

Lecture 5: CESL, Unfair terms

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Unfair terms

- European development – imposing the limits on the contractual freedom, where the substantial freedom of the bargaining is not secured
- Different concepts of protection against the unfair terms:
- The German Model – the standard terms as „self-made law of business”

Unfair terms

- The French model of the „contrat d’adhesion” and the idea of the protection of the weaker party, ultimately the consumers
- The Scandinavian model of the contractual fairness

Directive 93/13

- Directive on unfair terms in consumer contracts as a compromise between the German and the French tradition
- Non-negotiated terms in consumer contract are subject of the fairness test, even drafted for only one use
- Consumer friendly interpretation
- General clause (Article 3 I of the Directive) referring to the good faith
- Relation between goods and the price exempted from the testing
- Indicative list of the terms presumed to be unfair.
- Collective procedures

The CESL and the Unfair Terms Art. 79 - 86

- Intrusion of the non-negotiated terms into the contract (Art. 70)
- Fairness test:
- B2C – Contracts
 - General clause – Article 83
 - Black list – Article 84
 - Grey list – Article 85

The CESL and the Unfair Terms

- Unfair Terms in B2B contracts – Article 86
- Differences between the B2B and B2C unfair terms testing system
- The role of the non-mandatory law as a criterion of the contractual justice

The CESL and the Unfair Terms

- Buyer is buying a used car from a Seller under the CESL (the CESL has been effectively selected by the parties). On the Website of the seller there are the terms of the contract. According to the one of the terms the liability for the lack of conformity of the car is excluded. The Buyer is a taxi driver and buys a car to conduct this kind of business activity. Despite of this the Buyer intends to use the car for private purposes. The car has a defect in its engine, which existed already before the car has been handed over to the buyer. The buyer requires a repair of the car. Seller refuses this request.