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# The Impact of Market Ideology on Transnational Contract Law

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## I. INTRODUCTION

As world trade expands to the remotest of venues, commercial laws that encompass transnational jurisdictions become increasingly important. The appropriateness of these laws rely, *inter alia*, on the strength of the assumptive base supporting such transnational laws of commerce. As this article explains, transnational contract law is not the product of the Immaculate Conception; it is the anachronistic progeny of certain European laws that emerged during the Industrial Revolution. As such, transnational contract law inherits many of the characteristics of its progenitors. Those characteristics, however, become awkward when viewed through a contemporary institutional context that diverges from the prevailing social arrangements of the Industrial Revolution.

This article focuses on one such taint, namely, that courts are hindered in their ability to promote justice in international contract disputes because of outdated assumptions they make about typical markets. First, this article suggests a relationship between assumptions about prevailing markets and the likelihood that justice will emerge from contract law disputes. With that linkage as background, this article then proceeds to lay out the social and political conditions in Europe during the codification of the West's most influential contract laws in England, France, and Germany. These social and political conditions created the

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foundational assumptions upon which these contract laws were developed. This article then establishes a connection between these assumptions and the substantive core of the world's emerging *lex mercatoria*:<sup>1</sup> the UNIDROIT Principles of International Commercial Contracts 2004 (UPICC),<sup>2</sup> the Principles of European Contract Law (PECL),<sup>3</sup> and the UN Convention on Contracts for the International Sale of Goods (CISG).<sup>4</sup>

Once the connection between the formative assumptions of western contract law and the emerging *lex mercatoria* are established, this article will argue that the prevailing assumptions of transnational commercial law threaten the ability of the courts to promote justice. In particular, this article will focus on a particularly salient illustration of capitalism's grip on commercial

1. Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 382 (2005) [hereinafter Lando, *CISG and Its Followers*] (discussing the importance of the UPICC, PECL, and CISG as the "troika" of modern international contract law).

2. INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004) [hereinafter UPICC]; Ole Lando, *A Vision of a Future World Contract Law*, 37 UCC L. J. 2, 5-6 (2005) [hereinafter Lando, *Vision of a Future*]. UNIDROIT published two editions of the UNIDROIT Principles of International Commercial Contracts (UPICC). The first edition, published in 1994, contained rules on formation, interpretation, content, performance, validity, performance, and non-performance. The revisions to the UPICC made in 2004 included provisions about third party rights, assignment of rights, transfer of obligations, assignments of contracts, limitation periods, and substantive autonomy. The UPICC deals with commercial contract disputes between parties of different nations when said parties choose to abide by the UPICC. In such cases, UPICC is typically seen as neutral to the interests of both parties.

3. Comm'n on European Contract Law, Introduction to the Principles of European Contract Law, [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/survey\\_pecl.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm) (last visited Apr. 21, 2008) [hereinafter PECL] (discussing the history of the Principles of European Contract Law). The members of the Commission on European Contract Law published the Principles of European Contract Law (PECL) in two sections. Drafted in 1995, Parts I and II of PECL deal, *inter alia* with performance, non-performance, and remedies. The principles previously published in Part I are included in revised form published in 1999. Part III deals with plurality of parties, assignment of claims, substitution of new debt, transfer of contract, set-off, prescription, illegality, conditions and capitalization of interest. PECL concerns contractual disputes between member states of the European Union.

4. COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1-8 (Peter Schlechtriem ed., Geoffrey Thomas trans., 1998) [hereinafter CISG COMMENTARY]. The 1980 UN Convention on Contracts for the International Sale of Goods (CISG) was ratified by the majority of the member countries of the European Union (EU), as well as a total of seventy-one countries as of May 2007. *Id.* The CISG deals with commercial contract disputes between nations all over the world. *Id.*; see also UNILEX, <http://www.unilex.info> (last visited Apr. 21, 2008) (providing a web resource and bibliography for the CISG).

law—standard form consumer contracts.<sup>5</sup> The fairness of standard form consumer contracts is especially contentious because the standard forms imposed by the stipulator are not individually negotiated and are typically sharply one-sided.<sup>6</sup> Despite the imbalanced basis for establishing the terms of the contract, however, international courts still consider these contracts generally enforceable because they promote the traditional concept of justice imbued in western contract law.<sup>7</sup>

Finally and most significantly, this article identifies the flaws in the typical justifications for enforcing form contracts. These flaws will be shown by noting the difference between the kinds of justice flowing from alternative assumptions about the nature of power relationships in market exchange venues. Indeed, enforcing form contracts is often justified by appeals to economic justice as defined by the tenets of capitalism,<sup>8</sup> not to a more robust version of justice consistent with other legal realms.

## II. MARKETS AND JUSTICE

When discussing justice within market systems, scholars apply many different, and sometimes conflicting, definitions to the word “justice.”<sup>9</sup> Consequently, they also have trouble defining what constitutes a “just” action within the market system.<sup>10</sup> For example, George Priest argues that markets can act as tools to advance social justice by promoting equal opportunity and enabling individuals to develop their talents.<sup>11</sup> Priest criticizes the ideas of Owen Fiss, who suggests that a norm of social equality, promoted by social policies, is the best way to achieve social justice.<sup>12</sup> Priest

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5. Leone Niglia, *The “Rules” Dilemma – The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe*, 13 COLUM. J. EUR. L. 125, 125 n.1 (2006).

6. *Id.*

7. See discussion *infra* Part V.

8. Lando, *CISG and Its Followers*, *supra* note 1, at 387.

9. See George L. Priest, *Beyond Brown: Opportunity Versus Equality as an Empowerment Norm: An Essay for Owen Fiss*, 58 U. MIAMI L. REV. 347, 349 (2003); see also JULES COLEMAN, *RISKS AND WRONGS* (1992); Jeremy Waldron, *Liberal Markets*, 92 MICH. L. REV. 1456, 1461 (1994) (reviewing COLEMAN, *supra*).

10. *Id.*

11. Priest, *supra* note 9, at 357.

12. *Id.* at 352-55. Fiss has focused much of his writing on the equality norm, the recognition of the moral and political equality of individuals, and legal cases and social policies designed to end caste system. Priest argues that Fiss has now begun to “promote solutions that extend beyond the equality norm of *Brown* and involve increased reliance on the market,” since part of Fiss’s solution to the problem of poverty in urban ghettos

asserts that the equality norm is not sufficient to achieve social justice, and instead we should "[embrace] a norm of enhancing opportunity . . . viewing the central ambition of the society as creating the opportunity for individuals to more fully improve their abilities."<sup>13</sup> In fact, he argues that "[a]dopting the opportunity norm . . . compels a different understanding and interpretation of the market than [Fiss] and others currently accept."<sup>14</sup>

Priest believes that Fiss has a negative view of the market because Fiss "[views] market activities, in contrast to politics or the behavior of the government, as motivated principally by self-interest."<sup>15</sup> As Priest explains, however, "most market activities could be explained as readily as efforts to provide the best products and services to fellow citizens."<sup>16</sup> Priest further argues that political activity can also be "motivated by self-interest," and that wealth earned in the market can be used for many (implicitly helpful) purposes.<sup>17</sup>

In Priest's opinion, government solutions to advance social justice have proven ineffectual in terms of equalizing opportunities for economic success: "[B]lacks may have (roughly) equal access to the same levels of schooling as whites, equal access to employment, equal access to housing, and equal access to government programs. But those forms of equality do not guarantee equal incomes or equal success in economic life."<sup>18</sup> He argues that, to achieve social justice, we must adopt a norm of equal opportunity that will help individuals achieve their full potential, which in turn will translate into success in the market system.<sup>19</sup> According to Priest, when markets have state-defined rules that "allow individuals to make the best use of their talents, they serve to implement social change. The market is the medium

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was to move African American people to suburban areas, find jobs for them, and make them market participants. *Id.* at 357.

13. *Id.* at 349.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 349-50.

18. *Id.* at 356.

19. *Id.* at 357. While allowing individuals to make the best use of their talents is certainly an attractive idea, Priest does not explain what sorts of policies, programs, actions, or methods would promote and enhance equal opportunity. He argues that equal incomes and success are not guaranteed by equal schooling and access to employment, and while this idea may not be without merit, he leaves open the question about how opportunity is supposed to be equalized otherwise.

through which individuals can improve their lives,” and thereby advance social justice.<sup>20</sup>

Neither Priest nor Fiss focus on the international perspective of justice provided by Ernst-Ulrich Petersmann.<sup>21</sup> Petersmann links economic rights with market access to human rights and the fair distribution of resources that enables people to achieve their full potential.<sup>22</sup> His form of international justice is concerned with “non-discriminatory conditions of competition and . . . equality of opportunities among individuals and peoples in *economic markets* no less than in political markets.”<sup>23</sup>

Presenting a slightly different view of justice and the market system, Jules Coleman suggests that individuals have a basic and instinctive urge to cooperate, not compete.<sup>24</sup> In his view, “market competition is a form of cooperative interaction to which we resort when the costs of social decision making become too high.”<sup>25</sup>

Competition under this cooperative theory, however, is not without rules. Under the cooperative market model, markets are constructed of rights and norms established by the community to indicate “acceptable and unacceptable ways of doing business.”<sup>26</sup> When the norms are upset or individuals’ rights are otherwise disturbed, those individuals may experience a loss.<sup>27</sup> Coleman focuses on wrongful losses, specifically, those losses “accruing from the infringement of a right or a loss that is someone’s fault [as a result of] that person’s failure to observe some local norm of

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20. *Id.*

21. *Id.*

22. Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOYOLA L.A. L. REV. 407, 410 (2003) (“From a human rights perspective, international justice refers . . . to human rights and democratic procedures that justify the allocation and protection of equal basic rights, and the distribution of scarce resources necessary for personal self-development of individuals.”).

23. *Id.* at 415-16 (emphasis in original). Petersmann suggests that economic rights are intimately connected to human rights and political justice: “Where respect for, and protection of, human dignity are recognized as constitutional obligations of governments, respect for the core of economic liberty rights and protection of social human rights to satisfy basic needs (‘distributive justice’) can be interpreted as legal consequences of an indivisible obligation to protect individual self-development in dignity.” *Id.* at 421 (citing the COUNCIL OF EUROPE, *THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY* (1998)).

24. See Waldron, *supra* note 9, at 1461 (reviewing COLEMAN, *supra* note 9, at 61). Coleman suggests that forming a market is a cooperative behavior since individuals must first agree on principles such as property and property rights. See COLEMAN, *supra* note 9, at 61.

25. Waldron, *supra* note 9, at 1461.

26. *Id.* at 1476 (reviewing COLEMAN, *supra* note 9, at 330-60).

27. *Id.*

market conduct.”<sup>28</sup> According to Coleman, the harm caused by these wrongful losses must be reapportioned under a theory of “corrective justice” to promote a just outcome.

Coleman defines “corrective justice” as a set of moral principles “that [establish] connections between wrongful losses and the agents responsible for them.”<sup>29</sup> He states that the person who caused a wrongful loss has an obligation to repair that loss, generally by compensating the person who experienced it.<sup>30</sup> Such a duty, according to Coleman, “is a matter of justice.”<sup>31</sup>

Coleman bases his theory of corrective justice on the victim’s right to recover from the person who injured her.<sup>32</sup> He admits that under tort law this idea can appear unfair, as individuals may be expected to pay a large amount of money because they were careless for a second while driving.<sup>33</sup> Coleman, however, suggests that when considering corrective justice under tort theory, we must forget about ideas of retributive justice under criminal law, which focuses on punishment and the moral conduct of individuals.<sup>34</sup> He argues that while “strict liability for the injurer seems unfair, strict liability for his victim seems even worse.”<sup>35</sup>

In his analysis of Coleman’s ideas, Jeremy Waldron agrees that building social stability through cooperation is one of the primary reasons individuals use markets.<sup>36</sup> However, Waldron also argues that Coleman is too quick to dismiss efficiency as another main reason for market use.<sup>37</sup> Waldron explains that under

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28. *Id.*

29. Waldron, *supra* note 9, at 1476 (reviewing COLEMAN, *supra* note 9, at 361-380).

30. *Id.* at 1467.

31. *Id.*

32. *Id.* at 1480.

33. *Id.* at 1482.

34. *Id.* (reviewing COLEMAN, *supra* note 9, at 222). Waldron argues that we must still consider “connections that exist between the different domains of justice . . . [and] the possibility that there are overarching principles or intuitions of fairness . . . that these domains share in common and that entitle both corrective justice and retributive justice, for example, to be regarded as forms of justice.” *Id.* at 1483.

35. *Id.* at 1484 (reviewing COLEMAN, *supra* note 9, at 223-25).

36. *See id.* at 1461.

37. *Id.* at 1466. Waldron and Coleman disagree on the primary reasons individuals use markets. Coleman argues the main benefit of markets is not efficiency, but the fact markets enable cooperation and social stability in diverse societies, since individuals can trade without having to agree on all of their ideas and values: “We use the values that we do share to create and sustain a structure that enables us to cooperate with regard to values that we do not share.” *Id.* Waldron, however, suggests that social stability is only part of the reason people use the markets, stating that markets “allow the simultaneous pursuit of stability and economic efficiency” and “without markets we would have to

Coleman's theories, markets, cooperation, and corrective justice can all be linked:

[C]reating and sustaining a market is partly a matter of creating and sustaining rights. To sustain a right is to ensure as far as possible that the duties it generates are observed and to do something about the situation when they are not . . . tort law, understood as corrective justice, is a way of performing this last task.<sup>38</sup>

In Coleman's view, corrective justice exists to guarantee the mutually-agreed upon rights of individuals in a cooperative market system.<sup>39</sup>

In contrast, Lily Chinn uses theories of environmental justice to criticize markets, suggesting they are far more competitive than cooperative and can work to the disadvantage of low-income earners and minority groups.<sup>40</sup> According to Chinn, "traditional market-based approaches focus on efficiency by finding the least costly solution to a problem. But economics often ignores distributional fairness among participants in the market."<sup>41</sup> Environmental justice, on the other hand, does not consider efficiency to be a primary goal, focusing instead on "relieving low-income and minority communities of environmental burdens regardless of resulting higher costs to certain market participants or society as a whole."<sup>42</sup> She explains that environmental justice "recognizes that race is a key factor in determining the distribution of environmental burdens" and seeks "the fair treatment of people of all races, income, and culture with respect to the development, implementation, and enforcement of environmental laws, regulations and policies."<sup>43</sup>

Chinn also critiques the practice of emissions trading from an environmental justice perspective.<sup>44</sup> In an emissions trading

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purchase stability by forgoing many interactions—exchanges, for example—that were available in principle." *Id.* at 1467.

38. *Id.* at 1487.

39. *Id.* at 1489.

40. See generally Lily N. Chinn, *Can the Market Be Fair and Efficient? An Environmental Justice Critique of Emissions Trading*, 26 *ECOLOGICAL L.Q.* 80 (1999).

41. *Id.* at 83.

42. *Id.* at 84.

43. *Id.* at 85 (quoting Exec. Order No. 12,898, § 1-101, 59 C.F.R. 7629 (1994)). "Fair treatment implies that no person or group of people should shoulder a disproportionate share of the negative environmental impacts resulting from the execution of this country's domestic and foreign policy programs." *Id.*

44. *Id.* at 88.



scheme, the government establishes a limit for how much pollution is allowed in a given area, and then sets limits for each factory or facility in that area.<sup>45</sup> If companies pollute at a level that does not exceed their allowable limit, they can trade those "pollution credits" on the market to companies that would otherwise exceed their limit.<sup>46</sup> Chinn explains that because the factories that pollute more tend to be located in areas with low-income and minority populations, those "pollution hot spots . . . tend to disproportionately affect those communities."<sup>47</sup> While those who support market solutions suggest many people benefit from emission trading because of the overall reduction in pollution, Chinn argues that low-income earners and minorities should not have to subsidize the rest of the population.<sup>48</sup> Under Chinn's definition of environmental justice, shifting the pollution burden onto the backs of disadvantaged communities renders emissions trading an unjust market interaction.<sup>49</sup>

James Murphy presents yet another version of the relationship between markets and justice. His discussion of James Gordley's defense of Scholastic jurists is a critique of the Scholastics' emphasis on the value of goods rather than the relationship between individuals when determining the justice of market exchanges.<sup>50</sup> According to Gordley, the Scholastics believe that "justice in a voluntary exchange 'requires that parties exchange performances of equal value.'"<sup>51</sup> "[T]his principle of [equal value] is crucial for explaining why courts enforce some kinds of agreements but not others and why courts interpret contracts the way they do."<sup>52</sup> By focusing on the exchange, the Scholastics emphasize the objects in the exchange rather than the

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45. *Id.* at 88-89.

46. *Id.* at 89.

47. *Id.* at 96.

48. *Id.* at 82.

49. *Id.*

50. James Bernard Murphy, *Equality in Exchange*, 47 AM. J. JURIS. 85, 86, 89 (2002); James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981). Gordley follows Scholastic jurists in the Aristotelian tradition and also cites Thomas Aquinas. Murphy, *supra*, at 86-87.

51. Murphy, *supra* note 50, at 85 (quoting Gordley, *supra* note 50, at 1590).

52. *Id.* Yet while the Scholastics argue "'justice in exchange necessarily requires the exchange of equivalents' . . . they [also] acknowledge the many cases in which justice does not require substantive fairness, as when gifts or distributions are mixed with exchanges." *Id.* at 95-96.

people.<sup>53</sup> This emphasis places importance on legal rather than moral issues and directs courts to examine the value of the goods and not the relationship between the parties when considering exchanges and contracts.<sup>54</sup> The Scholastics do, however, acknowledge a relationship between moral and legal issues. The Scholastics believe that while legal and moral evaluations are different, the legal evaluation “must ultimately rest upon a sound moral evaluation.”<sup>55</sup>

Murphy, however, believes that the Scholastics place too much of an emphasis on the value of the goods in a transaction when they should be focusing on the relationships involved. Although Murphy agrees that “equality is central to the justice of voluntary exchanges,”<sup>56</sup> he believes that equality of the parties, not the goods, is what truly matters.<sup>57</sup> According to Murphy, “[j]ustice is a relationship first and foremost between persons, not between things” and “equal market value of what is exchanged is [only] an important manifestation . . . of the respect each party owes to the other.”<sup>58</sup> Accordingly, to have just exchanges, the parties must respect each other and have equal bargaining power.<sup>59</sup>

Murphy further argues the Scholastics misinterpreted Aquinas and Aristotle’s ideas about distributive justice, asserting that those two philosophers understood property owners to be stewards who had a responsibility to use their property to help others in the community when needed.<sup>60</sup> As Murphy understands distributive justice, “[e]ach property owner is a kind of trustee who has a duty of justice to ensure that his property meets the needs of his fellow citizens.”<sup>61</sup> It would therefore “be unjust for the government to claim sole responsibility for distributive justice, for this would deny individuals and communities the right to exercise

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53. *Id.* at 91.

54. *Id.*

55. *Id.*

56. *Id.* at 98.

57. *Id.* See also Chinn, *supra* note 40, at 81-84. Individuals such as Chinn who advocate for environmental justice, also emphasize respect for parties outside of the actual market exchange, and the importance of considering how they may be affected to determine whether the exchange is just.

58. Murphy, *supra* note 50, at 98.

59. *Id.* at 100.

60. *Id.* at 113.

61. *Id.*

their best judgment and creative initiative in deciding how their wealth could best serve the common good.”<sup>62</sup>

Murphy's antagonism towards the Scholastic's position is evidenced by the theory of the “just price.” Because Gordley and the Scholastics insist that a “just price” is the essence of fairness, procedural unfairness, according to their position, should only be an issue if substantive fairness is in doubt.<sup>63</sup> As Murphy describes, “[h]ere we see a beautiful display of the logic of the just price: if the essence of justice in exchange is the equal value of what is exchanged, then that equality should be sufficient, in and of itself, to secure the justice of the exchange.”<sup>64</sup> Under this logic, it does not matter if one person takes advantage of another as long as the terms of the trade are fair.<sup>65</sup>

Murphy, to the contrary, believes that “just price” can lead to aberrant results. He argues, “a salesman might exercise improper influence over his customers not only when he overcharges them but also when he gets them to buy things that they really didn't need.”<sup>66</sup> Accordingly, Murphy argues, “some exchanges at unequal market prices are morally justified while some exchanges at equal market prices are not morally justified.”<sup>67</sup>

What can we learn from these alternative conceptions of the relationship between market activity and justice? Fiss, Petersmann, Chinn, and Murphy emphasize power relationships among individuals involved in a transaction as the *sine qua non* of justice. In contrast, Priest and Coleman are primarily concerned with fairness *on the assumption that distributional concerns are of minor importance*. Priest and Coleman believe that distributional differences are socially legitimate or, in the alternative, create efficiency and personal responsibility, and are therefore more significant than social equality in the sense of equal access to markets or equal bargaining power during negotiations.

The remainder of this article assumes that a version of justice that ignores bargaining power in markets reinforces the existing power relationships among stakeholders in the markets. In that

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62. *Id.*

63. *Id.* at 96.

64. *Id.* at 96-97.

65. *Id.* at 97.

66. *Id.*

67. *Id.* at 96. Murphy argues it is reasonable to grant relief in instances that “involve procedural unfairness, such as the buyer taking advantage of the ignorance or necessity of the seller.” *Id.*

respect, such a version of justice represents a political position in which power differences are preserved. Any version of justice that justifies contemporary inequality and its effects is not worthy of the name. Emerging patterns of legal development threaten to confirm the view of some that globalization is but another way to encourage the spread of international inequality.<sup>68</sup>

### III. THE HISTORICAL DEVELOPMENT OF MODERN CONTRACT LAW

English contract law was a late-bloomer, compared to the contract law of other nations.<sup>69</sup> While France and Germany both developed forms of contract law in the Middle Ages, the *beginning* of England's contract law did *not* appear until the sixteenth century.<sup>70</sup> This early form of English contract law took almost three hundred years to blossom into the recognizable version of modern contract law.<sup>71</sup> A major stimulus to this development was the Industrial Revolution.<sup>72</sup>

By 1770, civil liberties, international free trade, textile machines, and steam power moved England in a direction of economic development that soon migrated to much of the Western world.<sup>73</sup> This era of economic development, now known as the Industrial Revolution, saw a surge in economic transactions as these concepts brought together people from across the globe.<sup>74</sup> As

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68. The World Bank Group, Globalization: Data and Statistics, <http://www1.worldbank.org/economicpolicy/globalization/data.html> (last visited Apr. 21, 2008).

69. P.D.V. MARSH, COMPARATIVE CONTRACT LAW: ENGLAND, FRANCE, GERMANY 1-21 (1994) (discussing the origins of European contract law). Marsh writes that while both France and Germany developed their contract laws in the middle ages, England did not develop its contract law until about the sixteenth century. *Id.* Thus, England was about a half a century behind its European counterparts. *Id.*

70. See *id.* at 18, 21. English law was, in a sense, inchoate and desultory in that it was very new and it was not yet codified. It would not become codified until much later. *Id.*

71. *Id.* at 18.

72. Martin J. Doris, *The Continued Resonance and Challenge of the "Ius Commune" in Modern European Contract Law*, 34 INT'L J. LEGAL INFO. 391, 400-01 (2006) (discussing how the industrial age of the eighteenth and nineteenth centuries had a great impact on modern contract law). Doris also notes that modern contract law was influenced by laissez-faire economics. *Id.*

73. BERNARD GRUN, THE TIMETABLES OF HISTORY: A HORIZONTAL LINKAGE OF PEOPLE AND EVENTS 356-57 (1975). Grun's tables of events from that period show the future impact of the industrial revolution in surrounding countries. This rippling effect continues today.

74. MARSH, *supra* note 69, at 21.

industrialization picked up momentum, formerly simple, quotidian purchases became increasingly complex.<sup>75</sup> The new complexities of the market gave rise to a growing need for meticulously reasoned legal principles, such as executory contracts,<sup>76</sup> that were both capable of navigating new intricacies in the law and durable enough to protect business interests over time.<sup>77</sup> The exchange of ideas that resulted from grappling with these issues helped inspire the first all-encompassing systematization of English contract law.<sup>78</sup>

Codification of English contract law precipitated quite quickly relative to its gestation.<sup>79</sup> As a result, the codified contract law of that period incorporated the prevailing notion of justice at the time,<sup>80</sup> which centered on an individual's freedom to act and the responsibility attendant with such freedom. For example, "the will theory,"<sup>81</sup> which limits a court's role in mediating a contractual dispute to establishing the intent of the parties and nothing more, favors a system of justice based on individual responsibility, a laissez-faire approach to regulating the conditions of the bargain and universality.<sup>82</sup>

The will theory promotes individual responsibility by making the parties, not the court, responsible for the fairness of the contract.<sup>83</sup> Each individual is responsible for ensuring that the outcome of the contract is favorable to his or her own interests; the court will not step in to save a party from its ill-advised bargain. This limited role of the courts also reflects a laissez-faire approach to regulating the conditions of the bargain.<sup>84</sup>

While individual responsibility, laissez-faireism, and universality arose from the conditions inculcated by industrialization, scholars made these ideas fashionable. Ironically, the scholars most instrumental in developing the popular ideas

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75. *Id.*

76. *Id.* An executory contract is a formal agreement to perform consensual promises at a later date.

77. *Id.*

78. *See id.* Marsh claims that the systemization of commerce stimulated progress in other areas, such as contract law. As trade increased and became more readily prevalent, it forced contract law to evolve in order to stay apace.

79. *Id.*

80. *Id.* at 21-22.

81. *Id.* at 22. The will theory continues to hold sway in English common law. *Id.*

82. *Id.*

83. *Id.*

84. Arguably, the will theory also supports the idea of universality of legal principles because it asserts a course of action for all cases.

during the age of machines were humanists.<sup>85</sup> The central goal of a humanist is to further the interests of mankind.<sup>86</sup> To the thinkers of the eighteenth and nineteenth centuries, humanism meant improving the human condition.<sup>87</sup>

One of the most influential humanists was Thomas Paine, whose 1791 publication *The Rights of Man* provided the foundation for the modern conception of an individual's inherent rights, or *a priori* desserts.<sup>88</sup> Paine opined that an individual is naturally endowed with great personal sovereignty and that centralized, political institutions function to repress those rights.<sup>89</sup> Only with minimal interference from the government can humankind truly flourish.<sup>90</sup> Paine, like other prominent thinkers of the eighteenth and nineteenth centuries,<sup>91</sup> emphasized laissez-faireism and personal responsibility as central to improving the human condition.<sup>92</sup> It was also widely believed, however, that such improvement only benefited the individual and not mankind in the collective. It was not until Adam Smith that individuals' pursuits were reconciled with the idea of the greater good.<sup>93</sup>

In his monumental work *The Wealth of Nations*, Smith asserted that individuals promote the well-being of society most effectively when they selfishly pursue their own interests.<sup>94</sup> He

85. See, e.g., THOMAS PAINE, *RIGHTS OF MAN* (Oxford Univ. Press 1998) (1791).

86. See generally David Taffel, *Foreword* to THOMAS PAINE, *RIGHTS OF MAN* (Dover Publ'ns 1999) (1791).

87. See *id.*

88. See generally PAINE, *supra* note 85 (arguing that the natural state of man entitles men to equal rights such as autonomy, liberty, property, security, and the pursuit of property); see generally JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Pomona Press 2007) (1690) (discussing the nature of man).

89. PAINE, *supra* note 85, pt. I.

90. *Id.*

91. See, e.g., JOHN STUART MILL, *ON LIBERTY* 383 (Edward Alexander ed., Oxford Univ. Press 1999) (1859) (discussing Mill's proposal that individual consciences should be free from the constraints imposed by society). Mill maintained that the government should only have the right to interfere with the lives of citizens when they hurt one another. For example, he thought the government had no reason to ban opium. See also LOCKE, *supra* note 88 (elaborating that the "law of opinion" was just as important as the law of God and the law of the state); JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 57-88 (1992) (discussing the historical emergence of the public sphere and how this influenced the values of that time period).

92. See generally PAINE, *supra* note 85, pt. I.

93. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (Edwin Cannan ed., Bantam Classics 1991) (1776).

94. *Id.* bk. I, ch. 2 ("It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."). According to Smith's general thesis, voluntary, informed transaction always benefits both parties.

argued that when two self-interested, rational people enter into a bargain with each other, the transaction results in an equilibrium of interests that maximizes the utility of each party.<sup>95</sup> By optimally advancing the interests of each party, the transaction yields the ideal solution.<sup>96</sup> Because equilibrium is desirable, imposing regulations risks doing more harm than good.<sup>97</sup>

Even when the equilibrium is somehow maintained despite other parties' involvement, the transaction is less efficient than it would have been had the other parties stayed out.<sup>98</sup> Because interference with the market risks both inefficiency and inequality, it follows that *any* use of regulation as an equalizing device is counterproductive.<sup>99</sup> As long as individuals are rational in their decision-making processes, they are perfectly capable of negotiating for the most advantageous terms.

Following this logic, if one party to a bargain were to become severely disadvantaged as a result of a transaction, the

This idea was revolutionary because, in previous times, people saw bargains as a zero-sum game. See also M. Neil Browne, Carrie Williamson & Garrett Coyle, *The Shared Assumptions of the Jury System and the Market System*, 50 ST. LOUIS U. L.J. 425, 431-39 (2006); JULIE A. NELSON, *ECONOMICS FOR HUMANS* 10-12 (2006).

95. SMITH, *supra* note 93, bk. I, ch. 2; see also SIMONE DE BEAUVOIR, *ETHICS OF AMBIGUITY* (Bernard Frechtman ed., Citadel Press 2000) (1947). Simone de Beauvoir asserts that by choosing oneself, a person necessarily chooses others. This idea melds social responsibility with individual responsibility by demonstrating that an individual's choice necessarily affects other people.

96. See generally Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

97. See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 11-43, 81-133 (1991) (discussing the "perversity thesis": in trying to do good, one ends up doing harm). According to Hirschman, the perversity thesis is a common rhetorical tactic that has been used since the eighteenth century to argue that the government should not "interfere" with the social welfare. However, Hirschman writes that this tactic is likely to be used for reasons other than "intrinsic truth value;" namely, it is used to justify one's political views. While it is common sense that anything we do will have good and bad effects, this argument focuses only on the bad effects and ignores the positive things that have come from market regulation.

98. See Korobkin, *supra* note 96, at 1204-08.

99. SMITH, *supra* note 93, bk. IV, ch. 2; see also HIRSCHMAN, *supra* note 97, at 81-133. Another argument used against attempting to promote social welfare is what Hirschman calls the "jeopardy thesis," which argues that the cost of the proposed change always outweighs the benefits associated. In a sense, this argument is used by Smith to justify the market process and promote the idea that quotas or fair trade agreements interfere with the market. The market, here, is being used as the meta-issue, to which everyone must bow. If the market collapses, so the theory goes, we are all worse off. Thus, any attempts at changing the problems that arise *because* of the market are not worth the benefits that could result, as any purported benefit would never help as many people as would the unfettered market. *Id.*

disadvantaged party would be wholly responsible for the outcome. Not only is the individual responsible for pursuing his or her own self-interest, he or she is also morally required to do so.<sup>100</sup> Any failure to exercise his or her rights is the fault of either her reasoning or her will,<sup>101</sup> and not that of the market.<sup>102</sup>

Another essential element of Smith's classical economics, or, for that matter, neo-classical economics,<sup>103</sup> is its commitment to universalism.<sup>104</sup> Universalism is the idea that rules of human behavior are nomological, that is, they apply regardless of context. In this sense, economics embraces universalism as a way to simplify the evaluation of transactions.

#### IV. CURRENT TRANSNATIONAL CONTRACT LAW AND CLASSICAL ECONOMICS

The underpinnings of classical economics in modern English contract law continue to manifest themselves today in transnational commercial contract law. To illustrate this point, consider the following 2006 case from the Centro de Arbitraje de México, the Arbitrations Court of Mexico.

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100. See SMITH, *supra* note 93, bk. I, ch. 2 (noting that the market will satisfy both altruistic (benevolent) and egotistic (self-interest) goals).

101. This idea is also known as meritocracy. Michael Young coined the term "meritocracy" in his book *THE RISE OF THE MERITOCRACY* (1958). Generally, meritocracy is the idea that if one has talent and tries hard, he or she gets what she deserves. Meritocracy ignores social factors such as wealth or formal education as playing a role in desserts. As an interesting language note, in English we say we *earn* money. In French, however, they do not *earn* money; they *win* money (*Ils gagnent d'argent*). This suggests that meritocracy is perhaps an idea arising from social construction, rather than human nature. See generally MICHAEL YOUNG, *THE RISE OF MERITOCRACY* (1958).

102. See Browne, Williamson & Coyle, *supra* note 94, at 440-41 (arguing that an individual's failure to bargain for the best deal is her own fault, assuming that the market is adequately competitive).

103. For the purposes of this article, neo-classical and classical economics can be used almost interchangeably. See Economist.com, Economics A-Z, <http://www.economist.com/research/Economics/alphabetic.cfm?term=neo-classicaleconomics#neo-classicaleconomics> (last visited Apr. 21, 2008) (defining neo-classical economics as "the school of economics that developed the free-market ideas of classical economics into a full-scale model of how an economy works").

104. See Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L. J. 289, 289-94 (2002) (discussing the role of universality for legal formalists in the late nineteenth century). According to Teeven, "[t]his monistic urge for a unitary rule reflected a universal principle of enlightened Western rational thought, since Francis Bacon, the English judge and scientifically-minded philosopher, had resuscitated Plato's inductive ideas." *Id.*



A distributor from the United States entered into a contract with a Mexican vegetable grower who promised to exclusively produce for the distributor a certain amount of squash and cucumbers for a period of one year.<sup>105</sup> When the grower failed to supply the distributor with the promised goods, the distributor sent the grower a letter of notice (with return receipt) giving him fifteen days to perform his obligation under the agreement.<sup>106</sup> However, the grower failed to deliver any crops. The distributor also discovered that in addition to not furnishing the produce, the grower also violated the exclusivity clause in the contract.<sup>107</sup>

In 2006, the distributor brought this matter before the Centro de Arbitraje de México, seeking (1) termination of the contract; (2) damages sustained as a result of non-delivery; (3) payment of contractually stipulated penalties for violating the exclusivity clause; and (4) damages for the harm done to the distributor's reputation as a result of its failure to deliver the cucumbers and squash to the markets in California.<sup>108</sup> Pursuant to the contract's arbitration clause, the dispute was litigated in accordance with the UPICC.<sup>109</sup>

The claimant argued that the defendant had breached the contract by failing to supply the produce, while the defendant argued that he could not provide the promised goods due to unexpected forces beyond his control. The defendant blamed the El Niño effect<sup>110</sup> for the destruction of his crops.<sup>111</sup> The Centro de Arbitraje de México asserted that the occurrence of El Niño did not meet the criteria of a *force majeure* as defined in Article 7.1.7 (1) of the UPICC.<sup>112</sup> The arbitral tribunal found that, given the

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105. Breach of Contract Dispute (Mex. v. U.S.) (Centro de Arbitraje de México 2006), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1149&step=FullText>.

106. *Id.* ¶ 3. Pursuant to Article 7.3.2 (1) of the UPICC, claimant sent defendant the notice asking it to cure its breach. Without such notice, claimant cannot terminate the contract for non-performance.

107. *Id.* ¶¶ 3, 6.

108. *Id.*

109. *Id.* ¶¶ 2, 3, 10.

110. See generally MADELEINE J. NASH, EL NIÑO: UNLOCKING THE SECRETS OF THE MASTER WEATHER-MAKER (2002). Also known as the El Niño-Southern oscillation, the El Niño effect refers to the temperature fluctuations in surface waters of mainly the Eastern Pacific and Indian oceans. Among its effects are rainfall in normally dry areas (with normally wet climates experiencing severe drought for an extended period of time) and changes in air pressure.

111. Breach of Contract Dispute (Mex. v. U.S.) ¶ 9.

112. *Id.*

nature of the El Niño effect and the defendant's background in agriculture, the consequences of such an occurrence were indeed foreseeable.<sup>113</sup> The arbitration tribunal did concede, however, that the El Niño effect was beyond the grower's control.<sup>114</sup>

The grower next argued that it should be exempt from the consequences of non-performance due to hardship.<sup>115</sup> According to the arbitral tribunal, however, the claimant did not meet the necessary criteria for such relief as outlined in Article 6.2.2 of the UPICC.<sup>116</sup> The court asserted that rainstorms and flooding are some of the expected risks involved with growing vegetables in Central America.<sup>117</sup> Because the decimation of the grower's cucumber and squash harvest resulted from risks known at the time of conclusion of the contract, "the risk of [rainstorms and floods] fundamentally altering the equilibrium of the contract [should have been accounted for] by the disadvantaged party."<sup>118</sup>

The Centro de Arbitraje de México sided with the claimant, awarding him pecuniary damages.<sup>119</sup> The arbitral tribunal also held the defendant liable for payment of the previously stipulated penalty as compensation for violation of the exclusivity clause.<sup>120</sup> The arbitral tribunal, however, rejected the claimant's request for

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113. *Id.*

114. *Id.*

115. *Id.* ¶ 10.

116. UPICC, *supra* note 2, art. 6.2.2. According to Article 6.2.2, relief for hardship is granted only "where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and:

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract
- (c) the events are beyond the control of the disadvantaged party and
- (d) the risk of the event was not assumed by the disadvantaged party.

See also *id.* art 1.6(2). On a separate note, the wording of this article is somewhat peculiar because it refers to altering the "equilibrium." The implication is that there is an equilibrium to begin with that could be altered. Thus the assumption is that the exchange benefits both parties equally. This wording sounds strangely like Smith's conception of a bargain. See SMITH, *supra* note 93, bk. I, ch. 2.

117. Breach of Contract Dispute (Mex. v. U.S.).

118. *Id.* ¶ 9.

119. *Id.* The arbitral tribunal awarded pecuniary damage to the claimant because it had provided sufficient proof as to the "amount, certainty and foreseeability [of the damages] and its direct connection with the Defendant's failure to deliver, as required by Articles 7.4.2 (1), 7.4.3 and 7.4.4 of the UNIDROIT Principles." UPICC, *supra* note 2, arts. 7.4.2, 7.4.3, 7.4.4.

120. Breach of Contract Dispute (Mex. v. U.S.) ¶ 9.

monetary restitution for sullyng his reputation in the California produce market.<sup>121</sup> The arbitral tribunal found that the claimant had failed to provide sufficient proof to substantiate the allegation that his ability to sell produce in California in the future would be significantly affected.<sup>122</sup>

In summary, the claimant's petitions were sustained by the arbitral tribunal because the defendant (1) was expected to have reasonably foreseen the adverse weather conditions associated with El Niño and the effect it could have on his crops, (2) should have anticipated the possibility of crop decimation in drafting the contract, and (3) was at fault for not sufficiently preparing for this possibility. The ruling of the Centro de Arbitraje de México demonstrates what a significant role individual responsibility plays in determining fault in issues of transnational trade.

The importance of individual responsibility in transnational contract law<sup>123</sup> is further evidenced by the UPICC, PECL, and CISG.<sup>124</sup> Article 1.1 of UPICC and Article 1:102 of PECL both stipulate that parties should be free to (1) enter into a contract; and (2) determine its contents.<sup>125</sup> This meta-principle of freedom of contract is also central to the CISG.<sup>126</sup> By requiring contracting parties to voluntarily enter into contracts and then (2) holding them to the benefits and detriments of their bargains, the UPICC, PECL, and CISG form a "troika" of international contract law

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121. *Id.*

122. *Id.*

123. *But see* Patricia Pattison & Daniel Herron, *The Mountains are High and the Emperor is Far Away: Sanctity of Contract Law in China*, 40 AM. BUS. L. J. 459, 459-87 (2003) (discussing how the foundations of Chinese society, namely, "relationships, reciprocity, and respect" shape how contract law is written and applied in China). The uniqueness of individual responsibility in comparison to other systems is particularly evident in looking at Chinese contract law. An important difference between China and Western countries is that in China, the cogito is not "I think, therefore I am," but rather "we think, therefore we are." *Id.* In essence, the individual is not concerned as much about his own self-interest as he is concerned about the well being of the whole.

124. UPICC, *supra* note 2, arts. 3.2, 7.4.2. According to article 7.4.2 of the UPICC, had the claimant provided sufficient proof of his alleged tarnished reputation resulting from the transaction, he would have been entitled to those damages as well. Additionally, the defendant claimed that the contract was not in fact valid because it had not been registered with the Mexican authorities. The arbitral tribunal ruled that the contract was valid because, as stipulated in article 3.2 of UPICC, the only requirement necessary for validity of a contract is consensus between the parties. Breach of Contract Dispute (Mex. v. U.S.) ¶¶ 4, 10.

125. UPICC, *supra* note 2, art. 1.1; PECL, *supra* note 3, art. 1:102.

126. CISG COMMENTARY, *supra* note 4, art. 6.

that underscore the individual responsibility of each party.<sup>127</sup> Furthermore, as evidenced by the Centro de Arbitraje de México ruling above, such principles also require the parties to be rational.

As discussed in Section III above, the principles of capitalism emphasize individual responsibility and rationality. Indeed, in recognition of the capitalistic principles underlying the basic tenets of international contract law, a member of the Working Group for the Preparation of the 1994 UNIDROIT Principles pointed out that the wording of the UPICC and PECL articles noted above is “clearly directed against the socialist economies, where the exchange of goods and services are governed by state plans and orders.”<sup>128</sup>

Transnational contract law similarly embraces the principle of universality. The contextual variables of each case and their effect on the degree of justice attached to a particular court decision are presumed to serve as an *ad hoc* guide to jurisprudential development. If courts of law do not maintain a relatively high degree of consistency in making determinations of fault, contracts will no longer be considered reliable methods of ensuring performance.<sup>129</sup>

Laissez-faireism, individual responsibility, and universality are relatively unproblematic when applied to individual contracts. The facts of a particular negotiation and market exchange do at times reflect similar bargaining power and equivalent access to the price and quantity negotiations. Yet, applying such principles *en masse* to standard form consumer contracts reveals the flaws in such “universalized” justice.

## V. STANDARD FORM CONSUMER CONTRACTS

The advent of standard form contracts represents a culmination of many values associated with market ideology.<sup>130</sup> A

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127. Lando, *CISG and Its Followers*, *supra* note 1, at 382.

128. *Id.* at 387. For the list of the members of the Working Group for the Preparation of the UNIDROIT Principles 1994 & 2004, UPICC, see PECL, *supra* note 3, at xix.

129. See generally Niglia, *supra* note 5; see also JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007) (discussing the impact individual cases have on the integrity of the justice system).

130. Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT’L REV. 1, 3-4 (2002). In particular, the market ideology has blessed standard form consumer contracts with a fictitious image of the consumer. By seeing the consumer as fundamentally rational, unfair

standard form consumer contract is a compendium of terms prepared in advance by a stipulator (usually a firm) for acceptance by an adhering party (a consumer).<sup>131</sup> Standard form consumer contracts are particularly advantageous to the stipulator because they enable him or her to produce a large quantity of contracts in one fell swoop, rather than conduct each contract on an individual negotiated basis.<sup>132</sup>

This approach to determining the terms of a prospective trade can be advantageous to the consumer for a number of reasons. As standard contracts allow the seller to reduce transaction costs substantially, he is able to offer the product to the consumer at a much lower price. In addition, the consumer does not have to invest time in the contracting process, thus lowering the "real price" (in contrast to the "nominal price").<sup>133</sup> Standard form consumer contracts are also beneficial to the consumer because, if sellers were constrained to sell *only* to those with whom they had individually contracted, goods and services would cease to be easily accessible to the masses. Due to the modern market's dependence on mass production as a means of making products available to large numbers of people, standard form consumer contracts are vital to the efficient operation of the global marketplace.<sup>134</sup>

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terms of a contract are permitted so long as the consumer has the option of whether or not to enter into that contract. If the courts did not maintain this residue of market ideology, however, a certain amount of policing would be required by both the courts and the drafters to ensure the exclusion from the contract of terms that could severely disadvantage one party to the contract.

131. Standard Form Consumer Contracts are sometimes referred to simply as "standard form contracts" and also as "contracts of adhesion" (in that one party presents the contract to the other party for acceptance with no opportunity for negotiation). See Council Directive 93/13, art. 3.1, 1993 O.J. (L 095) 29 (EC) [hereinafter Unfair Terms Directive] (discussing the scope of the European Economic Community legislature as it pertains to standard form consumer contracts); HIROSHI ODA, *RUSSIAN COMMERCIAL LAW* § 8.2 (2002) (relating the standards of standard form contracts in the international arena, specifically Russia); see also Niglia, *supra* note 5, at 125 n.1, 126 (discussing the meaning of standard form consumer contracts and the problems associated with them).

132. Niglia, *supra* note 5, at 125 n.1.

133. The "nominal price" denotes the monetary price only, while the "real price" represents the amount of the labor involved in purchasing the item and the amount of money it costs to acquire the item. The "real price," as the name implies, is thought to be more accurate. SMITH, *supra* note 93, bk. I, ch. 5.

134. Bates, *supra* note 130, at 3-4. Bates discusses other benefits afforded to the consumer as a result of standard form contracts, including simplicity of transaction for the consumer and the seller, efficiency of the internal organizational structure, and reduction of economic barriers.

In fulfilling their function, standard form consumer contracts embody the values associated with market ideology by emphasizing (1) individual responsibility, (2) laissez-faireism, and (3) universality.<sup>135</sup> Individual responsibility is important to standard form consumer contracts because only when the consumer has the opportunity to accept or decline the contract is such a deal considered legally enforceable.<sup>136</sup> Social legitimacy of the freedom to contract depends on the existence of consumers who are capable of choosing for themselves which contracts they should sign; thus, standard form consumer contracts require reliance on individual responsibility.

Laissez-faireism, the concept of abstention by government from interfering in the free market, is critical to the continuation of standard form consumer contracts. The utility of standard form consumer contracts derives in part from its cost-reducing impact on the negotiation process. Governmental regulation, whatever its benefits, imposes costs on both parties to the bargain.

The adherence of standard form contracts to the principle of universality is axiomatic.<sup>137</sup> The contracts are "standard" in the sense that "one size fits all." No requirements to rethink or recalculate the contract terms are present. Thus, standard form contracts can be used for all types of transactions.

Despite their apparent benefits, standard form consumer contracts, also known as small-print contracts, are widely seen as detrimental to consumers.<sup>138</sup> As the stipulator is the sole drafter of the terms of the contract, she can consign the bulk of the liabilities onto the adhering party while exempting herself from any such liabilities.<sup>139</sup> The stipulator can also force the consumer to imperil

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135. See MARSH, *supra* note 69, at 22.

136. Korobkin, *supra* note 96, at 1204.

137. See Browne, Williamson & Coyle, *supra* note 94, and accompanying text.

138. See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1982); Robert Dugan, *The Application of Substantive Unconscionability to Standardized Contracts: A Systematic Approach*, 18 NEW ENG. L. REV. 77 (1982).

139. The terms "the adhering party" and "the stipulator" are borrowed from Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INT'L L. REV. 339, 357 (2001) (discussing how standard form consumer contracts tend to be unbalanced). Lando writes that in standard form consumer contracts the stipulator can: (1) require the adhering party to remain bound by the contract while the stipulator can postpone, change or even cancel his performance; (2) impose penalties to the adhering party in the case of breach of contract; and (3) absolve him or herself of any liability in the case of breach of contract. *Id.*; see also Otto Sandrock & Nina Moore

his or her assets beyond what the principle of proportionality would require.<sup>140</sup> For example, cross-collateral security contracts legally obligate the adhering party to relinquish all of his or her assets for repossession in the case of default on the last ten purchases made with the customer's credit card.<sup>141</sup> Even though the punishment clearly does not fit the "crime" of defaulting on a credit extension, the terms are admissible by law.<sup>142</sup>

One reason standard form consumer contracts are problematic is that they are often lengthy and written in legal language that is difficult for the ordinary consumer to understand.<sup>143</sup> Because consumers do not want to invest the time needed to read and comprehend the contract,<sup>144</sup> often they only look at a few points, if any, before signing.<sup>145</sup> Consumers, businesses, and courts tend to be unified in the observation that consumers do not read contracts.<sup>146</sup> If a consumer signs a standard form contract, however, he or she is bound by law to all the conditions under the duty-to-read provision.<sup>147</sup>

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Galston, *The Standard Terms Act of 1976 of West Germany*, 26 AM. J. COMP. L. 551 (1978) (discussing risks involved with standard form consumer contracts in Germany and the international implications).

140. The principle of proportionality is the idea that the punishment should fit the crime. In other words, the punishment should be proportional to the amount of damage done. See Bates, *supra* note 130, at 4.

141. *Id.* at 4 n.6.

142. *Id.* at 2 (noting that when the law enforces the terms of the contract supplied by the seller, it is, in effect, allowing the seller to reshape the law to its advantage).

143. Rakoff, *supra* note 138, at 1179.

144. See W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 855 (2006); Wayne Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contract: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 259 (2007); Melvin Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) ("Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing, and which probably aren't subject to revision in any event, a rational form taker will typically decide to remain ignorant of the preprinted terms."); Alan White & Cathy Lesser Mansfield, *Literacy and Contract*, 12 STAN. L. & POL'Y REV. 233, 242 (2006) (arguing that the root problem with contracts is not that people simply do not read them, because even if consumers did read contracts they could not understand them: "Actual assent is not just a fiction because of voluntary choices by consumers; it is effectively impossible . . . . The law is based on unfounded assumptions about the literacy of consumers and the readability of contracts and disclosure forms.").

145. See Barnes, *supra* note 144, at 237.

146. *Id.*

147. *Id.* at 245-46; see also Slawson, *supra* note 144, at 856-57.

While the basic logic of the duty-to-read provision is clear,<sup>148</sup> it gives the corporation a distinct advantage. Business owners realize consumers examine price, not complex contract terms, when making a purchase, motivating corporations to include terms that are unduly beneficial to the company.<sup>149</sup> Because companies write the standard form contracts, they are able to consult lawyers and draft contracts with full knowledge of their legal implications, while the average consumer is unlikely to be able to understand the meaning or legal implications of a standard form contract, even if she takes the time to read it.<sup>150</sup>

These criticisms and perceptions have not greatly restricted the use of such contracts.<sup>151</sup> Arguments about market efficiency and its subsequent effect on the kind of justice that ignores the power relationships framing a take-it-or-leave-it bargain seem to trump concerns about the disproportionate influence of the contract creator on the terms of the trade. As Charles Pouncy explains, however, "when market principles serve as moral indicators, the result is oversimplification and obstruction of economic justice rather than a promotion of it."<sup>152</sup> In response to

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148. Barnes, *supra* note 144, at 245-46.

149. See Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 194-95 (2005).

150. See W. David Slawson, *The New Meaning of Contract*, 42 U. PITT. L. REV. 21, 25 (1984) ("[It is] generally impossible to state in a writing all the legal implications that arise from a transaction, given the short time the parties can generally afford to spend in reading and understanding the document."); Eisenberg, *supra* note 144, at 243 (arguing that the party designing the form contract will use that same form again and again, and as such, will spend a good deal of time and money on the form to make sure the contract works to their advantage); Barnes, *supra* note 144, at 265 ("The entire onus has been placed on consumers . . . the duty-to-read rule permits merchants to pack their standard form contracts with one-sided terms, and it is thus at least ostensibly reasonable to hold that the consumer is bound by those terms when she signs.").

151. Barnes, *supra* note 144, at 272.

152. Charles R.P. Pouncy, *Economic Justice and Economic Theory: Limiting the Reach of Neoclassical Ideology*, 14 J. L. & PUB. POL'Y 11, 11-28 (2002) (asserting that economic justice is often, if not matter-of-factly, ignored in cases where classical economic theory plays a key role in interpreting or drafting the law). Pouncy contends that economic justice is fundamentally incompatible with neoclassical economic theory because economic justice requires, among other things, an unbiased interpretation of the law, and classical economics is inherently biased. The biases of classical economic theory are particularly apparent in cases where groups bargain with individuals. Because classical economics explains groups merely as aggregates of individuals, having the same, essential qualities, significant complexities that may influence the bargain are oversimplified. In particular, a pretext of classical economics is that inequalities of bargaining power are generally nonexistent because the bargaining power among individuals is essentially the same. As a result, instances where inequality of bargaining power brings about unfairness are often



the perceived unfairness of standard form consumer contracts, a number of countries have drafted laws to ensure a greater degree of consumer protection and enhanced equality in bargaining power.<sup>153</sup>

## VI. REGULATORY RECOGNITION THAT BARGAINING POWER MATTERS

Perhaps the most aggressive consumer protectionist law meant to combat the perceived unfairness of standard form consumer contracts is Germany's Act Concerning the Regulation of the Law of Standard Contract Terms (AGBG).<sup>154</sup> Enacted in 1976, the AGBG seeks to construct roadblocks for stipulators who try to place undue burden on the consumer in standard form consumer contracts.<sup>155</sup> The roadblocks are promulgated in the form of the "black list" and the "gray list." Section 11 of the AGBG includes a "black list," enumerating the conditions that render terms legally unenforceable as contravening consumer rights.<sup>156</sup> Alternatively, Section 10 of the AGBG includes the aptly named "gray list," which sets forth the "suspicious" conditions that *may* render terms unenforceable, but are not *necessarily* legally unenforceable.<sup>157</sup>

Even with mandatory safeguards in place, such as Sections 10 and 11 of the AGBG, consumers still face many obstacles to protecting their interests. For example, in order to remove the effects of unfair terms in a contract, parties would have to take

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considered fair because the choices of the weaker party are construed as the fault of that party.

153. Some of the laws that came about to amend the problems for consumers with standard form consumer contracts include: The Act Prohibiting Improper Contract Terms (ICT), Sweden; The Uniform Commercial Code (UCC), United States; The Unfair Contract Terms Act of 1977 (UCTA), United Kingdom; The Laws Governing General Conditions of Business Act (AGBG), West Germany; and The Israeli Standard Contracts Law of 1964 (SCL), Israel. *See* Bates, *supra* note 130, at 44-90.

154. *See* Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen [AGBG] [Act Concerning the Regulation of the Law of Standard Contract Terms], Dec. 9, 1976, amended June 29, 2000, BGBl. The standards of fairness of the AGBG were eventually integrated into the Bürgerliches Gesetzbuch on January 1, 2002, at section 242. *See* 1 KONRAD ZWIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 283 (Tony Weir trans., Oxford Univ. Press 2d ed. 1987); *see also* Sandrock & Galston, *supra* note 139, at 559.

155. Bates, *supra* note 130, at 55-56.

156. *Id.* at 62.

157. *Id.* Both lists apply only to consumer contracts. Sandrock & Galston, *supra* note 139, at 562; *see also* Lando, *CISG and Its Followers*, *supra* note 1, at 358.

their claim to court. Only consumers that have suffered the consequences of unfair terms, however, would have reason to take legal action. Therefore, many contracts containing unfair terms will never go before a judge. In addition, because litigation is costly and an inconvenient means to recovery, fighting the terms of an unfair contract may not be worth the cost it imposes.<sup>158</sup>

Even when parties go to court and receive exemptions from unfair terms, a court victory is only applicable to the individual consumer. The award won by a wronged consumer would have little to no effect on consumers impacted by similar unfair terms. Although victory in an individual action may strengthen a future case concerning the same type of unfair exchange, this case-by-case approach to the problem understandably prevents numerous justifiable claims from ever being adjudicated. Thus, there is little reason for stipulators to pay attention to either the black or the gray list when so few injured parties actually petition the courts.

One potentially significant effect of consumer protection laws stems from their demonstrative effect-jurisdictions observe a consumer protection law in another jurisdiction, promoting the movement of local laws in a similar direction. For example, on April 5, 1993, the terms of the AGBG were embraced by the European Union (EU) in the European Community (EC) Directive on Unfair Terms in Consumer Contracts (Directive),<sup>159</sup> although with some slight modification.<sup>160</sup>

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158. Lando, *Vision of a Future*, *supra* note 2, at 4-6.

159. Unfair Terms Directive, *supra* note 131, Annex (for the gray list of terms deemed possibly unfair; PECL, *supra* note 3, art. 4:110 (for reference to terms deemed unfair); see also Lando, *Vision of a Future*, *supra* note 2, at 4-6; UPICC, *supra* note 2, art. 2.20. To some extent, the principles of the directive were also adopted by UPICC. Per the comments to Article 3.10, the UPICC gives courts the power to render unenforceable:

1. grossly unfair liabilities on the part of the consumer
2. grossly excessive penalties on the part of the consumer
3. terms that give the stipulator an "excessive advantage"
4. grossly unfair standard term
5. subsequent events have altered the original "equilibrium" of the contract

Furthermore, Article 3.10 of UPICC requires that the abuse of the superior bargaining power of one party is relevant to the concrete case. See Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT 'Restatement' and Danish Law*, 46 AM. J. COMP. L. 485, 500 (1998) (discussing how deeming some terms of, in particular, standard form commercial contracts as unfair *a priori* serves as a means of perhaps unfairly policing international commercial contracts).

160. Of the modifications made to the AGBG, the ECJ decided that there should be no black list of terms deemed to be unfair per se; all "unfair" terms, black or gray, were seen as "gray" by the ECJ. See Case C-237/02, *Freigburger Kommunalbauten v. Hofstetter*, E.C.R. 1-3403 (2004).

It should be noted, however, that a recent interpretation of the Directive has undermined the law's intended consumer protectionism in favor of market competition.<sup>161</sup> In lieu of automatically invalidating terms that impose grossly undue burdens or other disadvantageous terms on the Adhering Party (the consumer),<sup>162</sup> the European Court of Justice (ECJ) adopted a circumstantial test that uses the particular circumstances of the case as the *res gestae* to determine fairness.<sup>163</sup>

*Freiburger* is illustrative of this interpretive shift.<sup>164</sup> On May 5, 2007, a municipal construction company in Germany sold Mr. and Mrs. Hofstetter a parking spot by way of a notary contract.<sup>165</sup> The parking spot was to be located in a city parking garage that had yet to be constructed.<sup>166</sup> As stipulated in Article 5 of the contract, the entirety of the purchase price of the parking spot was to be paid to the contractor (the municipal construction company) upon the delivery of a bank guarantee insuring the Hofstetters against non-performance.<sup>167</sup> The Hofstetters were furnished with the bank guarantee about two weeks after the conclusion of the contract, at which time they refused to make payment.<sup>168</sup> They insisted that, according to Paragraph 9 of the AGBG, they were not required to pay remittance until they had inspected the parking spot themselves to ensure its quality.<sup>169</sup> Approximately seven months after the conclusion of the contract, payment was finally made to the contractor, at which time the construction company filed suit against the Hofstetters for default interest due to their late payment.<sup>170</sup>

The Landgericht Freiburg (Freiburg Regional Court) ruled in favor of the plaintiff, ordering default interest to be paid.<sup>171</sup> The appeal, brought before the Oberlandesgericht Karlsruhe (Karlsruhe Higher Regional Court), ruled in favor of the defendant, finding

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161. See Niglia, *supra* note 5, at 145.

162. Unfair Terms Directive, *supra* note 131, at Annex (for the "gray list" of the seventeen terms of standard form consumer contracts that are considered unfair).

163. *Freiburger*, ¶¶ 22, 25 (2004); see also Niglia, *supra* note 5, at 131-40 (discussing *Freiburger* as it relates to the valuation of market principles).

164. *Freiburger*, ¶¶ 22, 25.

165. *Id.* ¶ 9.

166. *Id.*

167. *Id.* ¶¶ 10-11.

168. *Id.* ¶ 12.

169. *Id.* See also AGBG, *supra* note 154, ¶ 9.

170. *Freiburger*, ¶ 13.

171. *Id.* ¶ 13.

that, because the term contained in Article 5 was unfair as established in the AGBG, interest for late payment was not due.<sup>172</sup> The construction company appealed the ruling and the case proceeded to the Bundesgerichtshof (German Supreme Court).<sup>173</sup> The German Supreme Court ruled that, because Article 5 of the contract stipulated that if the entirety of the purchase price was not received at the time of delivery of the security (the bank guarantee), the purchaser would be liable for default interest, and the contracting company had a legal right to default interest regardless of terms that may be seen as unfair.<sup>174</sup>

However, because the German Supreme Court questioned its decision in conformity with laws of the European Union,<sup>175</sup> it referred this question to the ECJ for a preliminary ruling:

Is a term, contained in a seller's standard business conditions, which provides that the purchaser of a building which is to be constructed is to pay the total price for that building, irrespective of whether there has been any progress in the construction, provided that the seller has previously provided him with a guarantee from a credit institution securing any monetary claims the purchaser may have in respect of defective performance or non-performance of the contract, to be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?<sup>176</sup>

By referring a domestic dispute for a preliminary ruling to the ECJ, the Bundesgerichtshof demonstrated its desire to render rulings consistent with those of the EU.<sup>177</sup> Although the rules contained in PECL, wherein lies the Directive, are considered "soft law" because they are not legally binding in any country,<sup>178</sup> they are important to the cohesion of the EU nation states. Thus, those states that wish to show their desire to function as a part of a greater community will use the ECJ's ruling in this case to

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172. *Id.* ¶¶ 13-14.

173. *Id.* ¶ 14.

174. *Id.*

175. *Id.*

176. *Id.*

177. Niglia, *supra* note 5, at 139.

178. *See, e.g., Lando, CISG and Its Followers, supra* note 1, at 382. Hard law, on the contrary, is law for which compliance is not optional.

influence future judgments.<sup>179</sup> This ruling will therefore most likely have a ripple effect in other EU countries.

In response to the Bundesgerichtshof's question, the Court concluded that the Annex 4 of the Directive did not make the terms of Article 5 of the contract *per se* unfair.<sup>180</sup> The Court ruled that the question of unfairness is a matter for the national court to determine based on the particular circumstances in the case.<sup>181</sup> The construction company and the plaintiff, Freiburger, asserted that any disadvantage resulting from the term in question was offset by the advantage of a lower price.<sup>182</sup> The contractor stipulated to "early" payment as a way of reducing the interest that would be incurred during the construction of the parking garage and the Hofstetter's parking spot.<sup>183</sup> Freiburger argued that by avoiding this interest, the contractor was able to offer the Hofstetters a reduced price for their purchase.<sup>184</sup> However, because they failed to make payment at the time of delivery of the bank guarantee, the contractor was forced to incur the interest himself.<sup>185</sup> As a result, the price he had offered the Hofstetters was no longer fair, and the Hofstetters should be liable for the interest the contractor paid as a result of their breach.<sup>186</sup>

The plaintiffs argued that the security of the bank guarantee minimized the risks consigned to the Hofstetters because it protected them against non-performance, and to a certain extent, defective performance.<sup>187</sup> In rendering its decision, the Court thereby sidestepped compliance with the Annex of the Directive by maintaining that the Annex was non-exhaustive,<sup>188</sup> and should consequently not be construed as indicative of *per se* unfairness. Thus, the Court suggested that the contract might be permissible even though Article 5 contained a term<sup>189</sup> that violated Sections (o) and (b) of the Annex of the Directive.<sup>190</sup>

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179. *Id.*

180. *See Freiburger*, ¶¶ 23-25.

181. *Id.* ¶¶ 2-3.

182. *Id.* ¶ 16.

183. *Id.*

184. *Id.*

185. *Id.* ¶¶ 12-13.

186. *Id.* ¶ 16.

187. *Id.*

188. *See Case C-478/99, Comm'n v. Sweden*, E.C.R. I-4147, ¶ 20 (2002).

189. *Freiburger*, ¶¶ 23-24.

190. Unfair Terms Directive, *supra* note 131, at Annex. The Annex of the Directive contains all of the terms that may be deemed unfair by the Commission. The two terms

Consequently, the Court's preliminary ruling established that while the terms listed in the Annex of the Directive *could* be perceived as unfair, the Annex does not make them *necessarily* unfair.<sup>191</sup> In other words, the possibility of considering a *term* unfair does not presume that the underlying transaction is unfair. If the overall deal is not unfair, there should be no substantive reason to object to a particular term. As such, the fairness of the overall deal is the only significant factor to be considered when adjudicating fairness.

According to this logic, even though the Court seemed to agree with the defendants that the term found in Article 5 of the contract was unfair when viewed alone, it suggested that the term might not be unfair when used in this particular contract because of its relationship to the overall deal.<sup>192</sup> In drawing this conclusion, the Court referred to its previous judgments.<sup>193</sup> It pointed out that because the term of disadvantage to the consumer was balanced by terms that favored the consumer, namely the security deposit and the reduced price of construction, the overall deal may be considered by the national court as fair. In support, the Court cited the Opinion of the Advocate General indicating that the Court should not rule on the application of "general criteria" to a particular term.<sup>194</sup> Thus, the Court essentially suggested that certain terms deemed "unfair" by the Directive did not afford the Hofstetters the same level of legal protection, which might be considered appropriate in prior cases, when the term is considered in light of the entire contract.

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said to be violated in the *Freiburger* case were articles (o) and (b). Article (o) reads, "obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his"; and article (b) reads, "inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him." *Freiburger*, ¶ 17.

191. *Id.* ¶ 20.

192. *Id.* ¶ 21.

193. *Id.* ¶ 23. The Court referred to the ECJ joint rulings in *Océano* which determined that a term drafted in advance by the seller "satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive." If the purpose of the term is to confer jurisdiction for any dispute that arises under the contract, however, "[the term] must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." Joined Cases C-240-244/98, *Océano Grupo Editorial v. Quintero*, 2000 E.C.R. I-4941, ¶ 21-24 (2000).

194. *Freiburger*, ¶ 22.

*Freiburger* is significant because it represents the extent to which the triad of values promulgated by economic liberalism shapes interpretation of the law, even when the letter of the law erects safeguards against it. This subversion of prior legislation, case law, and traditional methods of making judgments points towards a laissez-faire attitude about power distribution and consequent effects on bargaining power.<sup>195</sup>

Nonetheless, in important respects, the result of the attempts at deregulation demonstrated by *Freiburger*, undercuts the very principles used to justify it.<sup>196</sup> In particular, the ECJ's clash of values is apparent in three respects: (1) the circumstantial test, (2) the disregard for case law, statutes, and legal scholarship, and (3) the regard for the overall deal in the context of the circumstantial test.

As Leone Niglia points out, *Freiburger* signifies a "shift away" from rule-bound logic to judicial discretion.<sup>197</sup> This shift is perhaps most visible in the ECJ's circumstantial test enunciated in *Freiburger*.<sup>198</sup> The circumstantial test posits that in judging the fairness of a term, it is necessary to broaden the focus to observe the context in which the term is employed.<sup>199</sup> The test disfavors bright-line rules that define particular terms as per se unfair. Instead, courts are encouraged to evaluate the fairness of terms as they relate to the "nature of the goods and services for which the contract was concluded."<sup>200</sup>

The circumstantial test is therefore used to legitimate suspect terms in standard form consumer contracts. As a result, consumers who suffer from disadvantages caused by standard form consumer contracts are less likely to seek legal intervention. Without a clear, comprehensible picture of what is necessary for "unfair" terms of a

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195. See generally Niglia, *supra* note 5 (discussing how *Freiburger* represents a drastic change in how cases are decided).

196. Several authors have discussed principles that seek to justify market ideology. See generally Korobkin, *supra* note 96, at 1204-08 (discussing efficiency); Browne, Williamson & Coyle, *supra* note 94 (discussing universality); SMITH, *supra* note 93 (discussing individual responsibility); NELSON, *supra* note 94, at 10-12 (discussing the rational and self-interested consumer); YOUNG, *supra* note 101 and accompanying text (discussing meritocracy).

197. Niglia, *supra* note 5, at 135, 145-46.

198. *Freiburger*, ¶ 21.

199. Niglia, *supra* note 5, at 128.

200. *Freiburger*, ¶ 21.

contract to be invalidated, it signals to consumers that litigation may not be worth pursuing.<sup>201</sup>

At the same time, by contending that fairness is based on individual context, the ECJ arguably *promotes* justification for consumer protectionist terms. For example, the events and circumstances surrounding one transaction may be inapplicable to a second market exchange.<sup>202</sup> Thus, the logic used to substantiate the test also serves as a rationale for opposing universality in the sense that one market price is as legitimate as the next.<sup>203</sup>

By disregarding the list of unfair terms as provided in the Annex of the Directive and the case law that supports the defendant's petition,<sup>204</sup> the Court takes power away from the many and gives it to the few. The result is to centralize, rather than to decentralize, power. In economics, decentralization of power is the key to establishing respect for market outcomes. If power is centralized, individuals do not have the ability to pursue their own best interests, and markets cannot achieve the utility maximization touted by market advocates.

It is equally problematic to view contractual fairness as a function of the overall bargain, as opposed to evaluating specific terms contained therein. The list of unfair terms within the Annex of the Directive seeks to protect, among other things, basic human rights.<sup>205</sup> When the Court rules that these rights can be taken away if they are balanced by other favorable terms,<sup>206</sup> the Court implies that such rights are not unconditional, but are subject to the whim of a judicial tribunal.

The intentions of the Commission in endorsing the Directive are clear from the communications of its members in 1993, prior to

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201. For the risks involved with pursuing litigation, see Case C-478/99, *Comm'n v. Sweden*, E.C.R. I-4147, ¶¶ 12, 14 (2002).

202. See generally Niglia, *supra* note 5.

203. See SMITH, *supra* note 93, at 52 (discussing universality); see also Browne, Williamson & Coyle, *supra* note 94 (discussing democratic ideas in economics).

204. *Freiburger*, ¶ 21.

205. For example, Section (q) protects against the limiting or exclusion of the right of the consumer to take legal action. Also, Section (p) protects against "giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement." These and other parts of the Annex of the Directive protect what are considered fundamental rights. Unfair Terms Directive, *supra* note 131, at Annex.

206. *Freiburger*, ¶ 16.



the enactment date.<sup>207</sup> According to the Commission, protectionist rules (such as those contained in the Annex of the Directive) have the potential to restrict "economic freedom and leads to the risk of higher unemployment following price rises, or to loss of competitiveness."<sup>208</sup> Thus, the Commission clearly voices support for a form of justice that ignores bargaining power relationships. Demand and supply curves are therefore ipso facto socially acceptable expressions of resource value.

It can be argued that the *Freiburger* case shows a great willingness on the part of courts to place market principles above any form of justice that is grounded in equal opportunity or positive freedom. The case dramatically represents the extent to which classical liberal support for market outcomes will go in shaping judicial reasoning, even when such reasoning is inconsistent with previous legislation and case law,<sup>209</sup> and even when such a perspective is potentially self-contradictory.<sup>210</sup>

## VII. CONCLUSION

Contract law becomes a global concern when international trade burgeons. *If* we assume that consumers are rational,<sup>211</sup> and *if* we assume that consumers have significantly similar bargaining power vis-à-vis those who produce and market products, then it follows that the individuals who sign contracts should be held responsible for honoring the terms of their bargain. It is only fair

207. *Commission Communication, Unfair Terms in Contracts Concluded with Consumers*, at 7, EC Bull., supp. 1/84, based on COM (84) 55 final (Feb. 14, 1984).

208. *Id.*

209. See *Freiburger*, ¶ 23. It should be noted, however, that the court does its best to distinguish prior case law, rather than making a radical departure.

210. Niglia, *supra* note 5, at 137-42.

211. Cf. Korobkin, *supra* note 96, at 1203-09 (arguing that humans are not infinitely rational, as Smith would have us believe, but rather, they are *boundedly* rational). Korobkin proposes that consumers choose what to buy not based on all of the complex qualities of the product and its accompanying standard form consumer contract, but based only on its "salient" features. Salient feature are those qualities that are most important to the consumer—such as price and visible qualities. By this account, it is in the best interest of the seller to satisfy only the visible and superficial features of a product. The seller has little incentive to assist the consumer in discovering attributes the consumer would like to know. For example, it does not make sense for a manufacturer of teen clothing, specializing in cheap and stylish clothes, to make garments out of cashmere or to spend hours meticulously sewing lining into the skirts or pants. Even though those qualities are the sign of well-made clothing, they are not the qualities that the consumer will look for before making a purchase. More likely, the clothing's salient features are (1) its degree of stylishness and (2) its degree of affordability. *Id.*

that they not make a commercial promise one day, and then decide tomorrow that they prefer another set of price, quantity or quality specifications. Yet, support for justice based on market outcomes, without examining the social relationships that encouraged, permitted, and shaped those outcomes, ignores the external factors that shape the self. Hence, support for a justice that ignores the distributional structure that resulted in those outcomes strips the individual of his character, turning him into a “cog,” or, as Nietzsche would say, creating an exterior without a corresponding interior.<sup>212</sup>

Fort and Schipani suggest a “tri-partite model” that would result in a more robust version of justice, one that honors market principles once they have been adjusted to create a more level playing field at the point of the negotiated exchange of goods and services.<sup>213</sup> Their vision of justice internalizes and respects three fundamental human values: (1) economization-creating something useful from raw materials; (2) power-aggrandizement-developing status and maximizing freedom; and (3) ecologization-forming a web of social cohesion.<sup>214</sup> “These steps,” they write, “would allow for the efficiency of markets to discipline corporations while preserving the moral goods of human lives lived in such corporations.”<sup>215</sup> These three principles would create a sharply different *lex mercatoria* from that shaped by classical liberalism’s attitude toward optimal resource allocation.<sup>216</sup>

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212. See generally FRIEDRICH NIETZSCHE, ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE (Hackett Publishing Company 1980) (1874). Nietzsche writes that the accumulation of knowledge without experience makes one develop an interior without a corresponding exterior in the sense that one’s identity is based solely in his immaterial, mental processes, without having any sense of oneself in the physical world. Nietzsche sees this as detrimental in that it prevents one from engaging in one’s own life. By making a person a cog in the machine, with no complex qualities, one effectually loses any sort of immaterial self and his existence is defined merely by his physical qualities. *Id.*

213. See generally TIMOTHY L. FORT & CINDY A. SCHIPANI, THE ROLE OF BUSINESS IN FOSTERING PEACEFUL SOCIETIES (2004).

214. TIMOTHY L. FORT, ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION 111-15 (2001).

215. *Id.* at 115.

216. See Browne, Williamson & Coyle, *supra* note 94, at 435. Using the economists’ dogma to decide matters of law is dangerous: “When assumptions are made in legal reasoning about consumer sovereignty without evidence as to the market structure, the social legitimacy of ‘the market’ should be strongly questioned.” *Id.* Thus, it seems out of place that the courts should make rulings dependent on particular market conditions that can later be used to decide cases where the market conditions are different. For this

Contemporary transnational contract law is especially non-responsive to the ecologization prong in the Fort/Schipani model. For example, the toleration of standard form consumer contracts tilts the distribution of bargaining power away from the individual consumer because terms are not negotiated on an individual basis. By restoring the dialogue between consumers and sellers, the relationship between them would be validated as a partnership, rather than as a relationship analogous to that of lord and serf. Under the partnership model, sellers would be required to respect consumers, and vice versa. Fort and Schipani write, "in the 1980s revival of civic republicanism, scholars have argued that the commitment to dialogue was a central tool to transform self-interested individuals into citizens concerned with the common good."<sup>217</sup> If consumers and sellers could see their relationships as promoting a common good, their bargaining would reflect both social and individual needs. Were courts to focus on the social dynamics of a bargain, they would be more likely to satisfy an egalitarian, rather than a crude utilitarian, conception of justice.<sup>218</sup>

Transnational contract law is based on ideas popular during the eighteenth and nineteenth centuries: individual responsibility, laissez-faireism, and universality. Individual responsibility leads to the pursuit of one's own self-interest; laissez-faireism leads to the ability to promote one's interests; and universality suggests that the pursuit of one's self-interests leads to the fulfillment of the interests of others. Ultimately, as this article demonstrates, the resulting "justice" is a selective justice.

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reason, deciding cases according to market ideology runs the risk of being inefficient or not morally justifiable.

217. FORT & SCHIPANI, *supra* note 213, at 129.

218. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Arthur Goldhammer ed., Penguin Books 2004) (1835) (discussing the problems with utilitarian forms of justice).