Commentary

The Optional Instrument of European Contract Law: Opting-in through Standard Terms – A Reply to Simon Whittaker –

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1. Whittaker: Review of Opt-in Clauses in Standard Terms

In a paper recently published in this journal, Simon Whittaker has criticized the "reduction of an individual consumer's protection" resulting from the adoption of an optional instrument on European contract law such as the one now contemplated by the European Commission (the "Optional Instrument")[1]. The article contains a number of propositions which will not be tackled here. This comment is confined to consumer contracts and to a pertinent key assumption of Whittaker: that a standard term exercising the option in favour of the Optional Instrument would be subject to judicial review under Directive 93/13 on unfair contract terms in consumer contracts[2].

As Whittaker puts it "such an option [in favour of the Optional Instrument] would undermine the contractual autonomy of consumer contractors and thereby their true freedom of contract. . . . This simple point can be supported more technically by applying the standards already put in place by EU law for the protection of the contractual autonomy of consumers. . . . [I]f the Optional Instrument were designated as the governing law by a business's standard terms, then (in the absence of a special derogation) this term would itself fall to be assessed for its fairness under the legal rules as required by the Unfair Contract Terms Directive 1993. . . . [A] contract term which merely designates an instrument of the likely complexity of the Optional Instrument (which it appears will contain rules sufficient to govern the general law of contract and the law of sale of goods) could well be thought to fall within the example of a potentially unfair term in the 'indicative' list of terms in the Annex to the 1993 Directive as one which has the effect of 'irrevocably binding the consumer to

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1 *Simon Whittaker*, The Optional Instrument of European Contract Law and Freedom of Contract, ERCL 7 (2011) 371 – 388 at p. 388.

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.'" Whittaker accordingly cites para (i) of the Annex in a footnote[3].

2. The Scope of the Unfair Contract Terms Directive

Whittaker's criticism has a policy dimension and a legal dimension; in his argument both are inextricably connected. But they should be separated in view of the application of both the law in force, i.e. the Unfair Contract Terms Directive and the future law, i.e. the Optional Instrument. Whittaker's assumptions concerning the application of Directive 93/13 take full account of neither the Directive nor the principles of the private international law of contracts as accepted with regard to the Rome I Regulation[4] and its predecessor, the Rome Convention of 1980[5].

The Directive allows the judicial review of contract terms, not of legal provisions dealing with contractual relations. This emerges very clearly from Article 1 para. 2. According to that provision the Directive does not apply to "the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area. . ." The background of this rule is elucidated in Recital 13: "the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms." This explanation underscores the rationale behind the judicial review of standard contract terms: Since such terms are drafted and imposed by one of the parties in view of a multitude of similar transactions, whereas the other party, seeking a single bargain, usually has no sufficient incentive to understand or to negotiate the terms, there is a stark risk of one-sidedness which judicial review is intended to cure. Legal provisions on contract law adopted in the democratic legislative procedure of a Member State do not raise the same concern and are therefore immunized against judicial review. The same applies to the instruments of the EU on matters of contract law.

Since the Optional Instrument will most likely be adopted in the form of an EU regulation, its content will consist of "regulatory provisions" as referred to in Article 1 para. 2 Dir. 93/13. As an EU regulation the Regulation on the Optional Instrument will be "directly applicable in all Member States", Article 288 para. 2 TFEU. Within the Member States it will not only have the same legal

3 *Whittaker*, ECLR 7 (2011) 387 – 389, in particular, considerations nos. 34, 35 and 38.3.

4 Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

5 Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ 1980 L 266/1.

status as, but will prevail over national law[6]. Thus, there is no way to apply Directive 93/13 to the substantive provisions of the Regulation on the Optional Instrument. The same considerations exclude a judicial review of the provisions of the Optional Instrument under the rules of that same instrument dealing with unfair contract terms[7].

In light of the preceding considerations it might be argued that the judicial review contemplated under the Directive does not target the provisions of the Optional Instrument, but rather the contract term electing the Optional Instrument as such. But the wording of Article 1 para. 2 is unambiguous on this point: it excludes "contract terms which *reflect* … regulatory provisions…"[8] Thus, a contract term which simply copies the substantive provisions of the Optional Instrument would be immunized against judicial review under Directive 93/13. If that is true, a contract term which designates the Optional Instrument as the applicable law, without copying the single provisions, cannot be treated differently.

3. The Unfair Contract Terms Directive and Choice-of-law Clauses

Whittaker's assumption that a contractual election of the Optional Instrument in a standard term would be subject to Directive 93/13 appears doubtful on other grounds, too. Such a contract term is equivalent to a choice-of-law clause in private international law. Would a standard term designating English law, as opposed to German law governing the contract in the absence of such a choice, be subject to the Directive? The original German law on standard contract terms enacted in 1976 (AGBG) actually contained a prohibition of standardized choice-of-law clauses in § 10 no. 8[9]: "In general conditions of contract shall be invalid particularly, (1) – (7) . . ., (8)[a term containing] an agreement on the application of foreign law or the law of the German Democratic Republic in cases, where a legitimate interest is lacking." It followed from this provision that only clauses deselecting German law by the designation of a foreign law were covered, probably similar to the interpretation of Directive 93/13 which Whittaker has in mind. Moreover, the agreement on the application of foreign law to the contract in question was subject to the very vague test of a legitimate interest. In the ten years of its existence the provision does not appear to have

6 See the constant affirmations by the European Court of Justice, e.g. ECJ 14 December 1971, case 43/71 (*Politi*), [1971] ECR 1039 cons. 9; see also *Trevor Hartley*, The Foundations of European Community Law, 5th ed. Oxford 2003, p. 203 – 206 and 228.

7 As implied by *Whittaker*, ECLR 7 (2011) 388 in consideration no. 38.

8 Author's emphasis.

9 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) of 9 December 1976, Bundesgesetzblatt 1976, I-3317; author's translation; what has been translated as legitimate interest, would literally be an "interest worthy of being acknowledged".

been applied by the courts notwithstanding the fact that German judges are not hesitant in striking down standard contract terms. It is noteworthy that leading commentators took the view that § 10 no. 8 did not apply to clauses selecting the Uniform Law on International Sales (ULIS)[10] because ULIS was not considered as foreign law[11].

§ 10 no. 8 AGBG was repealed in 1986 when the Rome Convention was implemented in German law[12]. In the explanation attached to the corresponding legislative proposal the German government had pointed out that the provision was "in partial contradiction to … Article 3 of the … [Rome] Convention on the law applicable to contractual obligations."[13] This view was approved by a working group of the Max Planck Institute which commented on the legislative proposal of the government[14]. In fact, as emerging from Article 3 para. 4 and Article 8 of the Rome Convention as well as from Article 3 para. 5 and Article 10 of the Rome I Regulation, the validity of contractual clauses which specify a choice of the applicable law is subject to the law governing the contract, i.e. the law chosen by the parties within the term in question. This is the only way to ensure a uniform assessment of choice-of-law clauses in the European Union, and the application of specific national rules determining the validity of such clauses in standard terms would have undermined that uniform assessment.

§ 10 no. 8 AGBG was enacted and repealed before the Directive 93/13 was adopted. But the application of Article 3 of the Directive to choice-of-law clauses designating the Optional Instrument – the interpretation suggested by Whittaker – comes very close to the situation under § 10 no. 8 AGBG. The Unfair Contract Terms Directive is not directly applicable; it is rather the national law enacted for its implementation which a court will have to apply. Since the Directive does not create uniformity but only minimum standards, see Article 8, the Member States would be free to enact provisions such as § 10 no. 8 AGBG or even stricter rules were the Directive applicable to choice-of-

10 Convention relating to a Uniform Law on the International Sale of Goods (ULIS) done at The Hague on 1 July 1964; English, French and German version printed in Bundesgesetzblatt 1973, II-886. For Contracting States like the United Kingdom which made a declaration under Art. V, ULIS is an optional instrument which applies only where the parties to the sales contract have agreed accordingly.

11 See *Hein Kötz* in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 1, 2nd ed. München 1984, § 10 Nr. 8 AGBG, comment no. 49.

12 Gesetz zur Neuregelung des Internationalen Privatrechts of 25 July 1986, Bundesgesetzblatt 1986, I-1142, see Article 6 § 2.

13 The explanation is reproduced in *Jörg Pirrung*, Internationales Privat- und Verfahrensrecht nach dem Inkrafttreten der Neuregelung des IPR – Texte, Materialien, Hinweise, Köln 1987, p. 88.

14 Kodifikation des deutschen Internationalen Privatrechts – Stellungnahme des Max-Planck-Instituts für ausländisches und internationales Privatrecht zum Regierungsentwurf von 1983, RabelsZ 47(1983) 595–728 at p. 671–672.

law clauses. Once again, the predominant objective of the uniform application of the Rome I Regulation would be jeopardized. The same would be true for the scope rules of a future Regulation on an Optional Instrument; those scope rules will undoubtedly have to be applied in a uniform manner which excludes a test under the national laws implementing Directive 93/13.

4. The Law Governing the Validity of Choice-of-law Clauses

Whittaker takes the further view that the invalidity of a choice-of-law clause may as well be assessed, in accordance with Article 10 para. 2 of the Rome I Regulation, under the law of a party's habitual residence[15]. While the validity of a choice-of-law clause is generally subject to the law governing the whole contract under Article 3 para. 5 and Article 10 para. 1 of the Rome I Regulation, it is also true that recourse may be had to the law of a party's habitual residence to show that this party did not consent. According to the report by Professors Giuliano and Lagarde on the predecessor rule of the Rome Convention[16], this provision is meant to take account of those legal systems which under certain circumstances consider a party's silence as consent[17]. Its background is the German principle whereby a party – who otherwise would not believe him- or herself to be contractually bound – may be deemed to have confirmed the existence of a contract by silence in response to a letter purporting to confirm an agreement allegedly concluded at an earlier date[18]. Article 10 para. 2 is meant to qualify this type of consent by operation of law, but it does not govern the validity of consent established otherwise[19]. Thus, it is not an appropriate tool to protect a party who has given his or her consent to the contract as such but has not taken notice of, or consented to, individual clauses of a standard contract form. Extending the scope of that rule, clearly drafted as an exception, to such mundane occurrences would be a clear overstatement of the scope of Article 10 para. 2.

5. Conclusion

In sum, Whittaker's line of argument is based on assumptions about Directive 93/13 and the Rome I Regulation which do not appear to accurately assess the

15 *Whittaker*, ERCL 7 (2011) 392.
16 Art. 8 para. 2 of the Rome Convention.
17 Report on the Convention on the Law Applicable to Contractual Obligations by Mario Giuliano and Paul Lagarde, OJ 1980 C 282/1; see note on Article 8 para. 2 at p. 28.
18 The so-called *kaufmännisches Bestätigungsschreiben*; the case-law only applies in any event where both parties are merchants. see for a discussion of the impact of the German case-law on the interpretation of Article 10 para. 2 Rome I Regulation *Richard Plender/ Michael Wilderspin*, The European Private International Law of Obligations, 3rd ed. London 2009, nos. 14-063 et seq.
19 See the report Giuliano/Lagarde, above at fn. 17, *ibid.*

law in this field. The policy considerations he links to these legal assumptions are likewise flawed. A case against the Optional Instrument cannot be based upon these assumptions.

This, of course, does not preclude anyone from criticising the adoption of the Optional Instrument on other policy grounds. The pertinent debate has started only recently, after the publication by the European Commission of a proposal for a regulation on a common European sales law[20].

20 COM (2011) 635 final of 11 October 2011. The proposal was published after this comment had been drafted and could not be discussed in this context.