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## **Incorporation of Standard Contract Terms on Websites**

### **Observations on the American Law Institute's Restatement of Consumer Contract Law**

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# Incorporation of Standard Contract Terms on Websites

## Observations on the American Law Institute's Restatement of Consumer Contract Law

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## Summary

The draft of the American Law Institute's Restatement of Consumer Contracts reflects the jurisdiction of the US courts on the 'adoption' (as the draft calls it) of standard contract terms into consumer contracts. This draft is of great value to European lawyers in understanding US developments, but it may also stimulate a reflection on the state and possible evolution of European legal systems. It turns

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\* Professor of Law at the Universities of Osnabrück and Nijmegen, Director of the European Legal Studies Institute Osnabrück. I benefited a great deal from the discussions at several Advisors meetings at the American Law Institute on the Restatement of Consumer Contracts project, in particular from the contributions of the project Reporters Oran Bar-Gill, Omri Ben-Shahar and Florencia Marotta-Wurgler.

out that in the United States, as in Europe, the law on the adoption of standard contract terms is still heavily influenced by cases from the pre-digital and paleo-digital era. This article explains the rules of the Restatement for the adoption of standard contract terms, tests their functionality, in particular using the example of websites, makes some drafting suggestions and puts forward a proposal for the further development of the law on the adoption of standard contract terms of websites. The adoption of standard contract terms governing the use of a website should not require that consumers receive a notice that the standard contract terms prior to entering that website. The requirements for the adoption of standard contract terms should be seen as mainly, if not only, having the purpose of pinpointing the wording of a contract for later reference if necessary.

Der Entwurf des Restatement des American Law Institute zu Verbraucherverträgen spiegelt die Rechtsprechung der US-amerikanischen Gerichte zur Einbeziehung von Allgemeinen Geschäftsbedingungen wider. Dieser Entwurf ist für europäische Juristen von hohem Wert für das Verständnis der US-amerikanischen Entwicklung, kann aber auch das Nachdenken über Stand und mögliche Weiterentwicklung europäischer Rechtsordnungen anregen. Es zeigt sich, dass in den Vereinigten Staaten – ähnlich wie in Europa – das Recht der Einbeziehung von Allgemeinen Geschäftsbedingungen noch sehr von Fällen aus der Vor- und Frühzeit der digitalen Ära geprägt ist. Dieser Artikel erläutert die Regeln des Restatement für die Einbeziehung von Allgemeinen Geschäftsbedingungen, fragt nach ihrer Funktionalität, insbesondere am Beispiel von Websites, macht einige Formulierungsvorschläge und wagt einen rechtsfortbildenden Vorschlag für die Einbeziehung von Allgemeinen Geschäftsbedingungen bei Websites. Bei Allgemeinen Geschäftsbedingungen, die die Nutzung einer Website regeln, sollte es für deren Einbeziehung nicht erforderlich sein, dass Verbraucher vor dem Aufrufen dieser Website einen Hinweis erhalten, dass die Allgemeinen Geschäftsbedingungen gelten. Als Zweck der Voraussetzungen für die Einbeziehung von Allgemeinen Geschäftsbedingungen sollte hauptsächlich, wenn nicht ausschließlich angesehen werden, dass sie den Wortlaut eines Vertrags festlegen, um diesen später bei Bedarf nachzuschlagen.

## I. Introduction and purpose of this paper

Rules, case law and doctrine on the adoption of standard contract terms into contracts are a wide field, even within a single legal system. This paper has a rather limited scope. It restricts itself to a description of, and some observations on, the two sub-sections dealing with the adoption of standard contract terms in the forthcoming Restatement of the American Law Institute on Consumer Law.<sup>1</sup>

The key test case will be the very important example in practice of a website whose operator seeks to make standard contract terms applicable and enforceable against a consumer who enters the website. Some observations made on this case give rise to more profound questions on the function and operability of the requirements for the adoption of standard contract terms. The paper then makes some drafting suggestions for the rules of the Restatement, proposing a more straightforward approach to the adoption of standard contract terms, at least for websites.

This paper subjects itself to two important self-restraints. Firstly, it does not deal with issues of data protection. The reason for this is that this paper is published in a European journal, and the EU General Data Protection Regulation has very much burdened consent for processing personal data in

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<sup>1</sup> This paper is a slightly extended version of my presentation at the conference ‘ALI Restatement on Consumer Law and Consumer Law in Europe’ held at the Humboldt University at Berlin on 23 and 24 November 2018; references in footnotes have been restricted to a bare minimum, in particular some comparative works.

order to prevent businesses from using a take-it-or-leave-it approach.<sup>2</sup> The Regulation's criteria for a valid consent now differ so much from the criteria for the adoption of standard contract terms that this would need an article of its own. Secondly, this paper does not deal with the question of whether the criteria for the adoption of standard contract terms in consumer contracts are actually consumer specific. Although there is much reason to assume that some, if not all, criteria would also be appropriate for B2B contracts,<sup>3</sup> the deliberations made here stick to consumer contracts and consumer cases, because the Restatement project of the American Law Institute is limited to this specific field.

## II. The different ways of adopting standard contract terms

The first two sub-sections of Section 2 of the draft Restatement of the American Law Institute on Consumer Contract Law (referred to below as the 'Restatement') read as follows:<sup>4</sup>

### § 2. Adoption of Standard Contract Terms

(a) A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving:

- (1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and
- (2) a reasonable opportunity to review the standard contract term.

(b) When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract if:

- (1) before manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be part of the consumer contract, informing the consumer about the opportunity to review and terminate the contract, and explaining that the failure to terminate would result in the adoption of the standard contract term; and
- (2) after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term; and
- (3) after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and does not exercise that power.

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<sup>2</sup> C. Hoofnagle, 'Designing for Consent', *European Consumer and Market Law Review* 2018, 162, also on the different consent standards in U. S. statutory law.

<sup>3</sup> On the purpose of fairness controls of standard contract terms in B2B contracts cf H. Schulte-Nölke, 'No Market for Lemons: On the Reasons for a Judicial Unfairness Test for B2B Contracts', (2015) *European Review of Private Law* 195-216.

<sup>4</sup> Cited from Council Draft No. 5 (19 September 2018); Section 2 contains a third sub-section that is not dealt with here; this sub-section (c) reads: '(c) If the consumer manifests assent to the transaction, a contract exists even if some of the standard contract terms are not adopted. In such case, the terms of the contract are those adopted under subsections (a) and (b), and, if the consumer elects, the unadopted standard terms, along with any terms supplied by law.' The full text of the draft Restatement is annexed to the introduction of this special issue together with an introduction by the reporters, cf O. Bar-Gill, O. Ben-Shahar and F. Marotta-Wurgler, 'The American Law Institute's Restatement of Consumer Contracts: Reporters' Introduction', (2019) *European Contract Law Review*, xxxx.

It is clear from the outset that sub-sections (a) and (b) distinguish two ways for the adoption of standard contract terms. The main difference is that, in cases falling under sub-section (a), the standard contract terms are available for review before the consumer manifests assent to the transaction, whereas in the cases falling under sub-section (b), the standard contract terms only become available for review after the consumer manifested assent to the transaction. Sub-section (a) could be called the ‘pre-assent review’ model, and consequently sub-section (b) the ‘post-assent review’ model.

### 1. The three elements of the ‘pre-assent-review’ model

The ‘pre-assent-review’ model of adoption, set out in sub-section (a), requires three elements for the adoption of a standard contract term, namely that (1) the consumer receives a reasonable notice of the standard contract term, (2) the consumer has a reasonable opportunity to review it, and (3) the consumer then manifests assent to the transaction. In a brick and mortar shop, this may happen at the point of purchase, where, for instance, the consumer is given a form with the terms in question (= notice and opportunity to review), then pays and is handed over the goods (= manifesting assent to the transaction). This model is rather close to the rules on the incorporation of standard contract terms in many European legal systems. The EU Directive on Unfair Terms in Consumer Contracts does not contain express provisions on the incorporation of standard contract terms into a consumer contract;<sup>5</sup> this issue is still mainly dealt with by national laws. For instance, § 305 paragraph (2) of the German Civil Code<sup>6</sup> requires a clearly visible notice, a reasonable opportunity to review the contents of the terms, and that the consumer agrees to their application when entering into the contract.

### 2. The five elements of the ‘post-assent-review’ model

The ‘post-assent review’ model, set out in sub-section (b) of Section 2, requires five elements for the adoption of standard contract terms, namely (1) that the consumer receives reasonable notice regarding the existence of the standard term before manifesting assent to the transaction, (2) that the consumer then manifests assent to the transaction, (3) that the standard term is made available for review after the consumer manifested assent to the transaction, (4) that the consumer has a reasonable opportunity to terminate the transaction, and (5) that the consumer does not exercise that power. This rule is clearly inspired by the American case law on the ‘shrink-wrap’ and ‘pay-now-terms-later’ situations.<sup>7</sup> In European legal systems, the question on whether the terms of a licence can be adopted through a shrink-, click- or browse-wrap is also being discussed widely and receives

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<sup>5</sup> See, however, Recital 20 of that directive, which reads: ‘Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms ...’; this is repeated in No (i) of Annex 1 of the Directive.

<sup>6</sup> § 305 paragraph (2) of the German Civil Code reads: ‘Incorporation of standard terms into the contract ...

(2) Standard terms only become part of a contract if the user, when entering into the contract,

1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and

2. gives the other party to the contract, in an acceptable manner, ... , the opportunity to take notice of their contents,

and if the other party to the contract agrees to their application.’

<sup>7</sup> See the forthcoming Reporters Notes on § 2 (consulted by the author in the version of Council Draft No 5 of 19 September 2018).

varying answers in the different European legal systems.<sup>8</sup> There seems to be, however, less support for accepting that standard contract terms that have not been made available for review by the consumer before the conclusion of the contract can become valid and enforceable.<sup>9</sup>

### 3. Preceding framework contract or subsequent contract amendment covered?

It should be noted that the two models in sub-sections (a) and (b) of Section 2 do not expressly deal with the rather clear situations where standard contract terms are agreed in a separate contract, either in a preceding stand-alone (usually framework) contract before any concrete transaction is made, or in a new contract concluded after the transaction, which seeks to introduce standard contract terms into an already concluded contract that originally had no small-print. The latter case could be construed as an amendment of the already concluded contract by incorporating standard terms. Generally, such situations should be rather easy to handle under the general rules on the formation of contract. In its Section 3, the Restatement expressly caters for the case where a business seeks to subsequently modify already adopted standard contract terms. This interesting provision is also deserving of more in-depth attention, but cannot be dealt with here due to limitations of space.

It might, however, be worth having a close look at the situation where a business seeks to adopt standard contract terms as a preceding stand-alone framework agreement for all subsequent transactions. It is not clear whether such a set of foregoing stand-alone standard contract terms for subsequent transactions can be adopted under Section (2) of the Restatement, since there might not yet be a 'transaction' that the consumer could manifest assent to. This depends on the interpretation of the notion of 'transaction', which will be looked at below. German law has a specific provision clarifying that the parties may agree in advance that specific standard contract terms are to govern subsequent legal transactions, and that these standard contract terms may be adopted under the specific rules for standard contract terms.<sup>10</sup> The purpose of this provision is to disburden the parties from the general requirements of concluding a contract, which may be more difficult to fulfil than the provisions on the adoption of standard contract terms.

## III. The meaning of 'adoption' and 'transaction'

The Restatement introduces the concepts of 'adoption' of standard contract terms and manifesting assent to a 'transaction'. Both expressions seem to be employed as more descriptive than legal notions. This use of descriptive language gives the impression that the requirements for the incorporation of standard contract terms into a contract are rather low, and that it should, in particular, be easier to adopt standard contract terms than to conclude a contract. The German Civil Code, for instance, requires for the incorporation of standard contract terms that the other party (i.e. the party that did not introduce the terms) 'agrees to apply' in the standard contract terms.<sup>11</sup> Under

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<sup>8</sup> Cf only M. Loos, 'The Regulation of Digital Content B2C Contracts in CESL', (2014) *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht – Journal of European Consumer and Market Law* 146, 151 with further reference.

<sup>9</sup> On exceptions to this principle in some European legal systems, see below under point VI (at the end).

<sup>10</sup> See § 305 paragraph (3) of the German Civil Code, which reads: '(3) The parties to the contract may, while complying with the requirements set out in sub-section (2) above, agree in advance that specific standard terms are to govern a specific type of legal transaction.'

<sup>11</sup> Cf § 305 paragraph (2) German Civil Code; on the situation under English and French law (where knowledge of the existence of the consumer might be sufficient), cf H. Beale, D. Tallon, S. Vogenauer, J. Rutgers and B. Fauvarque-Cosson, *Contract Law* (Ius Commune Casebooks for the Common Law of Europe) (Oxford: Hart Publishing, 2010) 759 et. seq.

the Restatement, the consumer does not need to agree to the application of the terms. If the consumer manifests assent to the 'transaction', the standard contract terms are 'adopted' under sub-section (a) simply through there being a reasonable notice and a reasonable opportunity to review. In other words: The assent to the transaction does not need to include the determination that the standard contract terms will apply.

Both sub-sections of Section 2 require that, for the adoption of the standard contract terms, the consumer manifests assent to the 'transaction'. By avoiding the word 'contract' in this context, the Restatement again uses a broad, more descriptive than technical legal concept for the exchange that is intended to be governed by the standard contract terms. For instance, entering a publicly accessible building (e.g. a shopping mall or a railway station) might perhaps qualify as a 'transaction', but would usually not qualify as the conclusion of a contract.

It is illuminative that the expression 'to manifest assent to a transaction' seems to have been lifted from the wording of the provision on the capacity to contract in the Restatement (Second) on Contract. In Section 12 sub-section 2 of that Restatement, the expression 'to manifest assent to a transaction' is used as a description of the conduct of a person that may be incapable of contracting.<sup>12</sup> By merely requiring the consumer's assent to a 'transaction' for the adoption of standard contract terms, the Restatement disconnects the question of whether standard contract terms are adopted from the question of whether a contract has been concluded. Taken to its logical end, this means that standard contract terms can already be adopted in a case in which a contract is not yet concluded (e.g. for the purpose to form part of a future contract).

It is striking how carefully the Restatement avoids conceptual language when describing the adoption of standard contract terms. The Restatement does not deal with the conclusion of a contract, obviously, because this is comprehensively dealt with in the Restatement (Second) on Contracts. The Restatement of Consumer Contracts does not even use words like 'conclusion' or 'formation' of a contract. In the context of the adoption of standard contract terms, the Restatement also does not employ key notions of the Restatement (Second) of Contracts for the conclusion of a contract such as 'promise',<sup>13</sup> 'manifestation of intention',<sup>14</sup> or 'manifestation of willingness'.<sup>15</sup>

On a theoretical level, there seems to be a big difference to classical thinking in contract law that requires that the parties agree to the application of standard contract terms when concluding a contract in order to have them incorporated. For a valid adoption of standard contract terms, the Restatement does not require that the consumer is actually aware of the existence of the terms, and then forms and expresses an intention that they become part of the contract. Only assent to the 'transaction' is needed, not assent to applying standard contract terms.

Taking a closer look, the difference to the German Civil Code, for example, which requires that a party 'agrees to the application of the standard contract terms', is smaller than it initially appears.

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<sup>12</sup> Section 12 (Capacity to Contract), sub-section 2 of the Restatement 2nd on Contracts reads: 'A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated.'

<sup>13</sup> Cf the definition of contract in Section 1 sub-section (3) of the Restatement, which has been lifted from Section 1 of the Restatement 2<sup>nd</sup> of Contracts.

<sup>14</sup> Cf Section 2 sub-section (1) of the Restatement 2nd on Contracts, which reads: 'A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made.'

<sup>15</sup> Cf The definition of 'offer' in Section 24 of the Restatement (Second) on Contracts, which reads: 'An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'

German law only requires that a contract party has a potential awareness of the existence of the standard contract terms (potentielles Erklärungsbewusstsein). For agreeing to the application of the standard contract terms, a conduct implying intent will suffice. It is usually sufficient for the incorporation of standard contract terms that the consumer, who has received a sufficient notice and opportunity to review the standard contract terms, does not explicitly object to them applying.<sup>16</sup>

The legislative technique of the German Civil Code may, however, have an advantage when a business wishes to adopt its standard contract terms in advance before any transaction. As mentioned, it may be impossible to adopt the terms under both subsections (a) and (b), because there might not (yet) be a transaction to which the consumer may manifest assent. In the Restatement, such a possible gap could easily be avoided by adding that the standard contract terms are adopted when the consumer manifests assent either to the transaction, or to the application of the standard contract terms.

#### IV. ProCD as a test case

The leading case for the 'post-assent review' model in sub-section (b) seems to be ProCD v. Zeidenberg,<sup>17</sup> which was not a consumer case, but has been quoted by other courts in consumer cases.<sup>18</sup> The defendant, Zeidenberg, purchased a telephone directory database on a CD-ROM produced by ProCD Inc. (referred to hereinafter as 'ProDC'). On the package, it was stated that there was a licence enclosed. The terms of the licence prohibited any commercial exploitation of the information stored on the CD-ROM. When installing the CD-ROM, the full text of the licence became accessible on the screen and did not let Zeidenberg proceed without indicating acceptance. He had ample opportunity to read the licence, which he finally accepted by clicking assent at a suitable dialogue box. The Court of Appeals, in contrast to the finding of the first instance court, held that the terms of the licence were valid and enforceable because Zeidenberg had accepted them by clicking, although he could have rejected the terms of the licence and returned the software.

It may be noteworthy that in the ProCD case, Zeidenberg expressly clicked assent to the terms in a click-box, whereas sub-section (b) of Section 2 does not require any positive act by the consumer. If the five elements of sub-section (b) are present, absolute inactivity by the consumer still results in the adoption of standard contract terms. This is somehow surprising, since legal systems are normally reluctant to apply the principle 'silence equals consent' in consumer cases. In this respect, the 'post-assent review' model of sub-section (b) seems to differ from European laws, where usually a consumer has to manifest assent to the standard contract terms.<sup>19</sup>

German law, for instance, would require, under § 305 paragraph (2) of the Civil Code, that the consumer agrees to the application of the standard contract terms, be it by an express declaration or by conduct implying intent. Clicking 'I agree' in a dialogue-box would be considered as an express declaration. Therefore, the ProCD case would probably have been decided similarly under German law.

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<sup>16</sup> See just T. Pfeiffer in M. Wolf, W. Lindacher and T. Pfeiffer, *AGB-Recht* (München: Beck, 6th ed. 2013), commentary No 105 on § 305 Civil Code.

<sup>17</sup> United States Court of Appeals for the Seventh Circuit, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>18</sup> Cf the forthcoming Reporters' Notes on § 2 (consulted by the author in the version of Council Draft No 5 of 19 September 2018) with reference to *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

<sup>19</sup> H. Beale, D. Tallon, S. Vogenauer, J. Rutgers and B. Fauvarque-Cosson, *Contract Law* (Ius Commune Casebooks for the Common Law of Europe) (Oxford: Hart Publishing, 2010) 759 et seq.; comparative conclusion by P. Hellwege, *Allgemeine Geschäftsbedingungen* (Tübingen: Mohr Siebeck, 2010) 390.



There is a second noteworthy peculiarity of the ProCD case. The defendant, Zeidenberg, bought the CD-ROM from a retail outlet in Madison, Wisconsin. At least under German law, one would probably distinguish two contracts concluded at different times with different parties.<sup>20</sup> The first contract would be a contract of sale of the CD-ROM concluded at the retail outlet between the retailer and the consumer. Under this contract, the retailer promises to hand over the CD-ROM with all of the data on it, and, if the data is protected under IP law, the retailer also promises that the consumer will receive a licence by the right holder permitting any use that the consumer reasonably expects to be permitted. The second contract would be a licence contract between the consumer and ProCD as the right-holder of the data on the CD-ROM. This contract would probably not yet be concluded in the retail outlet (since the retailer would probably not be an agent of ProCD), but instead when the consumer opens the CD-ROM and clicks 'I agree' to the standard contract terms of the licence.

In order to apply the 'post-assent review' model of sub-section (b) to the ProCD case, a clarification of the meaning of 'transaction' is necessary. It is particularly confusing that the Restatement always uses the definite article 'the' with 'transaction', as if it were totally clear to the reader which of the possibly several transactions is 'the' transaction that matters. At first sight, one would assume that 'the transaction' to which the consumer manifests assent needs to be a transaction between the two parties to the consumer contract of which the adopted standard contract terms will form a part. However, as stated, there may actually be (at least) two transactions between different parties: one between the retailer and Zeidenberg, and another between ProCD and Zeidenberg. Which assent to which of these transactions matters for the adoption of ProCD's standard contract terms?

In a ProCD constellation where a consumer clicks on a dialogue box, it seems more natural and workable that the standard contract terms are adopted under the 'pre-assent model' of sub-section (a) than under the 'post-assent model' of sub-section (b). Notice and opportunity are given at the latest when the notice and the standard contract terms appear on the screen while the consumer is installing the CD-ROM on his or her computer. By clicking 'I agree' to the terms, the consumer manifests assent to the 'transaction' between him- or herself and ProCD. It is therefore arguable whether sub-section (b) is of much use for resolving 'shrink-wrap' or 'pay-now-terms-later' cases such as ProCD, where there are two different 'transactions'.

In a ProCD constellation, the 'post-assent review' model of sub-section (b) for the adoption of standard contract terms would have a very limited scope. It would probably only be needed for the odd situation that the consumer (who received the notice already on the package) installs the CD-ROM and, after the standard contract terms become available for review, does nothing, neither returns the CD-ROM to the retailer (i.e. termination) nor clicks 'I Agree' in the dialogue-box and browses the CD-ROM. If the consumer clicked 'I agree', the standard contract terms would be adopted under sub-section (a). Such a case, where the consumer neither terminates nor continues, but simply holds on, may be very rare or only last a very short time.

## V. A website of a search engine as further test case

Assume that, as was actually the case in January 2019, a consumer types 'www.google.com' (or clicks on a link that leads to this URL). A nearly empty screen opens where there is not much more than, in the centre, below the Google logo, a single input line with a click button underneath saying 'Google Search' (besides another button saying 'I'm feeling lucky'). At the very bottom right of the screen, the consumer finds a link labelled 'Terms'. Imagine further that the consumer, of course, does not click

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<sup>20</sup> Cf Lehmann, in Loewenheim (ed.), *Handbuch des Urheberrechts* (München: Beck, 2nd edition 2010), § 76 Nr. 42, 44.

on that link, but instead enters 'American Law Institute', clicks on the search button, and then receives a screen full of useful search results.

In such a situation, it is rather clear that the standard contract terms, which are accessible via the link at the very right bottom, are adopted under Section 2 sub-section (a) of the Restatement. The link 'Terms' was a reasonable notice; the consumer had – via that link – a reasonable opportunity to review the standard contract terms, and, by entering a request in the input line and clicking on the search button, manifested assent to the 'transaction', which was an exchange of the consumer's data against the received information. There is no need for sub-section (b) in this example.

If, however, the consumer just opens the Google entry page under [www.google.com](http://www.google.com), but then does nothing except leave the entry page open on the screen, the question may arise whether the standard contract terms are adopted. Such a situation may actually happen when the consumer is distracted, for example by a phone call. Google might have an interest that the standard contract terms are already adopted from the very first millisecond after the consumer opens the entry page.<sup>21</sup>

Both sub-sections require that the consumer manifests assent to a 'transaction'. The only conduct that might be qualified as a manifestation of such assent could be the consumer typing 'www.google.com' and pushing ENTER. Is this already a 'transaction' in the sense of Section 2, when the consumer merely opens the nearly empty entry page of a search engine? This is, at best, doubtful since the word 'transaction' implies a kind of exchange, and the consumer only receives the possibility to type in a search request. This is hardly a benefit, the more so since such a search request can usually also be made directly via the web browser, without visiting Google's entry page.

Even if one accepts that typing 'www.google.com' and pushing ENTER qualifies as a manifestation of assent to a 'transaction', it is clear that the standard contract terms are not adopted under sub-section (a), because there was certainly no opportunity to review the terms before the manifestation of assent. However, it is somewhat discomfoting to accept that it is also highly questionable whether the standard contract terms are adopted under sub-section (b), since there was no notice regarding the existence of the standard contract terms before the consumer pushed ENTER. In a case in which there is a clear 'transaction' (e.g. the consumer types 'www.nytimes.com' and he or she instantly receives the headlines of the day already on the entry screen), this assessment does not change. In such a situation, the standard contract terms of The New York Times Company are not adopted under sub-section (a) or under sub-section (b), because there was again no notice regarding the existence of the standard contract terms before the consumer entered the website of the New York Times. The standard contract terms of The New York Times Company, which include such things as a limitation of liability,<sup>22</sup> are not valid under the Restatement as long as the consumer merely stays on the entry page and reads the headlines and neither clicks nor scrolls.

The reason for this somewhat surprising result is that both in the 'pre-assent review' model as well as in the 'post-assent review' model, the criteria for adoption have their clear place on a timeline. Notice always must come first. The notice must be made and somehow reach the consumer before

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<sup>21</sup> There might be a clause in the standard contract terms that excludes Google's liability, cf Google Terms of Service, Effective 22 January 2019 under the heading 'Liability for our Services'.

<sup>22</sup> Cf the 'Terms of service' (Last updated on 3 January 2019) which can be found under a link at the bottom of the page; No 5.3. of these terms read (in extracts): 'In no event will NYT, its affiliates and their respective shareholders, directors, officers, employees, advertisers, suppliers, content providers and licensors ("NYT parties") be liable (jointly or severally) to you or any other person as a result of your access or use of the services, .... These limitations apply whether the alleged liability is based on negligence, tort, contract, or other theory of liability, even if any of the NYT parties have been advised of the possibility of or could have foreseen any of the excluded damages, and irrespective of any failure of an essential purpose of a limited remedy.'

he or she manifests assent to a transaction. In the 'pre-assent' model, the opportunity to review must become available (at least) when the notice is made, but in any case before the consumer manifests assent to the transaction, whereas in the 'post-assent' model, the opportunity only commences after the consumer has manifested assent to the transaction.

The fact that there are different places on a timeline also means that there is normally an, at least small, time interval between these three elements. This follows from their classical function to ensure that the consumer is aware of the standard contract terms and has a chance to decide whether he or she wishes to contract under these terms. It is this quasi-natural order of the elements, and the time interval between them, that make it impossible for standard contract terms to apply from the very first moment a consumer visits a website.

A business that wishes to ensure that its standard contract terms apply as early as possible has two basic strategies. Firstly, it can program one or more 'I agree' pop-ups or 'Read more'-links through which the consumer has to click in order to continue browsing the website. Secondly, the business can re-direct the consumer to a subpage where the consumer must create an 'account' before he or she can enter the webpage again. Both strategies are somehow cumbersome, and it is likely that some consumers, if not nearly all, simply click through the forest of pop-ups and links without any reflection on the possible legal consequences.

## VI. Standard contract terms as house rules of websites?

It is striking that both in the draft comments on the Restatement<sup>23</sup> and occasionally also in legal literature,<sup>24</sup> the idea appears that standard contract terms for websites could be seen as a kind of house rules, similar to those that private, publicly accessible buildings such as a shopping centres or railway stations often have. It may be useful to take a closer look on this example from the offline world in order to assess whether the way in which such house rules are adopted can be a model for websites.

Assume that the railway station's house rules consist of a few hundred words and are displayed in dozens of posters all over the station. It would take a native speaker approximately two or three minutes to read such a poster. Assume also that a reasonable notice stating that the house rules apply is displayed at the entrance of the station, but that this notice does not include their full wording.

When a consumer enters the station, the 'pre-assent review' model of § 2 (a) of the Restatement would lead to the result that the standard contract terms do not yet apply at the moment the consumer crosses the threshold of the station. Since the first of the posters is displayed at a distance of about 10 m from the entrance, and the visitor does not have an opportunity to review the terms before reaching the poster, the house rules are not be adopted. Here the 'post assent review' of § 2 (b) of the Restatement comes into play. If entering the station qualifies as manifesting assent to a 'transaction', there was a 'notice' before the consumer entered and there is an 'opportunity to review' afterwards. Now, it depends on the further conduct of the consumer as to whether the standard contract terms are adopted or not. If the visitor immediately begins to study the poster and afterwards directly leaves the station, the standard contract terms are not adopted. If he or she

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<sup>23</sup> Cf the forthcoming Comments on § 2 (consulted by the author in the version of Council Draft No 5 of 19 September 2018).

<sup>24</sup> Cf just two examples from German legal literature: F. Schuster in G. Spindler and F. Schuster (ed), *Recht der elektronischen Medien* (München: Beck, 3<sup>rd</sup> ed. 2015), commentary on § 305 BGB No 38 (for auction platforms like eBay); C. Baldus, 'Das private Hausrecht: ein Phantom, Eine Erwiderung auf Götz Schulze, (2016) *Juristenzeitung*, 451 (very critical regarding the idea of house rules for chatrooms or virtual data rooms).

reads the poster and then stays within the station, the standard contract terms are adopted. It is, however, a very unlikely scenario that consumers will actually read such a poster with house rules.

In the much more likely scenario that the consumer does not bother with reading one of the posters, perhaps not even actually perceiving the notice at the entrance, the legal consequences should be the same as they are in the case where the consumer actually reads the poster. Again, the house rules can only be adopted under the 'post assent review' model of Section 2 (b) of the Restatement. At first sight, the legal analysis seems clear. There was a notice before the consumer entered, the consumer then manifested assent to the transaction by entering the station; he or she had a reasonable opportunity to review the house rules and did not leave the station.

There is, however, a considerable uncertainty regarding the exact time at which the house rules became valid and enforceable. The house rules certainly do not become valid in the moment when the consumer enters and when he or she is walking in the station before the first poster comes into reach, because there is not yet an opportunity to review at that time. Moreover, since it would take the consumer at least two minutes to read the poster, there is also no opportunity to review until after these two minutes pass. The slightly surprising result is that the house rules become applicable simply by the passing of some time, say two, three or four minutes, after the consumer enters the station. There is no clearly fixed magical moment at which everyone knows that from this moment on the house rules are valid and enforceable. They come quietly into force at an indeterminable second that passes unnoticed for everyone, including the consumer and the operator of the station.

One can, of course, argue that this rather short period of uncertainty of whether the house rules are adopted or not is acceptable, since it is unlikely that something will happen within this short period. It would further minimise if the house rules retroactively come into force (the Restatement, however, does not provide for retroactivity). Yet, if, for instance, such house rules contain a limitation of liability for damage to the consumer's property caused by negligence of the operating company of the station, the operating company must be able to prove that the consumer had been inside the station for, say, at least three minutes before the accident happened. This is a rather uncomfortable position of the operating company, which would be forced to make possibly costly documentation efforts simply for the purpose of being able to provide such proof.

The outcome of this little test for the adoption of house rules under the Restatement is somewhat disconcerting. Relying on the 'pre-assent review' model would force the operators of publicly accessible buildings to provide posters at all entrances, with the full wording of the standard contract terms. This may be impossible, or would at least unnecessarily spoil lucent glass-door fronts of modern architecture. The 'post-assent review' seems, at first sight, a practicable way out. Upon closer inspection, however, this model turns out to be a less-than-ideal solution, since there is substantial uncertainty in determining the moment from which the standard contract terms are adopted, and consequently a need for documentation efforts by businesses in order to be able to prove that the visitor did not immediately leave after he or she had the opportunity to review the terms.

The 'post-assent review' model is based on the assumption that there are people who actually take notice of the fact that there are standard contract terms, reflect at least a little bit on them, and then decide whether they wish to go ahead with the transaction or refrain from it. This is not an unlikely behaviour in the ProCD constellation, at least for a person who plans to commercially exploit the data on the CD-ROM and comes across a dialogue box that invites (or even forces) the user to click 'I agree' before continuing to browse the CD. Bothering with standard contract terms is, however, such unlikely conduct of a visitor of a publicly accessible building – or a website – that the 'post-assent-review' would lead to almost every visitor adopting the standard contract terms. Applying the

models of the Restatement to the house rules case raises the question of whether the criteria for adoption are not too cumbersome and, in particular, whether the period of uncertainty, which does not make a significant contribution to improving consumer protection (if at all), can be avoided.

In some legal systems, there are, at least for specific situations, instruments that avoid any period of uncertainty and ensure that standard contract terms are adopted before a consumer actually has an opportunity to review the terms. In Dutch law, Article 6:234 (1) of the Civil Code provides that a business can, if it is not possible to hand over or make available the standard contract terms prior to or at the conclusion of the contract, inform the other party prior to the conclusion of the contract that the standard contract terms are available for inspection at the Chamber of Commerce or at the Registry of a specific judicial court, and that they will be sent upon first request. An example for public transport and telecommunication services is provided in § 305a of the German Civil Code, under which standard contract terms become part of a contract with a transport or telecommunication service without any further requirement when they either have been approved by the competent transport authority or published in the gazette of the Federal Network Agency.

It is an issue of legal policy whether such a specific regime for the adoption of standard contract terms on websites should be introduced. Dutch law might serve as a model, although Article 6:234 (1) Civil Code, as it stands now, does not apply to websites since it is cumbersome but not impossible to make the standard contract terms available before the consumer enters the website. In any case, such a solution can hardly be introduced by the courts, especially since a competent authority for the registration of standard contract terms would have to be set up.

## VII. On the purpose of ‘notice’ and ‘opportunity to review’

Notice and opportunity to review are internationally widely acknowledged criteria for the incorporation of standard contract terms into a contract, even though there are differences in the way these requirements are presented in legislation and case law, and there are considerable differences in their application.<sup>25</sup> The classical purpose of these criteria is rather clear. They ensure that the validity of standard contract terms can be based on the general doctrine on the validity of contracts. A common denominator of the great variety of theories for the enforceability of contracts<sup>26</sup> is that the parties somehow agreed to the obligations arising from them. The requirements of ‘notice’ and ‘opportunity to review’ justify that obligations arising from standard contract terms are enforceable because it can be assumed that the consumer agreed, or at least did not object, to the application of the terms (usually without knowing their content). As the German legislator metaphorically put it when codifying the law on standard contract terms: Notice and

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<sup>25</sup> Cf H. Micklitz, J. Stuyck and E. Terry (eds), 'Cases, Materials and Text on Consumer Law' (Oxford: Hart Publishing, 2010) 282 et seq; comparative conclusion by P. Hellwege and L. Miller, 'Control of Standard Contract Terms' in G. Dannemann and S. Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford: Oxford University Press, 2013) 436; more detailed overview by P Hellwege, *Allgemeine Geschäftsbedingungen* (Tübingen: Mohr Siebeck, 2010) 349; on the exceptions, e.g., in Italian law, *ibidem* 365 and A. Barenghi, *Diritto dei consumatori* (Milanofiori Assago: Wolters Kluwer, 2017), 231-232.

<sup>26</sup> For an overview of the many theories, see just, with a focus on ‘wrap contracts’, N. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford: Oxford University Press), 2013, 6-16, 200-202.

opportunity to review ensure ‘that the incorporation of standard contract terms is firmly anchored on the ground of the contractual will of the parties’.<sup>27</sup>

‘Notice’ and ‘opportunity to review’ may be loaded with further functions. In particular in the common law, incorporation tests also have been construed as an instrument for fairness control for all contracts, not only consumer contracts, whereby the notion of fairness was understood in a more procedural than substantial sense. If, for instance, the standard contract terms contain any term that is particularly onerous, the business must take specific steps to bring this particular term to the other party’s attention.<sup>28</sup> In a consumer law context, an important example is the requirement of transparency. Under the EU Directive on Unfair Terms in Consumer Contracts, standard contract terms must be drafted in plain, intelligible language.<sup>29</sup> For consumers, the directive requires that it becomes easier to review the standard contract terms.<sup>30</sup> It is advocated that this duty is intended to help consumers assess their legal position before concluding a contract, and thereby contributes to an informed decision in due consideration of the obligations they undertake.<sup>31</sup> Others wonder whether the requirements for transparency of standard contract terms is intended to improve competition and the market in general by putting the consumer in a better position to decide whether or not to enter into a more advantageous contract.<sup>32</sup>

Such considerations form a dangerous line of reasoning. Evidence from behavioural research indicates that informational requirements such as ‘notice’ and ‘opportunity to review’ are not very effective (if at all) in actually helping consumers in a more informed decision-making, in particular as far as standard contract terms are concerned.<sup>33</sup> There is actually substantial evidence that consumers hardly ever read standard contract terms.<sup>34</sup> If the law is aimed at encouraging an informed decision by consumers regarding standard contract terms, then consumers are somehow expected to look through the terms. It is, however, highly questionable whether the law of standard contract terms

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<sup>27</sup> BT-Drs. 7/3919, 13; literally: “dass die Einbeziehung von AGB in den Einzelvertrag wieder fest auf dem Boden des nach dem BGB maßgeblichen rechtsgeschäftlichen Vertragswillens verankert wird“.

<sup>28</sup> *Spurling Ltd v. Bradshaw* [1956] 1 WLR 461; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433; for more examples cf H. Beale, D. Tallon, S. Vogenauer, J. Rutgers and B. Fauvarque-Cosson, *Contract Law* (Ius Commune Casebooks for the Common Law of Europe) (Hart Publishing, 2010) 759-765.

<sup>29</sup> Article 5 of the Directive.

<sup>30</sup> P. Rott, ‘Unfair Contract Terms’ in C. Twigg-Flesner (ed) *Research Handbook on EU Consumer and Contract Law* (Cheltenham: Edward Elgar, 2016), 287 et seq.

<sup>31</sup> Cf N. Sauphanor-Brouillaud, ‘La rédaction du contrat’ in N. Sauphanor-Brouillaud, C. Aubert de Vincelles, G. Brunaux and L. Usunier (eds), *Les contrats de consommation : Règles communes* (Issy-les-Moulineaux: LGDJ, 2nd ed. 2018), 758 et seq.; also T. Wilhelmsson and C. Twigg-Flesner, ‘Pre-contractual information duties in the *acquis communautaire*’, (2006) *European Review of Contract Law* 441, 449–450, with regard to Article 31 of the proposal for a directive on consumer rights (COM [2008] 614), which provided that contract terms must be expressed in plain, intelligible language and be legible, and must be made available to the consumer in a manner that gives him a real opportunity to become acquainted with the terms before the conclusion of the contract.

<sup>32</sup> Cf just H.-W. Micklitz, ‘Unfair Terms in Consumer Contracts’ in N. Reich, P. Rott and K. Tonner, *European Consumer Law* (Ius Communitatis Series 5) (Cambridge: Intersentia, 2nd ed. 2014), 144-145.

<sup>33</sup> M. Faure and H. Luth, ‘Behavioural Economics in Unfair Contract Terms,’ (2011) *Journal of Consumer Policy* 337, 354.

<sup>34</sup> Cf Y. Bakos, F. Marotta-Wurgler and D. Trossen, ‘Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts’, (2014) 43 *The Journal of Legal Studies* 1; O. Ben-Shahar and C. Schneider, *More Than You Wanted To Know: The Failure Of Mandated Disclosure* (Princeton: Princeton University Press, 2014) 14 et seq.

actually is intended to enable consumers to take personal responsibility for avoiding harsh boilerplate.<sup>35</sup>

It is a rather thin line of reasoning to assume that consumers might actually profit from a 'notice' and 'opportunity to review' as requirements for the adoption of standard contract terms when deciding whether to contract or not. One could, for example, argue, with at least some plausibility, that consumer law enforcement authorities and information intermediaries such as journalists and consumer organisations help some consumers in their decisions when they publish that certain standard contract terms are unfair. All in all, the doctrines of the contractual will or informed decision are not very convincing regarding the real reason why notice and opportunity to review are required for the adoption of standard contract terms.

This article is not the place to further summarise and fully flesh out a position to the broad debate on the purposes of the requirements for the incorporation of standard contract terms into contracts, which has been ongoing for decades at a European and national level. The individual positions of individual national laws or scholars can, in any case, hardly claim to be exclusive since the law on standard contract terms may be based on various ideological underpinnings of contract law theories, or even various models of the relationship between state and society.<sup>36</sup> I would, nevertheless, like to sketch out three rather fundamental assumptions that I, in part, have already explained in earlier works, and which might serve as a baseline for evaluating the rules of the Restatement on the adoption of standard contract terms.

Firstly, one of the most, if not the most, important functions of the law of standard contract terms should be to relieve consumers (and most of all other contract parties as well) from the burden of any obligation to read, ponder over, or even negotiate the bulk of standard contract terms before they agree to their application.<sup>37</sup> There are certainly exceptions to this principle, in particular for core terms, though these exceptions rather prove the rule.<sup>38</sup> This is particularly evident for websites. Any expectation that consumers bother with the usually rather lengthy texts under a link 'Terms' on a website before browsing it would make the use of the internet highly inefficient and would be contrary to any reasonable behaviour of consumers and to the interests of businesses as well. In order to reach the aim of disburdening consumers even from any bad feeling for simply accepting and not bothering with the content of standard contract terms, the law must create a deeply-rooted confidence of consumers that they will be protected by the state, by the courts, and by other mechanisms from any unfair disadvantage that comes from all standard contract terms under such a link on a website labelled 'Terms' or something similar

Secondly, 'notice' and 'opportunity to review' have a very important function for legal certainty that is so self-evident that it might easily be overlooked. This purpose could be called a 'pinpointing' function. It must be crystal clear which texts form part of the terms of a contract, including any standard contract terms. Even if a consumer does not read (since he or she is not expected to read anyway) the standard contract terms, the consumer must be in a position to find out – before and after the formation of a contract – what the terms of the contract, including the standard contract

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<sup>35</sup> On the reason why the law does not expect contract parties (even not businesses) to actually read standard contract terms cf. H. Schulte-Nölke, 'No Market for Lemons: On the Reasons for a Judicial Unfairness Test for B2B Contracts', (2015) *European Review of Private Law* 207.

<sup>36</sup> T. Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies' (2008) *XIV Juridica* 51-52.

<sup>37</sup> H. Schulte-Nölke, 'No Market for Lemons: On the Reasons for a Judicial Unfairness Test for B2B Contracts', (2015) *European Review of Private Law* 207.

<sup>38</sup> Sceptical regarding the notion of core terms F. Gomez, XXXXXXXX, in this issue.

terms, are. This is also true for the business as well as for courts, ADR bodies, and legal advisors. 'Notice' and 'opportunity to review' allow it to be determined whether standard contract terms are valid and enforceable or not. In the event of any doubt, it must be proven by the party that relies on the clause in a set of standard contract terms that the requirements of notice and opportunity to review were met. In a consumer case, the burden for this proof will be, perhaps with very few exceptions, on the business.

From the second assumption follows a third. Consumers need to know about the content of standard contract terms when there is a problem under their contract and they wish to learn about their legal position. The main situations in which consumers actually read standard contract terms are not before, but after the conclusion of the contract when, for example, a defective good has been delivered. This purpose of the opportunity to review could be called a 'reference function'. It is obvious that an opportunity to review before the conclusion of a contract is rather dysfunctional. Taken to its logical end, this observation should lead to a rule that the standard contract terms must be permanently available for review by the consumer for an appropriate period after the conclusion of the contract. The EU Consumer Rights Directive actually requires the business to provide all information regarding a distance contract on a durable medium at the latest within a reasonable time after the conclusion of the contract, unless the business has already provided that information on a durable medium prior to the conclusion of the contract.<sup>39</sup> This comes down to a duty of businesses to send, among other things, an imperishable copy of the standard contract terms to all consumers who conclude a distance contract. The same idea of making the standard contract terms permanently available seems to be one of the purposes behind a provision of the EU E-Commerce Directive, whereby the contract terms and general conditions of the service provider must be made available in a way that allows the recipient of the service to store and reproduce them.<sup>40</sup> This clearly discernible reference function also explains much better why standard contract terms need to be in plain and intelligible language, even though consumers actually never read them before the conclusion of the contract and, in my view, are not really expected to read them then.

If one accepts these three rather plausible, nearly self-evident assumptions, there is a rather clear consequence. It cannot be the main purpose of the notice and opportunity to review to ensure that the application of the standard contract terms is enclosed in the consumer's contractual will, or to improve the quality of the consumer's consent. If one further assumes that 'notice' and 'opportunity to review' mainly have a pinpointing function and a reference function, then it becomes less important, if not unimportant, that the requirements of notice and opportunity to review are fulfilled before the conclusion of a contract. For these two functions, it should be sufficient for the notice to be given when the contract is being concluded, and for the opportunity to review to arise shortly afterwards.

In particular, the example of websites shows that the law might already be developing towards a consistent implementation of what the Reporters of the Restatement used to call a 'Grand Bargain'.<sup>41</sup> This phrase was used in earlier versions of the Reporters' Introduction to describe the 'Llewellynian paradigm' of rather low-threshold requirements for adopting standard contract terms (which

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<sup>39</sup> Cf Art. 8(7) Consumer Rights Directive.

<sup>40</sup> Cf Art. 10 (3) E-Commerce Directive.

<sup>41</sup> In a Reporters' Memorandum of 4 September 2018 to the ALI Council, the Reporters Oren Bar-Gill, Omri Ben-Shahar and Florencia Marotta-Wurgler explained that the Restatement no longer contains any reference to the concept of 'Grand Bargain', because the law does not reflect such a 'bargain' among the different doctrines for adoption and back-end scrutiny of standard contract terms (Cited from Council Draft No 5, 19 September 2018).



Llewellyn called 'blanket assent')<sup>42</sup> compensated by a rather intense subsequent policing of the standard contract terms in order to prevent abuse and to protect the reasonable expectations of consumers. Allowing the adoption of standard contract terms, at least on websites, even without prior notice and an opportunity to review, even better justifies the subsequent scrutiny of these terms by the courts and authorities. The lower the requirements for adoption are, the stricter substantial fairness controls may apply. Such a trade-off could be both in the interests of businesses and consumers, since browsing the internet would be facilitated, uncertainty as to whether terms are adopted would be reduced, and consumers would be well protected in their legitimate expectations. Fairness controls of standard contract terms by courts and authorities can be construed from that angle as a public infrastructure for a business-friendly environment, in particular for further boosting the internet economy by removing click-barriers, where consumers are nevertheless well protected in their legitimate expectations regarding unfair standard contract terms.

## VIII. Adoption of standard contract terms of websites: Options for the further development of the law

The core of the problem regarding the adoption of standard contract terms of websites under sub-section (b) seems to be that the Restatement tries to cover the ProCD constellation and the case of websites with the same rule. Sometimes, it is the task of legal research to make proposals for the further development of the law, whether by legislation or by case law. The observations made here when testing the Restatement for the case of websites may give some lead for further reflection on what a special rule for the adoption of standard contract terms that govern the use of websites (and perhaps also publicly accessible buildings) could look like.

A relatively moderate further development of the law would be to slightly rearrange the order of events necessary for the adoption of standard contract terms on a website. It could be considered as sufficient for the adoption of standard contract terms that govern the use of a website that the notice and the opportunity to review the terms are given, not before the consumer types the URL of the website and pushes ENTER (or clicks on a link, which has the same effect), but that these two elements do not need to be present before the entry page of the website has fully opened.

An even more radical proposal would be to totally abandon any opportunity of the consumer to terminate the transaction after the standard contract terms have become available for review, and to consider, in the case of a website, all standard contract terms as adopted when the consumers has opened the website and there is a notice on the terms and an opportunity to review them.

A comparison of the necessary order of events for the then four models of adoption of standard contract terms may help to illustrate what the options are:

- Pre-assent review under Section 2 sub-section (a) of the Restatement:  
Notice => Opportunity to review => Manifestation of assent to the transaction
- Post-assent review under Section 2 sub-section (b) of the Restatement:  
Notice (also on the opportunity to terminate after review of the standard contract terms) => Manifestation of assent to the transaction => Opportunity to review => Opportunity to terminate => No termination
- Moderate proposal for websites:

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<sup>42</sup> K. Llewellyn, *The common law tradition: Deciding appeals* (Boston: Little, Brown, 1960), 370.

Entering the website => Notice (also on the opportunity to terminate after review of the standard contract terms) & Opportunity to review & Opportunity to terminate => No termination

- Radical proposal for websites:  
Entering the website => Notice & Opportunity to review [no opportunity to terminate]

The radical proposal would be the consistent implementation of the insight that the purpose of the notice and opportunity to review is just a pinpointing function and a reference function. The moderate proposal would only drop the requirement of a pre-assent notice, while maintaining a – probably rather theoretical and hypothetical – safeguard of private autonomy by allowing post-assent termination.

For the moderate proposal, a clarification would be needed as to the time from which the standard contract terms are valid and enforceable. A workable solution could be that the standard contract terms become valid and enforceable at the moment that the consumer opens the website, but would retroactively be considered as not having been adopted at all if the consumer leaves the site before a reasonable time for reviewing the standard contract terms has passed.

The burden of proof that the consumer did not leave the website within a reasonable time after having had the opportunity to review the standard contract terms would lie on the business. In many cases, this proof would be very easy, e.g. with the help of log-files.

## IX. Implementation of the proposals in the wording of the Restatement

The analysis of the current draft of the Restatement has revealed some points that might give reason for amendment. In order to illustrate how such amendments might be implemented in the wording of the Restatement, several drafting suggestions are made in the right column of the table below. The new text is underlined. A short explanation follows after the table. It goes without saying that these suggestions are not meant as criticism of the draft Restatement. It is merely an attempt to inspire discussion on the possible development of the law, and to indicate a possible direction of this development. Some of these suggestions, in particular the special rule for standard contract terms that govern the use of a website, might exceed the task of restating the current law and would be a proposal for law reform.

§ 2. Adoption of Standard Contract Terms <sup>43</sup>	§ 2. Adoption of Standard Contract Terms (Proposals for amendment underlined)
(a) A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction after receiving: (1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and (2) a reasonable opportunity to review the standard contract term.	(a) A standard contract term is adopted as part of a consumer contract if the consumer manifests assent to the transaction <u>or to the application of the standard contract term</u> after receiving: (1) a reasonable notice of the standard contract term and of the intent to include the term as part of the consumer contract, and (2) a reasonable opportunity to review the standard contract term.

<sup>43</sup> Cited from Council Draft No. 5 (19 September 2018).

<p>(b) When a standard contract term is available for review only after the consumer manifests assent to <del>the</del> transaction, the standard contract term is adopted as part of <del>the</del> consumer contract if:</p> <p>(1) before manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be part of <del>the</del> consumer contract, informing the consumer about the opportunity to review and terminate the <del>contract</del>, and explaining that the failure to terminate would result in the adoption of the standard contract term; and</p> <p>(2) after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term; and</p> <p>(3) after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and <del>does not exercise that power</del>.</p>	<p>(b) When a standard contract term is available for review only after the consumer manifests assent to <u>a</u> transaction, the standard contract term is adopted as part of <u>a</u> consumer contract if:</p> <p>(1) before manifesting assent to the transaction, the consumer receives a reasonable notice regarding the existence of the standard contract term intended to be part of <u>a</u> consumer contract, informing the consumer about the opportunity to review <u>the standard contract term</u> and terminate <u>the transaction</u>, and explaining that the failure to terminate would result in the adoption of the standard contract term; and</p> <p>(2) after manifesting assent to the transaction, the consumer receives a reasonable opportunity to review the standard contract term; and</p> <p>(3) after the standard contract term is made available for review, the consumer has a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden, and <u>continues with the transaction or agrees to the application of the standard term</u>.</p>
	<p><u>(b-bis)</u>  <u>When a consumer enters a website, a standard contract term that regulates the use of that website is adopted as part of a consumer contract if</u></p> <p><u>(1) a reasonable notice regarding the existence of the standard contract term is displayed on the website; and</u></p> <p><u>(2) the standard contract term is reasonably available for review on the website.</u>  <u>[ALTERNATIVE PROPOSAL: ; and</u>  <u>(3) after having had a reasonable opportunity to review the standard contract term, the consumer agrees to its application or continues to browse the website].</u></p>
(c)...	(c)...

### 1. Proposals for the amendment of Sub-section (a)

The insertion caters for the situation where there is no transaction, or a transaction has not yet taken place, but the business may nevertheless have a legitimate interest in standard contract terms being adopted before any transaction. This would be a framework agreement that might consist of nothing

other than the standard contract terms for subsequent transactions (e.g. a website with a search engine requests the consumer, before any search request can be made, to agree to a set of terms containing a limitation of liability<sup>44</sup>). The suggested amendment would allow alternative paths towards adoption, either by the manifestation of assent to a transaction or by agreement to the standard contract terms, both after notice and an opportunity to review.

## 2. Proposals for the amendment of Sub-section (b)

The suggested change from the definite article ('the') to the indefinite article ('a') is intended to facilitate the application this sub-section to situations where the transaction that the consumer manifested assent to is between other parties than the consumer contract of which the standard contract terms become part. The other amendments in No (1) seek to align the wording to the wording of No (3).

The amendment in No (3) suggests a different wording that seeks to avoid the somehow awkward result that the inactivity of a consumer leads to the adoption of a standard contract term. This would avoid a situation where the legal fiction 'silence equals consent' is applicable to consumer contracts. It might be more in line with the tradition of consumer law to construe the adoption of standard contract terms in ProCD constellations as a result of conduct implying intent.

## 3. New sub-section (b-bis) for websites

This is an attempt to visualise how a specific rule for the standard contract terms that govern the use of websites might look. In the wording, the very general notion of 'manifesting assent to a transaction' is replaced by 'enters a website' or 'continues to browse the website'. The basic idea is that standard contract terms can even be adopted when there was no precedent notice of the existence of the terms before opening the website, because reasonable consumers in any case expect that there will be 'Terms and Conditions' applicable, and hardly ever review them. The proposal comes in two alternatives. The wording without the square brackets would be a straight-forward acknowledgment that the requirements of 'notice' and an 'opportunity to review', at least in the case of websites, are not intended to ensure that consumers assent to the application of standard contract terms (because consumers hardly ever review standard contract terms). A more moderate amendment, which is closer to the idea that the adoption of standard contract terms requires at least a residual form of assent, would include the text in the square brackets, i.e. No (3). Even though the text in the square brackets would be nearly dead law, in the sense that consumers would hardly ever actually review the standard contract terms and then decide to leave the website, it would preserve the external appearance that the validity of standard contract terms is still based on the consumer's intent.

## X. Perspectives

Courts are not likely to fundamentally reform the law on the adoption of standard contract terms. The considerations put forward in this article illustrate that, ultimately, there are political choices to make. The internet has dramatically increased the number of situations where standard contract terms come into play. In the pre-digital area, the average number of sets of standard contract terms adopted per day by consumers in the western world was probably a rather low figure, most likely less than one per day. Now, however, billions of people from all countries of the world daily browse the internet, where they may be confronted with dozens of sets of standard contract terms per hour. It is

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<sup>44</sup> See above on the example of the entry page of the Google search engine (footnote 21).

probably no exaggeration to assume that the number of situations in which standard contract terms are proposed has increased 100 times or more.

Maintaining the requirements for adoption from the pre-digital area burdens the use of websites with billions of nearly useless click-boxes that waste billions of seconds every day. The sheer dimension is breath-taking. If it were only one billion seconds per day, this would amount to more than 10,000 years of human lifetime wasted per year. It is inconceivable that consumers appreciate the forest of click-boxes they are confronted with every day, the use of which they cannot assess. Legal requirements that do not have a plausible positive effect in favour of consumers are not likely to be perceived as useful and building up consumer confidence. This is a very fundamental concern. Laws that form, from the perspective of a consumer, simply an unnecessary nuisance instead of creating a discernible benefit, are not likely to increase the confidence of consumers in being well-protected by the state and its laws.