

# ERCL EUROPEAN REVIEW OF CONTRACT LAW

**SPECIAL ISSUE ON THE ALI RESTATEMENT  
ON CONSUMER CONTRACT LAW FROM A  
EUROPEAN PERSPECTIVE**

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# Oren Bar-Gill\*, Omri Ben-Shahar and Florencia Marotta-Wurgler

## The American Law Institute's Restatement of Consumer Contracts: Reporters' Introduction

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Consumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts—the business and the consumers. On one side stands a well-informed and counseled business party, entering numerous identical transactions, with the tools and sophistication to understand and draft detailed legal terms and design practices that serve its commercial goals. On the other side stand consumers who are informed only about some core aspects of the transaction, but rarely about the standard terms. These consumers enter the transaction mostly for personal or household purposes, without any professional understanding of its legal contours. It is both irrational and infeasible for most consumers to keep up with the increasingly complex terms provided by businesses in the multitude of transactions, large and small, entered into daily both in brick-and-mortar settings and online.<sup>1</sup>

There are many benefits to standard-form contracting, even in such asymmetric environments. The efficiencies of mass production and mass distribution of products and services would be hindered if the terms of each transaction with each consumer had to be individually negotiated. These efficiencies can benefit

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<sup>1</sup> Carlotta Rinaldo's contribution to this symposium highlights similar asymmetries in other contracting environments, including large v small businesses and employment relationships. The framework of analysis that we develop for consumer contracts can inform the law's treatment of these other contracts.

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all market participants, and the laws of consumer contracts in many countries have accordingly viewed standard-form contracting favorably, enforcing such contracts as long as some safeguards are met.

Recognizing that consumers typically lack the information, sophistication, and incentives to monitor the standard terms appended to their transactions, there is a concern that businesses will include terms that are unreasonably one-sided, unfair, and inefficient. In the absence of scrutiny from their customers, businesses might overreach and draft terms of agreement that undermine some of the value that consumers reasonably expected. Such overreaching might persist even in competitive environments.

In dealing with this fundamental challenge of potential abuse in asymmetric contracting environments, consumer-contract law in the United States deploys several policing techniques. The first technique is the doctrine of mutual assent—the rules that determine how a contract is formed, which terms are adopted into the agreement, and what processes a business must follow to alert consumers to the terms being introduced and to the consequences of their adoption. The second general technique is the use of mandatory restrictions over the substance of the deal and limits on business's sales practices—rules that limit the discretion of the business in drafting contract terms, police the representations that sellers make and set boundaries to the permissible terms of contracts.

Questions relating to these policing techniques have emerged at the forefront of consumer-contract case law in recent decades. In the area of contract formation, technological advances have made it easier for business parties to draft and disseminate lengthy documents with (often self-serving) contractual terms at the initiation phases of consumer transactions and to modify these terms periodically. Whereas shopping at a grocery store in the brick and mortar world entails very few, if any, standard contract terms (and many legally supplied gap-fillers), shopping at the online outlet of that store now entails a lengthy list of standard terms. The proliferation of lengthy standard-term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent. A signature at the bottom of the form, or a click 'I Accept' is, at best, a declaration 'I know I am agreeing to something, but I don't know to what. I trust that if something really bad is buried in the fine print, the law will protect me from its bite.' In such environments, whether the lengthy terms are presented to the consumer before or after the decision to enter the transaction, in a conspicuous or less visible manner, and with or without specific alerts, has little bearing on the consumer's awareness or understanding of the terms, as the process of review-and-scrutiny has become largely impractical. The complexity of the terms, the choices, and their significance, defeat any at-

tempt to simplify the presentation of the contract and to elicit ‘meaningful’ consent.<sup>2</sup>

Likewise, there are questions relating to the second policing technique—the limits of permissible contracting. As standard-form contracts increasingly replace longstanding default rules and stipulate commands drafted by business entities, courts have been called upon to police their reach. Whether the terms are excessively one-sided and unfair, or merely diverge from the consumer’s reasonable expectations as shaped by the business’s marketing practices, the law of consumer contracts establishes a framework for marking the boundaries. Traditional common law doctrines like unconscionability and misrepresentation have been applied by American courts to police suspect practices and terms relating to the subject matter of the transaction, the remedies that consumers or the business may seek when the transaction fails, to choices of law and forum, to the business’s discretion to specify and adjust contractual obligations, and many other areas of contracting.

Because of the imbalance between businesses and consumers, the application of contract law’s general rules of mutual assent alone are not likely to level the playing field. In a world of lengthy standard forms, more restrictive assent rules that demand more disclosures, more notifications and alerts, and more structured templates for manifesting assent, are unlikely to produce substantial benefit for consumers, even if designed with the benefit of up-to-date behavioral insights. Laws that emphasize the conspicuousness of disclosures, like the Uniform Commercial Code’s (UCC) rule that disclaimers of implied warranties become effective and are adopted as part of the contract only if made in a conspicuous manner,<sup>3</sup> induced lengthy disclaimer paragraphs in ALL CAPS typeface, but do little to cure the imbalance between the business and the consumer. As the length and incidence of standard-form contracts have grown, it has become all the less plausible to expect consumers to read and take informed account of the contracts’ provisions. In these environments, reforms that are focused on strengthening the disclosure requirements emanating from contract law’s general rules of mutual assent are highly unlikely to prompt consumers to read the terms, to carefully weigh them, and to ultimately make more prudent contracting decisions. Since advance disclosure of standard terms generally does not render the assent process any more meaningful, the ‘opportunity to read’ technique, which courts have em-

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2 O. Ben-Shahar and C.E. Schneider, *More Than You Wanted To Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014).

3 Uniform Commercial Code Sec 2-316(2).

braced, is quite ineffective in consumer contracts.<sup>4</sup> Some observers have even argued that mandating more disclosures might ‘backfire’ by creating a false presumption of meaningful assent, thus undercutting the second policing technique—the ex post scrutiny of unfair terms.<sup>5</sup>

Despite the limited effectiveness of the assent doctrine and of advance disclosure rules in producing environments of informed consent, American courts have—without exception—endorsed and enforced standard form contracts, as long as some disclosure requirements are met. The Restatement of Consumer Contracts reproduces the requirements developed by common-law courts for the adoption of standard contract terms into consumer contracts. The requirements focus on the timing, format of presentation, context, and substance of the notifications consumers receive regarding the existence of terms applying to the transaction.<sup>6</sup> The goal of these requirements is to afford consumers a reasonable opportunity to review the terms and to avoid the transaction, in the event (however unlikely) that they seek to exercise such scrutiny. While some variation exists among courts and jurisdictions concerning the substance and scope of the notifications accompanying the presentation of standard contract terms, the Restatement presents a comprehensive set of requirements unifying this jurisprudence. Satisfaction of such requirements does not impose significant burdens on businesses or consumers interested in quick, streamlined completion of transactions. Adherence by businesses to these procedures provides certainty surrounding the process of adoption of standard contract terms.<sup>7</sup>

In addition to the rules governing the adoption of standard contract terms, the Restatement presents the important mandatory restrictions over the substance

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4 O. Ben-Shahar, ‘The Myth of the Opportunity to Read in Contract Law’ 5 *European Review of Contract Law* 1–28 (2009); F. Marotta-Wurgler, ‘Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements’ 38 *Journal of Legal Studies* 309–343 (2009).

5 R.A. Hillman, ‘Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?’, in O. Ben-Shahar (ed), *Boilerplate: Foundations of Market Contracts* (Symposium Issue of Michigan Law Review, 2006) 87–89; Ben-Shahar and Schneider, n 2 above, ch 11.

6 Jacobien Rutgers’ contribution to this symposium offers helpful insights regarding the role that plain and easily comprehended language can play in increasing the effectiveness of disclosures.

7 See, eg, *Nguyen v Barnes & Noble, Inc.*, 763 F 3d 1171 (9<sup>th</sup> Cir 2014) (articulating disclosure requirements for browsewrap agreements); *Berkson v Gogo LLC*, 97 F Supp 3d 359, 403–405 (EDNY 2015) (providing a detailed account of various disclosure requirements under different online contexts); and *Meyer v Uber Techs, Inc.*, 868 F 3d 66 (2<sup>nd</sup> Cir 2017) (explaining disclosure requirements in mobile platforms). In this symposium, Hans Schulte-Nolke’s examination of the mechanisms by which linked terms should become part of the consumer contract and Stefan Grundmann’s analysis of post-contracting review of terms offer critical insights into the current doctrine.

of these terms and limits on the business's sales practices. One category of restrictions, which common law courts have developed primarily under the unconscionability doctrine, protects consumers against egregiously unfair terms.<sup>8</sup> Another category of restrictions protects consumers from standard contract terms that negate or undermine consumers' reasonably expected benefits from the bargain. At the center of this second safeguard stand rules that give effect to representations, affirmations, and promises made to consumers in the course of advertising, solicitation, and sales, even when meticulous language in the standard contract terms purports to undo such effect. Thus, the Restatement gives effect to promises and representations of fact made to the consumers by third parties that have an appreciable financial interest in the contract between the business and the consumer, and allows the consumer to recover from these third parties, as well as from the sellers.

The *ex post* scrutiny of permissible contracting, as well as the scrutiny of standard contract terms that conflict with other representations made to consumers, are not intended to be (nor can they feasibly operate as) a replacement for private ordering. Parties are allowed to design their transactions, and standard contract terms—despite being invisible to most consumers—are an indispensable part of the transaction. Parties may agree to bargain-basement terms, if they so wish, and for the right price. The *ex post* scrutiny by courts is only intended to uproot terms so unfair that they would be unlikely to survive in an environment of meaningful free choice, or that stealthily peel off the value that consumers bargained for.

Thus, the organizing structure of American consumer-contract law reflects Karl Llewellyn's influential model: a fairly streamlined adoption of standard contract terms (the 'supplementary boilerplate', in Llewellyn's words), along with rigorous scrutiny to protect the spirit of the bargained-for deal ('the dickered terms'). Llewellyn captured this structure with the concept of 'blanket assent' to 'any not unreasonable or indecent terms'. He recognized then—an insight that has become all the more relevant in the digital era—that the manifestation of assent to a consumer contract results in the adoption of standard contract terms but does not imply meaningful informed consent to these terms. Llewellyn recognized that common law courts scrutinize and uproot unfair terms and enforce the standard

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**8** In important contributions to this symposium, Anne-Lise Sibony and Fernando Gomez contrast the framework of the European unfairness doctrine, where courts will deny enforcement of non-core terms when they create a 'significant imbalance' between the contracting parties to the detriment of the consumer, in violation of the duty of good faith, with the American unconscionability doctrine, where courts must apply a sliding scale of procedural and substantive unconscionability.

contract terms only if they ‘do not alter or eviscerate the reasonable meaning of the dickered terms’.<sup>9</sup>

The Restatement offers a roadmap to the implementation of Llewellyn’s paradigm, which continues to accurately characterize the approach taken by American courts. The Restatement reflects the ‘blanket assent’ principle, whereby courts allow businesses to draft and affix standard contract terms to the transaction, as long as they provide consumers with adequate notices and opportunity to review the terms, as well as a meaningful opportunity to avoid the transaction. At the same time, the Restatement identifies the doctrines and rules arising from common-law jurisprudence, which restrict the effect of standard contract terms by prohibiting businesses from imposing intolerable terms or undermining the core bargain presented to consumers either as part of the dickered terms or in other precontractual communications.

In drafting the rules of consumer-contract law, the Restatement relied on two main sources. The first and primary source informing the Restatement are the common-law principles that have been guiding courts in adjudicating consumer-contract disputes. These principles are originally found in the Restatement of the Law Second, Contracts (and often reflect the statutory provisions of the UCC), but have evolved in particular and important directions that are specific to consumer contracts. Where appropriate and consistent with the common law of contracts and the UCC, the rules of the Restatement also reflect the jurisprudence of fairness and anti-deception guiding consumer-protection law. This latter body of law is manifested in several Sections of the Restatement that protect consumers by enforcing the bargain as presented to them, even when some elements are missing from, or qualified in, the standard contract terms. The two bodies of law that regulate consumer contracts—the general common law of contracts and statutory consumer-protection law—appear together in many litigated cases. The Restatement of Consumer Contracts promotes a greater conceptual unity across these two bodies of law.

The challenges posed by consumer contracts have heightened over the past generation, as courts have adapted traditional contract-law rules to the ever multiplying varieties of consumer contracts. To track this progression, the Restatement follows the traditional American Law Institute’s methodology and bolsters it with an additional layer of transparency. Primarily, the Restatement focuses on leading cases by evaluating the most recent decisions of the highest state courts, eliciting from them the guiding rationales. It clarifies the policy goals underlying

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<sup>9</sup> K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (New York: Little, Brown, 1960).

the rules followed by courts, and develops their conceptual implications to accord them greater clarity and coherence. In addition, and in order to confirm that the rules identified through this primary method indeed reflect the ‘law in action’, the Reporters read the *entire body of consumer-contract law decisions* relating to the rules of the Restatement—higher- as well as lower-court decisions, both state-court and federal-court cases, published and unpublished cases, and holdings as well as dicta, made available in online legal-research directories and from secondary sources. By looking at all the information flowing from case law and carefully organizing it according to outcomes, rationales, and influence (measured by various forms of citation counts), this methodology made it possible to examine with greater subtlety the emerging rules, their impact, and prominence, as well as to identify the leading cases. It decreases the possibility that important or well-reasoned cases may have been missed, and allows a closer consideration of the evolution of the doctrine to better understand how courts address key issues. We thus present a Restatement that reflects the rules as elicited from the most influential and persuasive court decisions, along with the assurance that these rules are indeed widely accepted by the courts in the many jurisdictions within the United States. It is important to emphasize that the examination of the entire body of case law using quantitative methods does not replace nor modify the traditional legal analysis—the craft of discovering the DNA of the law through experienced and informed reading of persuasive sources. Rather, the full landscape view bolsters the traditional approach with an added measure of comprehensiveness and transparency.

In November 2018, the Reporters of the Restatement presented the draft to a group of leading European experts in consumer contract law, in a conference dedicated to the Restatement held at Humboldt University in Berlin. The valuable comparative and critical insights provided during the two-day conference will be reflected in the final draft of the Restatement. The present draft is published here in full for the first time. It is organized as follows. Section 1 defines key terms. The first substantive rule is the Adoption of Standard Contract Terms provision in § 2. The rule reflects an approach, widely embraced by a large majority of courts, that enables businesses to design the terms of the transaction, as long as they provide reasonable notice and meaningful opportunity to review the terms and to avoid the transaction. This rule is complemented by a related provision in § 3, Modification of Standard Contract Terms, extending similar principles to modifications of standard contract terms. The remaining Sections comprise a set of rules that rely on ex post scrutiny by courts to limit the risk of abuse. Section 4 addresses the problem of open-ended terms, which grant the business unrestricted discretion to specify and adjust its obligations. Section 5 is the unconscionability rule, providing the framework for invalidating terms that unreasonably favor the business

party and unfairly surprise the consumer. Section 6 deals with the problem of deception, whereby the standard contract terms conflict with explicit affirmations or promises made to the consumer. Section 7 includes the rules regarding precontractual affirmations and promises. Section 8 creates presumptions of integration for standard contract terms (under the Parol Evidence Rule) and explains how such presumptions are rebutted by prior affirmations of fact or promises. And § 9 completes this list of anti-abuse provisions by stipulating the effects of striking terms out of contracts.

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## § 1. Definitions and Scope

### (a) Definitions:

- (1) ‘Consumer’ – An individual acting primarily for personal, family, or household purposes.
- (2) ‘Business’ – An individual or entity other than a consumer that regularly participates in or solicits, directly or indirectly, transactions with consumers.
- (3) ‘Contract’ – A promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
- (4) ‘Consumer contract’ – A contract between a business and a consumer other than an employment contract.
- (5) ‘Standard contract term’ – A term relating to a consumer contract that has been drafted prior to the transaction for use in multiple transactions between the business and consumer parties.
- (6) ‘Affirmation of fact or promise’ – Any statement about the transaction, including but not limited to statements about quantity, quality, characteristics, utility, price, discount, comparative cost, service, and remedy, intended to reach consumers, including in negotiations, advertising, brochures, or labels, or in any record accompanying the transaction, but excluding statements that would be reasonably understood by consumers as ‘puffing’ or statements of belief not founded on fact.
- (7) ‘Good faith’ – honesty in fact and the observance of reasonable commercial standards of fair dealing.

(b) Scope: This Restatement applies to consumer contracts, except to the extent that a matter is governed by statute or regulation. It restates contract law principles under state law and takes no position on the proper relationship of statutory or regulatory requirements and these principles.

## § 2. Adoption of Standard Contract Terms

- (a) A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving:
  - (1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and
  - (2) a reasonable opportunity to review the standard contract term.
- (b) When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract if:
  - (1) before manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be provided later and to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that the failure to terminate would result in the adoption of the standard contract term; and
  - (2) after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term; and
  - (3) after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and does not exercise that power.
- (c) If the consumer manifests assent to the transaction, a contract exists even if some of the standard contract terms are not adopted. In such case, the terms of the contract are those adopted under subsections (a) and (b), and, if the consumer elects, the unadopted standard terms, along with any terms supplied by law.

## § 3. Modification of Standard Contract Terms

- (a) A standard contract term in a consumer contract governing an ongoing relationship is modified if:
  - (1) the consumer receives a reasonable notice of the proposed modified term and a reasonable opportunity to review it; and
  - (2) the consumer receives a reasonable opportunity to reject the proposed modified term and continue the contractual relationship under the existing term, and a reasonable notice of this opportunity; and
  - (3) the consumer either (i) manifests assent to the modified term or (ii) does not reject the proposed modified term and continues the contractual relationship after the expiration of the rejection period provided in the proposal.

- (b) A consumer contract governing an ongoing relationship may provide for a reasonable procedure under which the business may propose a modification of the standard contract terms, but may not, to the detriment of the consumer, exclude the application of subsection (a), except that the established procedure may replace the reasonable opportunity to reject the proposed modified term with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.
- (c) A modification of a standard contract term in a consumer contract is enforceable only if it is proposed in good faith and if it does not have the effect of undermining an affirmation or promise made by the business that was made part of the basis of the original bargain between the business and the consumer.

#### § 4. Discretionary Obligations

- (a) A contract or any term that grants the business discretion to determine its rights and obligations must be interpreted, when reasonably susceptible to such interpretation, to provide that such discretion will be exercised in good faith.
- (b) A term in a contract that purports to grant the business absolute and unlimited discretion to determine its contractual rights and obligations unconstrained by the good-faith obligation is unenforceable by the business.

#### § 5. Unconscionability

- (a) An unconscionable contract or term is unenforceable, to the extent stated in § 9.
- (b) A contract or a term is unconscionable if at the time the contract is made it is:
  - (1) substantively unconscionable, namely fundamentally unfair or unreasonably one-sided, and
  - (2) procedurally unconscionable, because it results in unfair surprise or results from the absence of meaningful choice on the part of the consumer. In determining that a contract or a term is unconscionable, a greater degree of one of the elements in this subsection means that a lesser degree of the other element is sufficient to establish unconscionability.
- (c) Without limiting the scope of subsection (b)(1), a contract term is substantively unconscionable if its effect is to:
  - (1) unreasonably exclude or limit the business's liability or the consumer's remedies that would otherwise be applicable for:

- (A) death or personal injury for which, in the absence of a contractual provision in the consumer contract, the business would be liable, or
- (B) any loss to the consumer caused by an intentional or negligent act or omission of the business;
- (2) unreasonably expand the consumer's liability, the business's remedies, or the business's enforcement powers that would otherwise be applicable in the event of breach of contract by the consumer; or
- (3) unreasonably limit the consumer's ability to pursue or express a complaint or seek reasonable redress for a violation of a legal right.
- (d) In determining whether a contract or a term is unconscionable, the court should afford the parties a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect.

#### § 6. Deception

- (a) A contract or a term adopted as a result of a deceptive act or practice by the business is unenforceable by the business to the extent stated in § 9.
- (b) Without limiting the scope of subsection (a), an act or practice is deceptive if it has the effect of:
  - (1) contradicting or unreasonably limiting in the standard contract terms a material affirmation of fact or promise made by the business before the consumer assented to the transaction; or
  - (2) obscuring a charge to be paid by the consumer or the overall cost to the consumer.

#### § 7. Affirmations of Fact and Promises That Are Part of the Consumer Contract

- (a) An affirmation of fact or promise made by the business that creates a reasonable expectation by a reasonable consumer who is its intended audience that the subject matter of the contract will have the described attribute becomes part of the consumer contract.
- (b) An affirmation of fact or promise made by a third party that creates a reasonable expectation by a reasonable consumer who is its intended audience that the subject matter of the contract will have the described attribute:
  - (1) becomes part of the contract between the business and the consumer if:
    - (i) the business knew or reasonably should have known of it, and
    - (ii) the consumer could have reasonably believed that the business intended to stand behind the affirmation or promise; and
  - (2) creates a contractual obligation of the third party to the consumer, even if the third party did not transact directly with the consumer, so long as the

third party has an appreciable financial interest in the contract between the business and the consumer.

- (c) Standard contract terms that purport to negate or limit affirmations of fact or promises that become part of the consumer contract under subsections (a) and (b) are not enforceable

#### § 8. Standard Contract Terms and the Parol Evidence Rule

A standard contract term that contradicts, unreasonably limits, or fails to give the reasonably intended effect to a prior affirmation of fact or promise by the business does not constitute a final expression of the agreement regarding the subject matter of that term and does not have the effect under the parol evidence rule of discharging obligations that would otherwise arise as a result of the prior affirmation of fact or promise.

#### § 9. Effects of Derogation from Mandatory Rules

- (a) If the court finds that a contract or any term excludes, limits, or violates any mandatory rule, the court should do one of the following: refuse to enforce the contract, or it may enforce the remainder of the contract without the derogating term, or it may limit the application of the derogating term.
- (b) If the court enforces the remainder of the contract without the derogating term, the court may replace the derogating term with:
- (1) a term that is reasonable in the circumstances,
  - (2) a term that effects the minimal correction necessary to bring the contract into compliance with the mandatory rule, or
  - (3) if the contravening term was placed by the business in bad faith, a term that is calculated to give the business an incentive to avoid placing such terms in consumer contracts.