, a high level of trust implies a broad reliance on the mechanisms through which courts can interfere in unfair terms, as the existence of such terms means betrayal of the trust upon which the contracting was done.

Again, the empirically ascertained level of trust does not necessarily determine our normative visions of society. One may very well normatively argue for the adoption of principles along the lines of *caveat emptor*. One may also claim that certain distrust may be economically efficient — in particular, in contractual relationships in the marketplace. However, as a counter-argument one could refer to economic studies that mention a high level of trust both in other members of society and in the legal mechanisms of society as an important factor explaining the success of particular economies.

In addition, if one looks at transaction costs in the contractual setting, it is not necessarily the paradigm of distrust that is the more efficient, even though one might think that its relatively negative stance towards fair-

²⁰ EC Treaty article 82 (2) (a): “Such abuse may, in particular, consist in [...] directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.”

²¹ Article 4 (2).

²² Those differences between the English and German markets are also used as explanation in the well-known paper by G. Teubner. *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*. – *Modern Law Review* 1998, pp. 11–32.

²³ See, e.g., the overview by J. H. M. van Erp. *The Pre-contractual Stage*. – A. Hartkamp, M. Hesselink, E. Hondius, C. Jouston, E. du Perron, M. Veldman (eds.). *Towards a European Civil Code*. 3rd ed. Nijmegen: Ars Aequi Libri & Kluwer Law International 2004, pp. 375–377; P. Legrand. *Pre-contractual Disclosure and Information: English and French Law Compared*. – *Oxford Journal of Legal Studies* 1986, pp. 322–352.

ness rules should make it foreseeable and therefore legally less expensive. A comparison between common-law contract rules and Continental contract law illustrates this paradox. English contract law traditionally²⁴ considers itself to offer a high degree of legal foreseeability, because its starting point has been a strict adherence to a literal interpretation of the contract.²⁵ For a party to a contract to be able to foresee (in this legal environment) how the contractual relationship is going to function legally in various situations in the future, the terms of the contract have to cover all possible scenarios in detail and from various angles — and this has led to the well-known detailed and expensive Anglo-American contracting practice. If a party does not engage in writing detailed and comprehensive contract terms, the risk of the contract becoming unreasonable as the situation progresses grows. By contrast, the Continental system with its broader access to fairness might offer the parties a certain trust that courts may intervene if the contract becomes too unfair. In a system like this, the transaction costs related to contract-making are probably not as high as in a legal environment that forces the parties to make detailed and extensive contracts.

Irrespective of such more instrumental arguments, however, the basic issue remains: Do we want to promote a society that believes in and builds on trust or distrust? Such societal visions are not irrelevant in discussion of the scope and content of contractual fairness rules.

Finally, also our visions concerning the **functions of law** obviously affect our attitudes toward fairness rules in contracting. The basic legal tension, traditionally expressed in the maxim ‘*summum ius summa iniuria*’, between formal equality and foreseeability on the one hand and concrete justice on the other is at the core of the discussion concerning fairness rules in contract law. The basic question here is this: **What level of concrete injustice is the legal system prepared to accept as a tribute to the acknowledgement of the basic principle of *pacta sunt servanda*?**

Clearly, all legal systems have some threshold above which injustice stemming from contracts is considered to be too apparent to be acceptable. All legal systems also accept that perfect justice in each singular case is an impossible utopia — and that there is not, nor can there be, agreement on what such perfect justice could mean in detail.

The broad approach to fairness rules adopted in the Nordic general fairness model can probably be understood against the background of a vision of the function of law that recognises a greater role for the courts in striving for justice *in concreto*. In such a vision, the contractual fairness principle could be understood as an expression of the principle that parties should not be able to use freedom of contract to require courts to produce injustice.

5. Conclusions

Above I have attempted to paint, with a very broad brush, the complex picture of the philosophies behind the various approaches to contractual fairness rules. In a comparative perspective, one can distinguish several models of fairness regulation. These models are connected with various combinations of different conceptions of justice.

However, the approaches are not only related to different understandings of justice. I have tried to show that they also are affected by different views on how humans act and should act, how the economy functions, how one trusts and should trust fellow members of the society, and how much interest courts should have in concrete justice. In addition, opinions may differ on the normative conclusions regarding fairness regulation that one may legitimately draw from such varying views.

At least in part, all of this relates to the fact that European cultures are different.²⁶ The regulation of unfair contract terms is clearly an issue in relation to which deep cultural cleavages come to the fore. One may therefore ask whether rules of this kind can be harmonised in Europe without unnecessarily sacrificing culturally bound variations in the understanding of the nature of humans, the economy, society, and the law. Even though there are many arguments for a legal-technical harmonisation in respect of at least some contract law issues across the European Union, the basic idea of a Europe ‘united in its diversity’²⁷ may advise us to move cautiously in sensitive areas such as regulation of unfair terms.²⁸

²⁴ English contract law seems to be changing, however, see, e.g., on ‘good faith’ R. Brownsword, N. J. Hird, G. Howells (eds.). *Good Faith in Contract, Concept and Context*. Aldershot: Ashgate 1999.

²⁵ K. Zweigert, H. Kötz. *Introduction to Comparative Law*. Third Edition. Oxford: Clarendon Press 1998, p. 406.

²⁶ See more closely on the relationship between such differences and private law many of the contributions in Th. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.). *Private Law and the Many Cultures of Europe*. The Hague: Kluwer Law International 2007.

²⁷ Draft Treaty Establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, Preamble.

²⁸ The Unfair Contract Terms Directive was not extended to individual contract terms precisely because there was no agreement on the issue, see Th. Wilhelmsson. *Social Contract Law and European Integration*. Aldershot: Dartmouth 1995, p. 137.