Master’s Thesis in European Union Law
30 ECTS

Unfair Contract Terms in European Contract Law

Legal consequences for and beyond Swedish Contract Law

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Acknowledgements

I was first introduced to the topic of European Private Law late in my studies. Like any subject arising from the Union, it always hits one as lightning from the sky. The European Private Law project did indeed surprise me. How can it be possible? Is not private law the one thing which belongs to the member states? I decided to jump on the train and to take part of the debate by doing a course. The theme and questions in this essay originate from Seminar II on the course Perspectives of European Private Law. To this, I send my thanks to Joel. This master’s thesis is a continuation of my previous paper called An inconvenient truth – the effects of the Camino case on Swedish Contract Law which was written in that course.

During my internship at the Prime Minister’s Office EU coordination, the proposal for a Common European Sales Law (CESL) was discussed. Member states argue whether the legal basis is correct or not. However, no member state has really considered what a creation of a common European sales law substantially implies. What effects will the proposal have on the nature of private law? It is important to understand the future effects of the proposal, and of the whole private law project. These questions and much more, have driven me to write this thesis.

I want to send my thanks for fruitful academic discussions and help with materials to Frida-Louise Göransson and Jori Munukka. I wish to thank Sweden’s infrastructure for causing delays, hence giving me more time to write when commuting. At last, a special consideration to my family and friends.
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Abstract

Recent case law from the ECJ on one of the most important EU contract law legislation has left questions open about the compatibility of Swedish contract law with the Unfair Contracts Term Directive. The case law on Article 6 (1) in the directive seem to have changed the view on how to deal with the legal consequence of an unfair term in consumer contracts; namely that unfair terms cannot be adjusted but need to be declared invalid. This essay examines how the effects from the ECJ case law provide new light upon Swedish contract law. The effect creates a clash of ideas and rationalities between Union law and Swedish contract law. Unfair terms cannot be adjusted as the relevant Swedish legislation provides. An unfair term needs to be invalid, and if necessary, such an unfair term can in certain circumstances be complemented with default rules from national contract law. This does not only seem to change the interpretation and application of the Swedish law, but it also form an underlying tension between the instrumental market-functional Union law and the more justice oriented Swedish private law. Furthermore, as we move towards a new European civil code, perhaps these tensions and clashes may say something about where the discipline of European Private Law is headed.
Sammanfattning

Abbreviations

CMLR    Common Market Law Review
CUP    Cambridge University Press
EC    European Community
EEC    European Economic Community
ECJ    European Court of Justice
ELJ    European Law Journal
EL Rev    European Law Review
ERCL    European Review of Contract Law
ERT    Europärttslig tidskrift
EU    European Union
HD    Högsta domstolen
HUP    Harvard University Press
JCP    Journal of Consumer Policy
MLR    Market Law Review
NJA    Nytt juridiskt arkiv
OUP    Oxford University Press
RH    Rättsfallsreferat från Hovrätterna
TEU    Treaty on European Union
TFEU    Treaty on the functioning of the European Union
1Introduction

1.1Subject

From the dusty May sun
Her looming shadow grows
Hidden in the branches
Of the poison creosote
- The Handsome Family – Far from any road

When Sweden joined the EU in 1994, there was a spectre waiting in the shadows. It was, using a characterization made by Oxford Professor Vogenauer, the spectre of European contract law.¹ Mythical, intangible but almost there. Now, it has in some way revealed itself at the very front door of the Swedish contract law.

Among the EU law which needed to be implemented into Swedish law prior to the EU membership, was Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (UCT).² The UCT was partly incorporated into Section 36 of the Swedish Contracts Act (1915:218) (Contracts Act).³

Recent developments in ECJ’s case law on the UCT have rendered questions regarding the effects on Swedish contract law and the compatibility of Swedish implementation of the directive.

The underline of this thesis is very much concerned with the interpretation and application of Swedish contract law in the light of the recent case law from the ECJ. Nevertheless, the effects of the case law on UCT could have deeper impact than just the interpretation and application. The road goes deeper to an unexplored area where two rationalities meet and creates a tension, which chal-

² Official Journal L 095, 21/04/1993 p. 0029 – 0034
³ Lag (1914:218) om avtal och andra rättshandlingar på förmögenhetsrättens område
lenges the whole idea of what private law is and ought to be. A meeting between EU instrumentalism and justice. The subject matter is therefore also concerned with the ideas behind the UCT and Swedish contract law, and the clash between them.

1.2 Purpose and question formulation

“To forget one’s purpose is the commonest form of stupidity” - Friedrich Nietzsche

The purpose of this essay is to analyze the effects of Article 6 (1) UCT on Swedish contract law. The aim will be to examine its impact of the UCT, along with ECJ’s case law, on Section 36 of the Swedish Contracts Act and the concept of Complementary Construction of Contracts [utfyllnad]. Furthermore, my aim is to describe how the clash between European Union Private Law and Swedish contract law is challenging the idea of private law in national law. Basically, this essay will answer two fundamental questions;

- How does Article 6 (1) UCT affect Section 36 Contracts Act and Complementary Construction of Contracts?
- Why do the reasons behind the UCT and its case law challenge the idea of private law?

In essence, there are several reasons why there is an underlying need to say something about European Private Law. The main reason is my impression of passivity on behalf of the legislature and courts, in the development of European Private Law. They all seem to forget their purposes; the legislature to legislate and the court to develop the law. The main, and wider, purpose of this work is therefore to try to bring purpose to the discussion on European Private Law for the purpose of the further coexistence between European Union Private Law and national private law.
1.3 Method

“Research is what I am doing when I don’t know what I am doing” - Wernher von Braun

Dogmatic legal method⁴ and comparative method⁵ are used to pursue the answers and purposes of this essay.

Dogmatic legal method is, generally speaking, about reconstructing the law from certain given legal sources and to conclude if the law is satisfying. For example, by using case law on Article 6 (1) UCT I will conclude how Article 6 (1) UCT affects Swedish contract law (i.e. de lege lata). By then evaluating the result of my analysis of what the law is, I may evaluate if the law is satisfying or not (i.e. de lege ferenda). For example, if the aim of the given law is to achieve consumer protection, it must be evaluated if the law in fact does achieve consumer protection.

Comparative method is, according to Zweigert and Kötz, functionality.⁶ It means looking for what legal problem the other comparable rule in fact solves. For example, when Spanish law was examined, I asked how Spanish law adjusts unfair terms and complement a contract. In other words, comparative method according to Zweigert and Kötz entails analyzing the foreign law purely on the matter of its functionality, which is analyzing how the comparable law in fact solves the same legal problem posed in Swedish law. Comparative law is, in the end, the pursuit to see similarities and differences in solving the same legal problem in different legal systems.

When analyzing Article 6 (1) UCT, the case law from the ECJ has been crucial as well as the UCT itself. It means looking at all relevant case law on Article 6 (1) UCT and the recitals of the UCT. Essentially, the Camino case⁷ and the judgments after have been the main core of this essay. This implies, inter alia, looking at the reasoning and wording. Moreover, looking at the basis behind why the case law is as it is, I have examined at the treaties, communications from the

⁷ C – 618/10 Banco Español de Crédito SA v Joaquín Calderón Camino
Commission, history behind the consumer protection and the internal market. To better interpret these materials articles, journals and textbooks are used to get a grip of the legal sources of the EU.

Turning to Swedish law, a basic understanding of the provisions are coped with by looking at relevant legislation, case law and preparatory works. Textbooks and articles are also used to better understand the underlying reasons behind the Swedish provisions and concepts. The Swedish law is then viewed in the light of the Union law which means comparing Union law with Swedish law. Finally, to better understand the effects of Union law on Swedish contract law, the Swedish concepts are compared to Spanish law.

1.4 Delimitation

The focus of this essay is on the legal consequences of an unfair contract term; therefore it does not touch upon other questions such as the nature of unfairness. Unfairness is a perquisite for the legal consequences; this essay could be narrowed down even further if focused on the legal consequence of terms which are typically considered unfair. However, unfairness is very casuistic in its nature, making it difficult to give exhaustive examples of how the legal consequence is affected in certain contracts.

Much more could also be said on the methods applied by the ECJ. However, the section about the ECJ is more of an explanatory section striving to understand the ECJ’s jurisprudence on Article 6 (1) UCT than focusing on the Court itself.

Finally, there are many ideas on what contract law should be. The delimitation of this essay has been on the more justice oriented view on private law.
1.5 Disposition

As we begin our story, there will be a short presentation on what European Private Law consists of and its background history under section 2. This, for the purpose of introducing the driving forces of European Private Law and the future implications for national contract law. Then, as the essay moves on towards EU consumer law, the rationality of market functional instrumentalism is introduced at the end of section 2. It is necessary to understand these concepts as we jump into a concrete example which is the UCT and Article 6 (1) UCT in section 3. The case law on Article 6 (1) UCT will be presented by first examining the older case law and then ending with the Camino case. A brief introduction on the ECJ and its method will follow. Finally, as we move towards the end in section 4, this essay will introduce the idea of private law before entering detailed provisions and concepts of Swedish contract law. This essay will end with a summary in section 5, including further conclusions and implications for the future on European Contract Law.

1.6 Terminology

Firstly, European Private Law is the wider notion and discipline. Within the concept, European Contract Law is referring to EU law and other soft law materials containing typical contract law rules. European Union Private Law refers to explicit Union law on private law matters. EU consumer law is for example a part of European Union Private Law. So, the UCT is part of the EU consumer law, which is the major substance of European Union Private Law, which in turn, is part of European Contract Law. All these concepts fall under the discipline European Private Law. Thus, I may refer to either the one, as they all form a links in a chain.

Secondly, when I referring to the idea of private law I am in fact referring to the idea of justice as it is portrayed in this essay. I may either use *commutative justice* or *corrective justice*, but they have the same substance in this essay.
2 The European Private Law project

In Varietate Concordia

2.1 Legislative initiatives

In 2000, the Commission claimed that the member states were able to implement the UCT; despite beliefs that a European contract law would fail.\(^8\) Later on, the Commission promised to properly reflect on the desire to maintain a fragmented contract law.\(^9\) The Commission adapted four possible alternatives in developing the common European contract law. The first alternative was to take no EU action, but rather to rely on the capacity of the contracting parties. The Second option was to promote the development of common principles. Thirdly, an option was to improve the quality of the existing consumer acquis. The final option was an adoption of a new legislation, a European code. In 2003 the Commission followed up the final option in an Action Plan for a more coherent European Contract Law.\(^10\) In 2004 the Commission issued another communication acknowledging the importance of Common Frame of Reference (CFR) and the improvement of existing consumer acquis. Recently, the legislative project on a European Civil Code has culminated in 2011 into a proposal for a Common European Sales Law (CESL).\(^11\) The recent proposal for a CESL has stagnated the discussion on a common European civil code. During this spring of 2014, member states have been disagreeing on several matters, among them, the legal basis of the CESL.

\(^8\) COM (2000) 248 final
\(^9\) COM (2001) 398 final
\(^10\) COM (2003) 68 final
\(^11\) COM (2011) 636 final
2.2 Academic efforts

In addition to the legislative efforts to unite European contract law, the academic world has been deeply involved in the discussion of a future European Private Law. The topic of European Private Law has made it to a professeorenrecht, meaning that the law is developed by the scholars as in the historical school in Germany during the 19\textsuperscript{th} century. The Commission on European Contract Law (Lando-Commission) developed the Principles of European Contract Law (PECL) in 1995. The principles were to set out, by comparative studies, the common European contract principles.

The Study Group for a European Civil Code (Study Group) was formed with the aspirations to further develop and expand the principles set out in the PECL to more material and detailed rules covering more parts of private law. Later on, the Study Group, together with the Research Group on the existing EC Private Law (Acquis Group), published the Draft Common Frame of Reference (DCFR) containing model rules, comments and national notes on private law.

In summary, these ideas and aspirations from the Commission and the academic groups could more or less be adequately described as the European Private Law project. The project is a goal rather than a fact. The European Private Law project contains communications and soft law instruments, without any real legal substance. EU consumer law on the other hand, is the core of the European Union Private Law and hence the core of the European Private Law in general. European Private Law could be described as being built upon EU consumer law and other European Union Private Law matter, complemented however by the wider soft law instruments presented by academic groups.

\textit{European Private Law}

PECL, DCFR etc

EU consumer law

2.3 Ius commune – a time not long forgotten

The European Private Law project may be found peculiar, especially in relation to the idea of introducing a common European private law when there are 28 more or less different member state national laws in the EU. Private Law belongs to every state’s legal culture. In other words, the European Private Law project may sound like a utopia. In some ways it is. The European Private Law project is a remembrance of a forgotten age which was lost in the nation state era along with the introduction of national civil codes. This faded memory of a time, when almost the whole of Europe had a “common civil law”, may be the reasons behind today’s driving power towards a European civil code. To understand the European Private Law project of today, the *ius commune* needs to be presented. History also has a way of repeating itself.

The *ius commune* was the common private law of Europe in the west, stretching from the beginning from Italian cities until ending its late expansion in the Scandinavian countries. It had little influence on the British islands due to the strong central power of the king in England. Hence, the uninfluenced islands created the conditions for the English common law system to develop its own way. The *ius commune* was therefore practiced in all Latin Christian countries except England and consisted of Roman and Canon law.

The rise of the *ius commune* started off in 1100 AD with the rediscovery of the *Corpus Iuris Civilis*. At the same time Europe had a growing population and an increasing economic activity. Hence, there was a need for legal solutions for the benefit of trade. The *Corpus Iuris Civilis* became the centre of the *ius commu*

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14 E.g. Code Civil (1804) in France, BGB (1900) in Germany
16 Zweigert & Kötz (n 6) p. 181 f
18 van Caenegem (n 15) p. 45
mune, due to its wide range of legal solutions, the scholars study and teaching of the corpus. The common language was Latin. Almost at the same time, ancient Greek philosophy was rediscovered. For example, the Nicomachean Ethics of Aristotle was commented by Thomas of Aquino. The ius commune was therefore in many ways guided by the principles of the corpus and of Greek philosophy. Alongside the ius commune, there was the *ius propium*, which was the local law and custom.

It is often a misconception that the ius commune was the dominant, consistent and only law in Europe at that time. The ius commune was instead subsidiary, inconsistently interpreted and it shared co-existence with different local laws throughout Europe. Europe did not have a central government, judiciary or supranational cooperation such as the EU. Europe consisted at that time by shattered cities, counties and states with its own rules and customs. The authority of ius commune was therefore subsidiary to local law and customs. Hence, it was applied when no local law or custom could deal with the legal situation. But still, these local laws and customs were interpreted in the light of the ius commune.

The scholars however, had a great influence on the development of the ius commune. The application and interpretation of the ius commune could be explained; “in culinary terms, ingredients and recipes were shared, but dishes could be very diverse”. The ius commune provided the toolbox, but the tools were used differently.

In comparison, the ius commune share many features with the EU today. Like the ius commune, legal entities did have their own local law and customs but shared common ground through the Roman-Canon law. However, the ius commune was never supreme to the local law, in the way EU law has supremacy.

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20 van Caenegem (n 15) p. 47
21 Heirbaut & Storme (n 19) p. 23
23 Heirbaut & Storme (n 19) p. 21
over member state national law. Instead, there was a mutual interaction between the ius commune and the ius propium.

In conclusion, history has taught us that it is possible to create a common private law for Europe. Although the circumstances were different at the time of the old ius commune, there is a theoretical chance to create a new ius commune. However, this potentially new ius commune does not seem to share the same features of the EU. As we will see, the guiding principles and ideas of private law differed from the viewpoint of today. EU is based on market integration and functionality whilst the ius commune was rather based on the ideas from the corpus and Greek Philosophy, which were more justice oriented. Although both the European Union Private Law of today and ius commune supposedly emerged from the need of a functioning market, the idea of what private law differ. Hence, it could be discussed whether Europe is really entering into a new ius commune. Nonetheless, the old ius commune is a great inspiration to the European Private Law project progression and explains the driving power behind it.

2.4 EU consumer law

In the Treaty of Rome 1957 (EEC), references were made to the notion of consumer, when the treaty prohibited any discrimination of consumers in the Community. The Community did however not have explicit legislative power to enact consumer legislation; it was rather thought that the consumer would benefit from the market efficiency which the internal market would bring.

In 1975 the Council enacted the first Consumer Policy Programme. The policy programme stressed the need for an effective consumer policy and stated that it should be investigated if legislation regarding contractual terms should be enacted. However, the Single European Act 1987 (SEA) did incorporate con-

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24 C – 6/64 Flaminio Costa v ENEL, C – 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA
25 Tontti, ‘European legal pluralism as a rebirth of IUS commune’ (2001) p. 44 f
26 See Tontti (n 25)
28 Council Resolution 14 of April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 92/2
sumer policy within the internal market framework. After the Maastricht Treaty 1993 (EC) the EU had the constitutional power to enact measures within the explicit field of consumer protection.

The SEA already provided, before the EC, legislative powers for the approximation of laws for the functioning of the internal market under Article 100a ECC, which later on became Article 95 EC after the Treaty of Amsterdam 1997. Today, Article 100a EEC and Article 95 EC are mostly found in Article 114 TFEU. Looking at the historical developments of the approximation of laws for the purpose of the internal market, it seems that the internal market has been a ground pillar in developing EU consumer law. In other words, the key behind developing EU consumer law has been in establishing the functionality of EU’s internal market. Compared to the 1975 Consumer Policy Programme, the programme was justified to improve the quality of life, rather than integrating the market. Somewhere down the line, EU consumer law “lost” its aim of promoting quality of life, to rather integrating the internal market. SEA could be the reason. Consequently, the purpose of EU consumer law also changed, from life-improving to market functionality. I can only speculate on the reasons behind these presumed ideological shifts in idea. However, it seems that the member states perhaps have an easier time in cooperating in regards to the internal market rather than the life quality of the consumer. For example, Article 114 TFEU follows the ordinary legislative procedure whilst Article 115 TFEU follows a special legislative procedure. However, it should be observed though, that Article 12 TFEU urges that consumer protection should be taken into account when defining and implementing Union law. Moreover, Article 169.1 TFEU binds the Union to ensure a high level of consumer protection and Article 38 of the Charter of Fundamental Rights also binds the Union to ensure a high consumer protection. Therefore, even if EU consumer law has a strong market basis, consumer protection does seem to form a part of EU consumer law according to the treaty provisions.

30 Weatherill (n 27) p. 11
In summary, EU consumer law is driven by the internal market, but with an eye on consumer protection. In a way, these purposes seem to be mutually strengthening each other; internal market is realized through consumer well-fare, whilst consumer protection seems to be promoted through market integration. In sum, EU consumer law has been a part of the EU from the beginning; from avoiding trade barriers, to protecting the health of consumer, to integrating the market. An essential part of the purposes behind EU consumer law is market integration, which reflects the application of the acquis and interpretation by the ECJ.\(^{31}\)

Some see the development of Union consumer law as an independent development, with its own life, turning into a *sui generis*.\(^{32}\) This may be a correct observation, but the consumer acquis is still an incoherent and inconsistent mess as the Commission concluded in COM (2004) 68 and the follow up plan in COM (2004) 651.\(^{33}\) Nevertheless, the development is going faster and deeper as the CESL is presented, without any actual regards to the consequence of cleaning up the already existing consumer acquis. Although, the enactment of the Consumer Rights Directive was a fair try to make a coherent consumer acquis.

EU consumer law has passed many different periods with diverse measures and purposes. EU consumer law is an essential part of the treaties and a driving force of the core of European Private Law. The nature of today’s EU consumer law can be demonstrated with an example from the core of consumer acquis;\(^{34}\) the UCT in section 3 below. However, the meaning of the internal market must be outlined to begin with.

\(^{2.4.1}\) Market functionality

According to Article 3.3 TEU the Union shall establish an internal market. Furthermore, Article 26 TEU stipulates that the EU shall take measurements for

\(^{31}\) See section 3.3.4
\(^{32}\) Weatherill (n 27) p. 5
\(^{34}\) The core of European Union Private Law could be formulated into include, among other; Doorstep Selling (1985), Package Travel (1990), Timeshare (1994), Distance Selling Directive (1997) and Consumer Rights Directive (2011)
the functioning of the internal market and establish an area of freedom without obstacles for the internal market. According to the ECJ, circumstances within the EU need to resemble, as far as possible, a common market.\footnote{C – 15/81 Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal p. 33} Article 114 TFEU is a natural consequence for obtaining a single market and the Article was especially created to obtain a single market.\footnote{Hettne & Bergström, ‘Introduktion till EU-rätten’ (2014), p. 210. See also COM (85) 310 final} Article 114 TFEU has, as said, been the legal basis for the European contract law we see today. The aim of the internal market, as regards to European contract law, is to uniform conditions for a common market, avoid risk of unknown legal order and save transactions costs for cross-border traders.\footnote{Reich, ‘A European Contract Law or an EU Contract Law Regulation for Consumer?’, JCP 2005 (28) p. 385}

The market-functional idea is mainly followed by the EU legislature but also enhanced by the ECJ’s effet utile, especially in EU consumer law.\footnote{Schmid (n 33) p. 211} The liberal market approach fits in the market-integration idea as its advocate freedom of choice, i.e. freedom to contract throughout the borders without any limitations. A European Private Law should, according to liberalism, be based on the principle of autonomy, only regulating when there is a market-failure and in order to eliminate cross-border obstacles.\footnote{DCFR outline (2009), Von Bar, Clive & Shulte-Nölke (ed.), p. 62 f}

The market-integration approach does indeed, as we will see, affect national legal systems. However, it also has effect on other soft law instruments within the European Private Law project. The DCFR has been criticized for being heavily neo-liberal influenced by the consumer acquis without any further assessment of the existing acquis, to obtain a structural improvement.\footnote{Luger, ‘Old and New Insights for the protection of consumers in European Private law in the wake of the global economical crisis’, The Foundation of European Private Law, Brownsword, Micklitz, Niglia and Weatherill (ed.) 2011 p. 99} In other words, the DCFR seems to endorse market-functionalism and liberalism of the EU legislature and consumer acquis.\footnote{Luger (n 40) p. 91, Schmid (n 33) p. 211} In conclusion, the market-functional approach makes the EU law highly instrumental which may explain why there is an underlying tension between EU law and member state law.
2.4.1.1 Instrumentalism in EU consumer law

The term instrumentalism signifies, in the legal context, that law serves as a mean for extra-legal ends. Such a legal end could for example constitute the implementation of the purposes formulated by the treaties of the EU. All competence to legislate within EU is formulated in terms of goals, making the EU legislative act’s instrumentalist per se. However, instrumentalism is not unfamiliar to member states such as Sweden. Instrumentalism is often found in national statutes such as the Consumer Credit Act, Consumer Sales Act and the Consumer Services Act. These acts do have extra legal ends to protect consumers. It is not wrong to state, that instrumentalism is typically found in statues and other regulations. Instrumentalism is therefore not a significantly new concept. However, the effect of the EU instrumentalist approach in traditionally private law relations appears to be more far reaching, as instrumentalism is per se to eradicate any obstacle (i.e. national law which hinders the internal market) to achieve and implement a certain legal aim. It lies in the nature of instrumentalism, probably due to the supremacy of Union law over member state national, to have an all-or-nothing approach towards other ideas or rationalities which are incompatible with the aim(s).

The UCT, as any EU consumer law at that time, was based on article 100a EEC. In other words, the legal basis of the UCT is market integration. As pointed out by the Commission when introducing the UCT, the legislation was needed to give consumers the confidence to buy across frontiers, and therefore having a positive effect on the operation of the internal market. It was held by the Commission that consumers lack the confidence to use the new possibilities opened by the internal market due to unharmonized member state consumer contract

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43 Michaels (n 42) p. 142
44 Lag (2010:1846) Konsumentkreditlag
45 Lag (1990:932) Konsumentköplag
46 Lag (1985:716) Konsumenttjänstlag
47 Michaels (n 42) p. 143
48 COM (90) 322 final p. 8
law.\textsuperscript{49} Overall, the market-functional approach is claimed by the Commission to be the best way to secure a free and competitive market, promote cross-border trade and to consequentially increase the wealth of the Community.\textsuperscript{50} As far as I see it, there is a desire from the Commission and the EU legislature to remove all obstacles of the internal market and to materialize the internal market as formulated by the treaties. In other words, EU consumer law such as the UCT has extra-legal ends, and those legal ends are, inter alia, the establishment of an internal market. This makes the UCT, and consequently Article 6 (1), strongly influenced by an instrumental approach to eradicate any obstacle for obtaining a single market, affecting member state law thereafter.

EU consumer law, and hence the core of European Private Law, is heavily influenced by market functional approach to establish a functioning common market. As pointed out by Schmid, the tendency for private law to be instrumental entails that the internal relation of private parties are scarificed for the sake of integration of the internal market.\textsuperscript{51} I am going to portray how Schmid’s observation is correct by demonstrating the effects of the UCT and the Camino case on Swedish contract law.

\textsuperscript{49}COM (90) 322 p. 2
\textsuperscript{50} Lando (n 33) p. 819
\textsuperscript{51} See Schmid (n 33) p. 218 for further examples from ECJ case law
3 Unfair Contract Terms Directive

3.1 Background

The UCT is said to be the corner stone and most fundamental legislative act of European Contract Law, and of European Private Law. The directive harmonizes unfair contract terms at a minimum level, which strikes the very essence of national contract law. The UCT contains only 11 articles with an annex over presumed unfair terms. The aim of the directive is to deal with unfair contractual terms and the UCT harmonizes the dealing with unfair terms in essentially three ways. Firstly, the UCT only applies to terms which have not been individually negotiated (Article 3.1 UCT). This notion is broader than the concept of standard contracts. Secondly, the UCT harmonizes the test on unfairness of the term in question by testing if the term is contrary to good faith and creates a significant imbalance between the parties (Article 3.1 UCT). Finally, the unfairness must have been there at the time of the conclusion of the contract (Article 4.1 UCT). An important aspect to add is that the consequence of an unfair term is that it shall not be binding for the consumer (Article 6.1 UCT), which we will come back to.

The UCT applies only to contract terms which have been concluded between a consumer and a seller after December 31 1994 (Article 2). Additionally, the contract term must have been neither individually negotiated (Article 3) nor concerned core terms (Article 4) or terms which reflects statutory or regulatory provisions (Article 1.2).


53 Nebbia (n 52) p. 218
In conclusion, the directive has brought some unity on how the deal with unfair contract terms in consumer relations, increasing consumer protection against the usage of unfair contract terms. However, recent case law on the UCT has left some questions regarding its application unaddressed, and more fundamentally, regarding the impact of the directive on the national idea of private law.

3.2 Article 6 (1) UCT

According to a lexical reading of Article 6 (1) UCT, the provision obliges the member states to ensure, under national law, that unfair terms shall not be binding on the consumer and that the contract shall continue to bind the parties upon those terms, if it is possible for the contract to exist as a whole. Not much can be extracted from a lexical reading. How far do member states need to ensure this obligation? Which measures under national law are allowed? To what extent shall the term not be binding?

What is clear is that Article 6 (1) UCT regulates the legal consequence of an unfair contract term. Thus, what is more unclear is the meaning of an unfair term shall not be binding on the consumer.

Directives are meant to be binding in relation to their results according to Article 288 TFEU. It is therefore more suitable to interpret the meaning in a teleological way rather than focusing on the wording, as it is the result that is essential. Under the recitals it is stated that it is necessary to adopt measures with the aim of progressively establishing and facilitating an internal market. Furthermore, the recitals reaffirm the importance of consumer protection. The UCT has in other words; aims to abolish any obstacle for the purpose of the internal market and improving the situation for consumers within the EU. The legal consequence of Article 6 (1) UCT renders in, that not binding should be interpreted as meaning abolishing any binding mechanism which could constitute a threat to the functioning of the internal market and at the same time improve consumer protection. In other words, a teleological interpretation indicates that the legal consequence is far reaching, to the extent that it abolishes any obstacle to the internal
market and at the same time improves consumer protection. What these legal consequences could consist of, could be answered by ECJ’s case law.

3.2.1 ECJ’s case law on Article 6 (1) UCT

Already in 2000, the ECJ stated in Oceano, that in relation to the national courts own motion to assess an unfair term, that the aim of UCT is to prevent an individual consumer from being bound by an unfair term. Although the content of Article 6 (1) UCT is not clearly touched upon, the Oceano ruling contributes the conclusion that the UCT not only is aimed against existing unfair terms but to the prevention of the usage of unfair terms (Article 7 UCT). The ECJ’s viewpoint was reaffirmed in Cofidis and later on in Mostaza Claro, without really assessing the meaning of Article 6 (1) UCT.

In Asturcom Telecomunicaciones the ECJ held that it is up to the referring court to give effect, in accordance with national law, to the consequence of an unfair term, so long as the clause is not capable of binding the consumer. It must follow from the ECJ’s viewpoint that, Article 6 (1) UCT leaves the discretion to the national courts to decide, under national law, the legal consequence of an unfair term as long as the unfair terms do not bind the consumer. In Photovost and Perenicova & Perenic and Invitel the ECJ reaffirmed that the national court must use all the consequences arising under national law, in order to ensure that the consumer is not bound by an unfair term. In Invitel, the ECJ stated that the reason behind that the unfair term shall not be binding on the consumer, is to replace the formal balance which the contract establishes between rights and obligations. The reason behind the argument of restoring the balance could be a result from the UCT’s aim to achieve consumer protection. The ECJ has many times stressed that the consumer is in a weak position in relation to the

54 Joined cases C – 240/98 & C – 244/98 Oceano Grupo Editorial SA v Rocio Murciano Quintero  p. 28
55 C – 473/00 Cofidis SA v Jean-Louis Fredout p. 32
56 C – 168/05 Elisa María Mostaza Claro v Centro Móvil Milenium SL p. 7
57 C – 40/08 Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira  p. 58
58 C – 76/10 Photovost´ v Iveta Korckovská  p. 62
59 C – 453/10 Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o. p. 30
60 C – 472/10 Nemzeti Fogyasztővédelmi Hatóság v Invitel Távközlési Zrt. p. 34
61 Ibid. p. 34
seller. Even before, in *Mostaza Claro*, the ECJ stressed that Article 6 (1) UCT aims to re-establish the equality between parties.\textsuperscript{62} It seems from the case law that the ECJ in some way cares for the private law relation, by restoring the formal balance.

In summary, the UCT has a market integration purpose and consumer protection aim. According to the settled case law, national courts seems to have a discretion under Article 6 (1) UCT to set the legal consequence, as long as the unfair term do not bind the consumer. Moreover, the ECJ has stressed, inter alia, that the prevention of unfair terms is essential and that the purpose is also to restore balance to the contractual relation.

### 3.3 Camino – the tipping point

Until the Camino case, there was no real case which brought further light on which kind of measures under national law would fulfil the obligations laid down in Article 6 (1) UCT. The preliminary ruling was delivered, after hearing advocate general Tristenjak, in 2012 by the first chamber at the ECJ. Spain, Germany and the European Commission intervened. In other words, the ruling seems to have some dignity and was potentially controversial.

The Camino case concerned a loan agreement on 30 000 EURO between the creditor Banco Español de Crédito SA and the debtor and consumer Joaquín Calderón Camino. The nominal interest rate was set to 7.95 %, the annual percentage rate of charge to 8.89 % and the interest rate on late payments was 29 %. Because the monthly repayments had not yet been paid by Mr. Camino, the creditor sought action in the national court for the sum and interest rate on late payments. The Court of First Instance in Barcelona declared, on its own motion, the term relating to the interest rate void, and set the rate at 19 % instead. In appeal, the Provincial Court refereed the case to the ECJ for a preliminary ruling. Among other questions, the Provincial Court asked what the scope of Article 6 (1) UCT contained of, where it provides that unfair contract terms shall not be

\textsuperscript{62} C – 168/05 (n 56) p. 36
binding, in relation to the correct interpretation in the light of UCT of the Spanish national law in question.

The Spanish law in question, Article 83 (1) of the Legislative Decree 1/2007, provides that an unfair term shall be automatically void. However, under subsection 2 of the same article it is stipulated that the national court shall modify the contract and enjoy moderating powers in regards to the rights and obligations of the parties in relation to the existing part of the contract and in regards to the consequences of voidable terms. In the national court case, the Court of First Instance had declared the unfair contract term void, and then used its moderating powers to reconstruct the term resulting in a lower interest rate.

The ECJ started off by reformulating the question posed by the national court, essentially asking whether Article 6 (1) UCT precludes national legislation, such as Article 83 Legislative Decree 1/2007, which allows a national court to revise a content of an unfair term. Already here, there is an indication of what the ECJ wants to achieve. By reformulating the question posed by the Provincial Court in Barcelona, the ECJ had obtained a possibility to move the law to their perceived direction.

The ECJ reaffirmed that it is up to the national courts in each member state to draw all consequences which follows from national law to ensure that the consumer will not be bound by an unfair contract term. However, the wording of Article 6 (1) UCT does not allow national courts to revise the content of an unfair contract term.

Furthermore, according to the ECJ, if a national court would have the possibility to revise the content of an unfair contract term, sellers or suppliers would still be tempted to use those terms in knowledge that even if the term is found unfair it would be modified. A continued usage of those unfair contract terms

63 REAL DECRETO LEGISLATIVO 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, BOE No 287 of 30 November 2007
64 Camino (n 7) p. 63
65 Ibid p. 65
66 Ibid p. 69
was according to ECJ not compatible with the purpose of the UCT, as stipulated in Article 7 read with 24th recital, to prevent the continued usage of unfair terms.

Consequently, the ECJ concluded:

“71. It follows, therefore, that Article 6 (1) of Directive 93/13 cannot be understood as allowing the national court, in the case where it finds that there is an unfair term in a contract concluded between a seller or a supplier, to revise the content of that term instead of merely setting aside its application to the consumer.”

In other words, Article 6 (1) UCT does not allow national courts to revise the content of an unfair term. The ECJ is clear on pointing out that this is the case when there is an unfair term between a seller/supplier and a consumer, which is self-evident as the UCT applies only between seller/supplier and consumer.

Finalizing the masterpiece, the ECJ summarizes that Article 6 (1) UCT precludes member state legislation such as Article 83 of the Legislative Decree 1/2007. The preclusion of the Spanish provision could be seen as a spill-over effect from the above conclusion. However, the preclusion of the Spanish legislation is indeed harsh but fair in the eye of the ECJ, to satisfy the aim of the UCT.

3.3.1 Linguistic implications

In essence, it is the national courts power to “revise the content” which the ECJ points out as incompatible with Article 6 (1) UCT. The language of the case was Spanish and the words used in the Spanish version were “p. 71(...) modifique el contenido (...”). In the French version it was formulated as “p. 71 (...) de réviser le contenu (...)” and in the Swedish version “p. 71 (...) ändra innehållet (...”). It is apparent that the meaning of revise has broad implications in all the above languages to include any adjustments, conciliations or modifications of an unfair contract term. Even if the unfair term is declared void and then replaced by another term (as the Spanish legislation provides according to my interpretation) it

67 Camino (n 7) p. 73
is, in the view of the ECJ, to revise an unfair term. Then, it would certainly constitute to “revise the content” if an unfair contract term was adjusted without being void firstly. The words; revise (eng), modifique (spa), revise (fre) and ändra (Swe), do all portray the ECJ’s language as a categorical expression of what kind of measures under Article 6 (1) UCT are excluded.

3.3.2 Effects on Article 6 (1) UCT
In comparison to the pre-existing case law on Article 6 (1) UCT, the Camino case narrows downs which measures under national law are allowed, by negative definition; those measures which do not allow revising of the content of an unfair contract term. Moreover and most interesting, the reasons behind are very much related to the purpose of preventing the usage of unfair contract terms, as already stated in the Oceano case mentioned above. The purposes of standard of living, quality life and establishing the formal balance are reaffirmed and recognized but not in any way decisive for the outcome. The ECJ even states, in paragraph 66, that the lexical interpretation of Article 6 (1) UCT is borne out by the objective and overall scheme of the UCT. Still, what objective exactly is not specified by the ECJ. In my opinion, the preventing purpose of the UCT is decisive for the outcome. This is supported by the elaborated and last arguments put forward in paragraphs 68 – 70 in the judgment, which are also put forward by the Advocate General.

Thus, my perception is that the purpose behind preventing the usage of unfair contract terms prevailed before restoring the formal balance between the contracting parties. However, by preventing the usage of unfair terms, the ECJ could very well accomplish the UCT’s other aims and purposes. But in my opinion, just looking at the private law issue at stake between the creditor and the debtor, the judgment do not in any way restore any balance between the contracting parties. On the contrary, the ECJ succeeds in some way to over compensate the consumer, by stating that the term related to the interest rate should be struck out and not even adjusted; making the purpose of giving a loan ineffective. It may have achieved consumer protection by striking out the unfair term and sent a clear sig-
nal to all the creditors in Europe not to use unfair terms, but it did not leave the private law relation in a balanced condition. It leaves the private law relation with a creditor without, prima facie, an interest rate and the debtor with a loan he or she cannot pay back. The aim to restore balance and equality did not seem to have impact on the ECJ decision; rather the ECJ went for Article 7 and the UCT recitals which aim to prevent the usage of unfair contract terms.

In conclusion, the Camino case brings further light on which measures under national law are compatible with Article 6 (1) UCT. What seems clear enough though, is that revising the content of an unfair contract term under national law is not in accordance with the purpose of the UCT. The judgment renders many questions relating to Swedish contract law; among them, Section 36 of the Swedish Contracts Act 1914 and Complementary Construction of Contracts.

3.3.3 Post Camino cases
Later on, in the cases of Jőrös⁶⁸ and Brusse⁶⁹ the ECJ reaffirmed the judgment from Camino.

In Jőrös, the case also concerned a credit agreement between a consumer and a finance institute. According to the contract terms, the loan giver could, under certain circumstances, amend the management costs and change interest rate and commission costs. The ECJ held, in reference to Camino, that national courts have a duty to establish all the consequences arising under national law to ensure the consumer is not bound by that an unfair term.⁷⁰

In Brusse, the issue concerned a tenancy agreement. The company letting residential property, sought action in court for termination of the contract and payment for the rent and penalty charges. However, the tenants objected by requesting reduction of the penalty charges because the term was unfair. The question posed by the Dutch court was; if the UCT allows mitigation of a penalty clause although the defendant does not invoke voidability but rather modification of the penalty clause. The ECJ restated what is established in the Camino judg-

⁶⁹ C – 488/11 Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV
⁷⁰ Jőrös (n 68) p. 41, 51
ment p. 66 – 69; that if a national court were allowed to revise a content of an unfair term, it would weaken the dissuasive effect of the non-application of those unfair terms with regard to the consumer.\textsuperscript{71} Therefore, the referring court cannot reduce the amount of the penalty imposed, instead the court should exclude its application.\textsuperscript{72}

The argument that revising an unfair term compromises the long-term objective of the UCT comes back again in Brusse, which highlights the UCT’s extra legal ends rather than conflict oriented solutions. The same argument was reused in the recent judgment Kásler,\textsuperscript{73} when the ECJ once again upheld the reasons behind the Camino judgment not to revise an unfair contract term.\textsuperscript{74} However, Kásler leaves an opening which we will come back to as regards to Complementary Construction of Contracts.\textsuperscript{75}

In conclusion, the Camino judgments\textsuperscript{76} may indeed restore the formal balance between the contracting parties and preventing the usage of unfair contract terms. However, if formal balance is to obtain some kind of justice between the parties, the results are rather an injustice, as over compensation is not justice but creating yet another imbalance. Instead, the focus seems to be preventing the further usage of unfair terms. The outcomes from the judgments may be explained by the special character of the ECJ.

3.3.4 The ECJ – the elephant in the room

The ECJ has a leading role in developing European Private Law and an essential impact on the market functional approach in the EU.\textsuperscript{77} This is according to my opinion portrayed in the Camino judgments.

According to article 19 TFEU, the ECJ’s main task is to ensure that Union law is properly interpreted and applied in accordance with the treaties. ECJ’s

\textsuperscript{71} Brusse (n 69) p. 58
\textsuperscript{72} Ibid. p. 59
\textsuperscript{73} C – 26/13 Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt
\textsuperscript{74} Ibid. p.79
\textsuperscript{75} See section 4.2
\textsuperscript{76} Camino (n 7), Brusse (n 69), Jőrös (n 68) and partly the judgment from Kásler (n 73) as they all originally derive from the Camino case
essential task is therefore to ensure a uniform application of Union law throughout the member states. This is done partly by the process of preliminary rulings in accordance with Article 234 TFEU. By these rulings, concepts and other legal questions can be consistently interpreted. In these proceedings, the ECJ only deals with questions of law. Compared to annulment actions under Article 263 TFEU which is very much concerned with the circumstances of the case and the parties’ arguments, a preliminary ruling is more concerned with a wide and abstract explanation of how to interpret Union law. Therefore, a preliminary ruling has a greater impact on law than other proceedings, especially in grand chambers or plenum.\textsuperscript{78}

ECJ has a much wider role than merely interpreting Union law; it has a driving role in complementing the treaties and other acquis. Through its case law, the ECJ has developed, inter alia, the concept of direct effect,\textsuperscript{79} the notion of supremacy\textsuperscript{80} and conditions for state liability.\textsuperscript{81} The ECJ is a driving force in the complement of Union law, making Union law dynamic and into a living instrument. It is not surprising why the ECJ has been criticised for judicial activism when it has such powers to affect the Union law.\textsuperscript{82} Nevertheless, the ECJ has the difficult role of balancing the functions of the treaties and the interest against the protectionism of the member states. On the one hand, securing the interpretation an application of the Union law throughout the legal orders of the member states and on the other hand, ensuring sufficient protection for the member states and other individual rights. This ambivalent role of the Court, places the ECJ in a very complicated situation. The ECJ must balance Union law against the own legal traditions and concepts of the member states.

When the ECJ is confronted with such a question, which puts member state law and Union at its head, the ECJ chooses the solution or method which best confers

\textsuperscript{78} Hettne & Okten-Eriksson, ‘EU-rättslig metod – Teori och genomslag i svensk rättstillämpning’ (2011), p. 53
\textsuperscript{79} C – 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen
\textsuperscript{80} Costa ENEL (n 24)
\textsuperscript{81} C – 6/90 & C – 9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic
\textsuperscript{82} Craig & de Bürca, ‘EU law - Text Cases and Materials’ (2011), p. 65 f
the realization of Union law: the effet utile, in accordance with its constitutional role set out in Article 19 TFEU.

3.3.4.1 Effet utile – an instrument

The ECJ has many methods in operating within this matter of member state law and Union law. In most cases, the ECJ applies the wording and overall scheme of the EU legislation in question. However, the teleological approach is the most observed method.\(^\text{83}\) Thus, it is simple to mix up, and for good reasons, the effet utile with the teleological approach. Effet utile is rather considered as not an interpretation method per se, but rather as a guideline in choosing method of interpretation. Effet utile is to interpret the EU legislation in question so that the efficiency and its purpose prevail and to ensure the most favourable interpretation for the objectives and norms of the EU in an effective way.\(^\text{84}\) In other words, the efficacy of the Union law would be insignificant if Union law was not interpreted in accordance with the treaties. If a provision has an alternative meaning or perceived to stipulate several ways it could be interpreted, the interpretation which ensures the full effectiveness of Union law should apply. Effectiveness is about, among other, compliance, implementation and enforcement of EU law.\(^\text{85}\) The effet utile may therefore be a method to achieve effectiveness. Teleological interpretation and the effet utile have the purposive ingredient, but the effet utile adds an effective dimension.

In the Camino judgments for example, the ECJ stresses the importance of interpreting provisions not solely on the basis of their wording but also in consideration of the overall scheme and objectives.\(^\text{86}\) Indeed, in p. 69 of the Camino judgment, the ECJ points out that if national courts would be allowed to revise an unfair contract term, it would compromise the long-term objective of Article 7 UCT. Furthermore, in p. 70 Camino, the ECJ points out that a possibility for na-

\(^{83}\) Hettne & Bergström (n 36) p. 389
\(^{84}\) Hettne & Ökten-Eriksson (n 74) p. 49, Bengoetxea, MacCormick & Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’, The European Court of Justice, de Búrca & Weiler (ed.) (2001), p. 57
\(^{86}\) Camino (n 7) p. 61
tional courts to revise a term would not ensure an efficient or high level consumer protection. Expressions such as long-term objective, efficiency and to ensure consumer protection, indicates that the ECJ wishes to ensure the purpose of the UCT to the extent that it precludes national legislation such as the Spanish law in question. So, it is to some extent clear that the ECJ chooses an interpretation of Article 6 (1) UCT which secures the preventing usage of unfair contract terms for the purpose of a high consumer protection. Then, not only will the ECJ choose an interpretation which fulfils its purpose but it needs to be effective. After confirming the UCT’s purpose, the fulfilment needs to be adequately executed, that is by prohibiting the revising unfair terms. In other words, the ECJ ensures the full effectiveness of the UCT’s utility to prevent the usage of unfair contract terms by interpreting Article 6 (1) UCT as precluding the revision of an unfair term and declaring the legislation inconsistent. That is, as I can see it, the effet utile in action.

In conclusion, the ECJ’s methods are a factor to take into account when examining the instrumental effects of EU law on member state private law. The ECJ is a driving force in developing the market integration and contributing to an instrumentalist approach of the EU consumer law. It is the ECJ’s constitutional status as the sole arbitral of EU law and its duty to ensure conform and effective application of EU law which probably renders its method such as the effet utile. If we could ask the ECJ itself, it would probably answer that their solution lies within the acquis per se. Nevertheless, the ECJ’s method for realizing Union law affects member state law and sacrifices the nature of national concepts, traditions and system coherency of member state law.

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4 Swedish Contract Law

4.1 The idea of private law

“suum cuique” Ulpianus

Private law, and especially contract law, can be subsumed under a wide range of different ideas and purposes. In our quest to understand how to apply and interpret private law rules, practitioners and scholars seek to submit private law to certain ideas or purposes. Contract law is just as diverse as society is. In other words, we live in “private law pluralism”. From a liberal approach, social justice oriented, functionalism and commutative justice. It is therefore problematic to conclude that contract law has one idea or purpose. However, there are some essential features which should be pointed out. Contract law is, as we see it today in the western world, very much liberally oriented and individual. Contract law is therefore quite suitable for a liberal market economy. It is the single most adequate social construction to achieve work allocation and other functional allocation of resources. The dominant idea of contract law is seemingly liberal, which makes it a suitable tool for creating a common European market.

Even if we seem to understand contract law through its purposes, to facilitate trade and to uphold the market economy, contract law is also concerned with individuals’ relations to each other, i.e. to bind the parties and to facilitate the exchange of rights and duties in a legally binding form. This relationship of rights and duties could essentially be understood through three basic questions; how

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92 Adlercreutz (n 91) p.19
93 Ibid. p. 18
does a private law relation emerge, what is the content of the private law relation and should the obligations under the private law relation remain, surcease or be modified.\textsuperscript{94} For that reason, my impression is that one does not need to ask what private law is, until a legal question is formulated. Only then, by asking the right question; the judge, scholar or legislator gets the right answer. Giving the right answer is bringing justice to the private law relation, by solving the posed questions and upholding the rights and duties between the parties. In other words, by asking what private law should solve, one can understand what private law is. Private law is therefore, according to my point of view, \textit{justice}, by solving the three basic questions which arises in a private law relation.

\textbf{4.1.1 A question of justice}

Justice is a concept that might make people uncomfortable. As a concept, justice is vague. It is too indistinguishable to give any substance for a fruitful discussion. Nevertheless, as far as I see it, justice as concept can have a meaning. That meaning is \textit{com mutative} or \textit{corrective justice}.

Justice, described as a relation of mutual obligations and liability was already formulated during the old ius commune by Ulpian, later written down in Book one Justice and Law, in Justinian’s Digest or Pandects: \textsuperscript{95}

\textit{“Justice is a steady and enduring will to render unto every man his due.”}

To render every man his due essentially means enforcement of private law obligations. Enforcing interest rate from a loan would be to render the loan giver his due. To adjust a term would still render the loan givers due, however more mitigated.

In some way the forerunner of Ulpian’s formulation of justice, Aristotle was re-discovered during the old ius commune.\textsuperscript{96} In Nicomachean Ethics Book V Ch. 4 § 3 the following passage illuminates private law relation as liability:

\textsuperscript{94} Samuelsson & Melander, 'Tolkning och tillämpning' (2003), p. 84
\textsuperscript{96} See n 15
"The justice in transactions between man and man is a sort of equality [...], and the injustice a sort of inequality; [...] according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it [...] by means of the penalty, taking away from the gain of the assailant."  

Reading this passage, Aristotle seems to formulate justice as a mathematical transaction between individuals. Without seeing whether it is a god or a bad man, for what purpose or intentions; law treats them as equals and strives to restore the balance between them. It must be stressed that, nothing is mentioned in Aristotle’s view on overcompensation. Translated into contract law matters, if a term is considered unfair, hence threatening to create imbalance in a relation between equals, that in balance should by means be equalized (through e.g. adjustment). Justice in private law relation seems to be, simply equalizing an imbalance. In other words, justice is restoring a formal balance between the contractual parties.

Votinius, a Swedish scholar, interpret Aristotle’s view as friendship, that there is something more than just the specific obligation in the private law relation based on a viewpoint of reciprocal friendship. It may be a consequence of an interpretation of Aristotle but nevertheless far-reaching. A lexical reading from the extract cited above illuminates the mathematical viewpoint on private law as a transfer of resources between two individuals. Justice, in private law, is transaction between two individuals and when one party has injured other party,

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98 Votinius (n 91) p. 336
justice is done by compensating for that injury and nothing more nor nothing less. There is enough trouble with the word justice, as it entails values and morals. Instead, Aristotle’s strict view gives justice “objective” meaning being simple and straight.

The Canadian scholar, Ernest J Weinrib however, calls Aristotle’s view “corrective justice” rather than “commutative justice”. In a sense, his description is more accurate. Aristotle’s justice is stricter, highlighting the correlative equalization of gain and loss and the reflection of a relationship between two individuals. There is neither more nor less than the connection between two private law individuals, and not an internal feature of friendship or loyalty in the concept of corrective justice. Moreover, Weinrib argues that private law can only be understood from within, and not as an expression of purposes. He expresses this as “the only purpose of private law is to be private law.” In his view, just as love does not borrow light from extrinsic ends, but rather from its own end, private law is internal. Meaning in other words, that private law does not get its substance from outer purposes but rather from within. However, already here it gets blurry. How then should private law be understood according to Weinrib, if we cannot derive it from external purposes such as market integration or any teleological viewpoint? My guess is through looking at what should be solved in a private law relation. The answer according to Weinrib is by experience, because we can only understand what is familiar to us. Then, let us look at something that is familiar in this case, namely Section 36 of the Contracts Act.

### 4.2 Section 36 of the Swedish Contracts Act

It is said, that Section 36 of the Swedish Contracts Act is the most cited legal provision in Swedish court. Without exaggerating, Section 36 could easily qualify as one of the great legal engineering of the past century when introduced. Therefore, it is not surprising that the legal community has not criticised the pro-

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99 Weinrib (n 90) p. 75 f
100 Weinrib (n 90) p. 5
101 Ibid p. 9
vision thoroughly nor have the legislature considered a substantial revision of the paragraph, since it was introduced in 1976. The same provision is even found in Ch. 4 Section 1 of the Finnish Consumer Sales Act and in Ch. 3 Section 36 in the Danish Contracts Act (Aftaleloven).

Section 36 the Contracts Act reads as follows:

“A contract term may be adjusted or disregarded, if the term is unreasonable having regard to the contents of the contract, the circumstances at the making of the contract, subsequent events and other circumstances. [...] In the application of this provision special attention should be paid to the need for protection of a person who is in capacity of a consumer or otherwise occupies an inferior position in the contractual relationship.”

Swedish national courts have a wide discretion according to Section 36 of the Contracts Act to modify contracts. The provision allows the national courts to adjust an unreasonable (or unfair) contract term. An adjustment could render in, for example, a reduction of the amount of damages, interest rate or fine to be paid, limitation of time stipulated by a term, or adjusting the legal consequence of a penalty clause. Swedish courts are also allowed to disregard an unreasonable contract term partly or totally and even to declare the whole contract invalid. If an unfair term is disregarded, the term is regarded as never being part of the contract from the beginning (i.e. ex tunc). In other words, when an unfair contract term is disregarded it is declared invalid. Moreover, if it is necessary, the courts have the powers to modify the entire contract due to the results from an adjustment or when disregarding an unfair contractual term.

Section 36 of the Contracts Act is applicable in all commercial contracts and judicial acts [rättshandlingar]. However, the provision is also applicable by anal-

103 LBK nr 781 af 26/08/1996
105 Prop. 1975/76:81 p. 110
106 See RH 1980:13
ogy in non-commercial matters which as contractual characteristics. The paragraph is applicable in all consumer contracts, and as cited above, special attention should be paid to consumers when applying Section 36 of the Contracts Act. By this it is meant that, national courts should more often adjust and disregard an unfair term in consumer relations whilst being more restrictive in commercial relations. Consequently, Section 36 of the Contracts Act plays a key role in protecting consumers against unfair contract terms and in upholding the balance between contracting parties.

4.2.1 Corrective justice
Section 36 of the Swedish Contracts Act may be regarded as a manifestation of Aristotle’s and Ulpian’s justice, this holds especially for the possibility to adjust an unfair contract term. Firstly, if a term is found unfair, the provision allows the term to be adjusted (i.e. equalized) accordingly so that the contract renders every man his due. For example, if a term regulating the interest rate in a loan agreement is found unfair, Section 36 of the Contracts Act would allow a court to revise the content of that term so that the loan giver is still given his due, that is, interest rate. Secondly, Section 36 permits national courts to imply positive obligations when adjusting the contract term. By doing so, justice is done by enforcing obligations upon the contractual party which has gained the upper hand, so that the formal relationship may be equalized. Thirdly, in the government bill introducing Section 36, adjustment of terms is needed if a contract does not comply with justice between the contracting parties. In other words, the provision is needed to bring justice. What kind of justice is however not specified. Nevertheless, the government bill points out that, the justice is needed between two private law subjects, and not in society. Hence, the legislature may imply justice between parties (i.e. commutative/corrective justice) and not distributive justice. Finally, according to settled case law on Section 36, courts are

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107 Prop. 1975/76:81 p. 113 f, NJA 1982 s. 230 (family law), AD 1983:18 (collective agreement in labour law)
108 Prop. 1975/76:81 s. 117
109 Votinius (n 91) p. 339 f
110 Prop. 1975/76:81 p. 105
willing to adjust unfair contract term for the sake of keeping the contract “alive”.\textsuperscript{111} By doing so, the courts are allowed to equalize the gains and losses, so that every party is rendered his part of the contract.

Thus, even if we see fragments of the classical Aristotelian justice within the construction of Section 36 of the Contracts Act, we still live in private law pluralism. Section 36 is an exception from the principle that every party should be responsible for their own risk when contracting.\textsuperscript{112} As it is also pointed out by the legislature, the contractual parties are by principle responsible for their own interests’ as far as possible.\textsuperscript{113} It is therefore not surprising that the government bill advocates a restrictive application of Section 36 of the Contracts Act.\textsuperscript{114} Section 36 does indeed have liberal ideas embodied, which protects the freedom of contract making it an exception from the principle of \textit{pacta sunt servanda}.

These different ideas within Section 36 does in fact highlight the dual nature of the provision as a casuistic weighing of interests between freedom of contract and corrective justice, without really favouring neither rationality or idea. However, as I see it, adjustment of contracts is the ultimate manifestation of justice as it maintains the private law obligations and keeps the contract alive.

\textbf{4.3 Article 6 UCT and Section 36 of the Swedish Contracts Act}

Article 6 UCT was implemented into Swedish law by a simple reference to Section 36 of the Contracts Act.\textsuperscript{115} In the preparatory works introducing the UCT into Swedish law, it was discussed how Article 6 (1) UCT should in fact be understood. The Swedish legislature concluded that the provision could be interpreted in two ways.\textsuperscript{116} To begin with, the words “not binding” in Article 6 (1) UCT could mean that a term is not binding to its content. This would still allow the possibility to adjust an unfair contract term. However, the other

\footnotesize{\begin{itemize}
\item \textsuperscript{111} See e.g. NJA 1997 s. 524, NJA 1983 s. 385, RH 1986:112, RH 110:85
\item \textsuperscript{112} NJA 1985 s. 178
\item \textsuperscript{113} Prop. 1975/76:81 p. 101
\item \textsuperscript{114} Prop. 1975/76:81 p. 81 f
\item \textsuperscript{115} Prop. 1994/95:17 p. 54 f
\item \textsuperscript{116} Ibid p. 54 f
\end{itemize}}
interpretation may well be that an unfair term shall not, to any extent, be binding to the consumer. The second interpretation would not make it possible to adjust an unfair contract term.

The Swedish legislature decided to opt for the first interpretation, meaning Article 6 (1) UCT should be interpreted as not being binding to its content. Such an interpretation was, according to the legislature, more consistent with the lexical reading of Article 6 UCT and consistent with the purpose of the UCT. It was stated in the preparatory works that, an invalidity of an unfair term is not favourable for a consumer. In some cases, the contract could not be able to exist and the consumer would be better off with an unfair contract. However, it was admitted in the government bill that, the fact that Article 6 (1) stipulates that the contract shall continue to bind the parties without the unfair term, supported the other interpretation.\footnote{117 See Camino (n 7) p. 64. The ECJ uses the same argument but reaches a different conclusion}

Without going any further into how convincing the government’s arguments were, we know today that the government’s interpretation should be reconsidered due the recent developments from the ECJ.

\textit{4.3.1 Reconsideration}

It is evident from the Camino cases that the Swedish legislature’s interpretation of Article 6 (1) UCT needs to be updated and that it is no longer possible to adjust unfair contract terms falling under the scope of the UCT, in accordance with Section 36 of the Contracts Act. As the Swedish legislator did consider Article 6 (1) UCT to prohibit adjustment of contracts, the Camino case cannot strictly qualify as a Jack-in-the-box\footnote{118 Wilhelmsson, ‘Jack-in-the-Box Theory of European Community Law’, Law and Diffuse interests in the European Legal Order, Kramer, Micklitz & Tonner (ed.) (1997)} effect arising from Union law.

The categorical expression in Camino p. 71 that, Article 6 (1) UCT does not allow national courts to revise a content of an unfair term, does indeed apply to the Swedish legislation as well. On the other hand, it could be argued that the Camino case is applicable on certain credit agreements only. However, this is not
likely as the ECJ makes a general observation on the interpretation of Article 6 (1) UCT.

A Swedish court can very well adjust an unfair term relating to the interest rate in a loan agreement between a consumer and a seller. This would, in the view of the ECJ, compromise the long term objective of Article 7 UCT. That is, to prevent the usage of unfair contract terms. Sellers and suppliers would still, according to the ECJ, be tempted to use the same unfair term if they knew that it could be modified in court. To adjust a term is to revise a term, and to revise a term is not compatible with Article 6 (1) UCT according to the Camino judgments. Therefore, Article 6 UCT should be interpreted as meaning that a term shall not, to any extent, be binding to the consumer. In other words, Swedish courts cannot adjust, modify or conciliate an unfair term but must instead set aside its application in relation to the consumer. This conclusion may also apply on the Finnish legislation and the Danish Aftaleloven.

The Spanish provision, Article 83 of the Legislative Decree 1/2007, was even precluded by the ECJ. Should Section 36 of the Swedish Contracts Act also be precluded?

4.3.2 Spanish legislation and Section 36 of the Swedish Contracts Act
According to Article 83.1 of the Legislative Decree 1/2007 under scrutiny in the Camino judgment, an unfair term shall be void and deemed to never have taken part of the contract. Moreover, as a consequence of a term’s voidability, Article 83. 2 stipulates that the national court shall modify the contract and enjoy moderating powers regarding the right and obligations of the parties where the contract continues in existence. The modification shall be operated in accordance with custom, law and good faith.

Firstly, Section 36 of the Contracts Act does also allow national courts to declare an unfair term void, or disregard it. However, it is up to the national court to seek appropriate remedies as there is no imperative to either adjust or disregard an unfair term. The court seeks the most adequate remedy for the unfair term. Secondly, the Swedish provision does also allow courts to modify or invalidate
the entire contract due to an adjustment or invalidity of an unfair term. Finally, the difference lies in the methodological way to deal with unfair terms. The Spanish legislation operates by first allowing the court to declare an unfair term void and then to replace it by modifying the rights and obligations of the parties. The Swedish legislation however, does instead firstly allow a direct adjustment of the unfair term, without first declaring it void and then replacing it as the Spanish stipulates, and secondly if appropriate, invalidity of an unfair term without any modification to the actual term. Replacing a term or supplementing a contract is not done by applying Section 36 of the Contracts Act but by instead applying the notion of Complementary Construction of Contracts [utfyllnad] in Swedish law.

To conclude, the main difference from the Swedish provision lies in the Spanish legislation first declaring an unfair term void and then replacing it. The difference seems to be merely methodological. Nevertheless, both methods do revise, adjust and conciliate an unfair term as the Camino judgment prohibits.

4.3.3 End of Section 36 of the Swedish Contracts Act
There are good reasons for Section 36 of the Contracts Act to be precluded by the ECJ. As pointed out in p. 73 of the Camino judgment, the Spanish legislation is a mere example of what is not compatible with Article 6 (1) UCT. However, there is an opening. There may be other reasons for not precluding the legislation.

Firstly, Section 36 of the Contracts Act applies in a wide range of contracts and judicial acts. The effects of the Camino judgments will only arise in certain situations, when the UCT is applicable. It must be a contract between a seller/supplier and consumer, the term must not have been individually negotiated and not concern core matters of the contract. Therefore, national courts will only need to refrain from adjusting an unfair contract term when the UCT is applicable. Other than that, the Swedish courts are free to adjust unfair terms accordingly.
Secondly, in Von Colson\textsuperscript{119}, the ECJ stated that national courts are obliged to interpret and apply national law, in particular legislation implementing a directive, in conformity with the Union law in question. This of course, under the condition that it is possible to interpret the national legislation in accordance with Union law. Section 36 Contracts Act does indeed give the possibility to interpret the provision in the light of the Camino judgments. As said, there is an option for the Swedish national courts to choose remedy for the unfair contract term to either render in adjusting or disregarding an unfair term; by not adjusting an unfair term but rather to disregard it. National courts would fulfil its obligations to fully implement and apply the UCT in accordance with the Camino judgments. The Spanish Supreme Court seems to operate with a consistent interpretation of the UCT.\textsuperscript{120}

Summarizing, the entire scope of Section 36 of the Contracts Act is not outdated because of the Camino judgments. However, where the UCT is applicable, Section 36 needs to be interpreted in the light of the recent case law on Article 6 (1) UCT. That is, making it impossible to adjust an unfair term when the UCT is applicable. Nevertheless, this leaves questions open what a national court can do after disregarding an unfair term. Can a court still replace an unfair term with a fair term, or would this also constitute revision of the content of an unfair term?

4.4 Complementary Construction of Contracts – the way forward?

As highlighted before, replacing terms and supplementing contracts is done through Complementary Construction of Contracts. This is executed under the national courts discretion by constructing a term from default rules, custom or other relevant facts. For example, if a price has not been agreed on, the court can construct a term which regulates a reasonable price.\textsuperscript{121} According to Swedish

\textsuperscript{119} Von Colson (n 79)
\textsuperscript{120} STS 1916/2013 p. 273
\textsuperscript{121} See Section 45 of the Swedish Sales of Goods Act 1990 (Köplag (1990:931))
case law, Complementary Construction of Contracts is used as a last resort when the interpretation of contract is not enough.122

From the viewpoint of Swedish law, the Spanish legislation in question in the Camino judgment was a kind of complementary construction of the contract. Article 83 of the Legislative Decree 1/2007 allows Spanish courts to moderate the rights and obligations between the parties in accordance to custom, law and good faith, after declaring a term invalid. That is to me as a Swedish lawyer, to construct a contract by complementing it with other terms. Consequentially, if so, is Complementary Construction of Contracts in Swedish law in accordance with the Camino judgments? For how do we continue the contractual relationship when the term relating to the interest rate is declared invalid?

After the preliminary ruling was delivered by the ECJ, the Provincial Court of Barcelona declared the term regulating the interest rate void.123 However, the Spanish court pointed out that, the plaintiff (i.e. the bank) could, in another court proceeding, pursue interest on overdue payment according to the general provisions of Spanish law and seek compensation from damages arising from the late payments by Mr. Camino. If this is possible under the settled case law on Article 6 (1) UCT, the preventing effect the ECJ want to obtain is worthless. A seller/supplier could easily continue to litigate in another court proceeding, claiming interest rate and so forth. In the second court proceeding the debtor could be granted an interest rate at 19 %, which was not possible under the first proceeding due to it constituted revising of an unfair term.

In Swedish law, the late interest rate would be supplemented through Complementary Construction of Contracts by Section 5 and 6 of the Swedish Act on Instruments of Debt124 and calculated in accordance with Section 6 and 9 of the Swedish Interest Act.125

122 NJA 1998 s. 448, NJA 1997 s. 382, NJA 1999 s. 629
123 AAP B 7113/2012
124 Lag (1936:81) om skuldebrev
125 Räntelag (1975:635)
4.4.1 Kásler judgment

In the recent judgment of Kásler, the ECJ seemed to have reconsidered the Camino judgment’s effect. The national case concerned a mortgage loan between a consumer and a bank, which was fixed under foreign currency. According to the contract terms, the bank had the authority to determine the amount of monthly instalments in reference to the selling rate of the foreign currency, which the consumer claimed was unfair. The national court asked whether Article 6 (1) UCT and the Camino case (especially p. 73 in the Camino judgment) permitted a national court to first eliminate the unfair term and then supplementing the contract in accordance with national law, as it could not continue to exist on the basis of the remaining contractual terms. ECJ concluded that Article 6 (1) UCT does, as the situation is in the main proceedings, not preclude national courts from deleting an unfair term and substituting it for a supplementary provision of national law in accordance with the national principles of contract law. On the contrary, the ECJ held that replacing an unfair term with national provisions is alleged not be unfair. Substituting unfair terms for national provisions is intended to restore the formal balance between the contracting parties, by re-establishing the equality between them.

Another option would be to declare the entire contract invalid. That would render more difficult issues as the consumer would end up in financial troubles when paying back the loan. As pointed out by the ECJ, such a consequence would expose the consumer for an unfavourable situation and would rather penalise the consumer than the lender. In comparison to the Camino judgments, the ECJ seems to take the private law relation into account by seeing the consequences of invalid terms and unchangeable contract. By referring to the formal balance between the parties and taken the consumer’s situation with an invalid contract. This, in contrast to the Camino case which focused on the long term objective of Article 7 UCT, is a shift by the ECJ to more individual related view on the UCT.

126 Kásler (n 73) p. 80
127 Ibid p. 81-82
128 Ibid p. 83-84
However, the ECJ still reaffirms the judgment from Camino and Article 7 UCT importance.\textsuperscript{129} The question arises if then, the Kásler judgment be reconciled with the Camino judgments.

4.4.1.1 Camino and Kásler - outcomes

So far, the ECJ has stated that revising of terms are not in accordance with Article 6 (1) UCT seen in the overall scheme and objective of the UCT. Nevertheless, Article 6 (1) UCT does indeed allow courts to delete a term and then substituting it for a supplementary provision from national law, in accordance with the principles of the law of contract. Consequentially, it must still follow that, is it not in accordance with Article 6 (1) UCT to revise the content of an unfair term but nevertheless allowed to declare it invalid and then substituting it with supplementary provision from national law.

If we then just look at the wording of the Spanish legislation in the Camino judgment we see that, the provision first stipulates that a term should be declared void and secondly provides that the national court shall moderate the contract. In the Kásler judgment, the ECJ states that Article 6 (1) UCT does not preclude a national court to delete and substitute a term in accordance with the principles of the law of contract. This must probably mean the principles which every member state has within its national contract law, for example the Legislative Decree 1/2007 in Spain or Complementary Construction of Contracts in Sweden. Then, if Article 83 of the Legislative Decree 1/2007 first allows national courts to delete a term (or declaring it void) and then moderating it by supplementing the contract with a new term in accordance with the national law, it must mean that the Kásler judgment would not preclude the Spanish legislation under scrutiny in the Camino judgment. However, I cannot accurately describe how the Spanish legislation operates or more importantly, how the ECJ perceives it. It is still open whether the Spanish legislation in fact revises unfair terms or deletes them for then substituting. However, the Kásler judgment can still be reconciled with the Camino judgments as the Spanish legislation was more a spill-over effect. The

\textsuperscript{129} Kásler p. 78-79
courts still reaffirms that Article 6 (1) UCT does not allow revising. However, the ECJ has nuanced their view by allowing supplementation of contracts when a term is declared void.

Additionally, the ECJ stresses that the conclusion follows in a situation such as the main proceedings. This is an expression that is not used in the Camino judgment. Such an expression implies a narrowing of the precedent. The situation in the main proceeding concerns a debtor/consumer and a creditor/bank, as the Camino case. All the prerequisites for the application of the UCT apply in both cases. However, there may be one difference. In the Kásler judgment, the contract could not, according to the referring national court, continue to exist without the unfair term. This is also highlighted by the ECJ.\(^{130}\) It could be that the Kásler judgment precedent is narrowed to cases when those contracts could not continue to exist without the unfair term. Such an interpretation, although narrow but plausible, would not allow supplementation when the contract actually can continue to exist without the unfair term. Article 6 (1) UCT even stipulates that the contract shall continue to exist if capable without the unfair term, then if the contract is not capable due to an unfair term, is should not continue to exist.

Although it is unclear how the scope of the Kásler judgment should be viewed, there are two plausible interpretations; a narrow one and broader one. To refer to the application of the UCT by adding the expression in a situation as the proceedings may be a truism, nevertheless a preliminary ruling concerns the interpretation of Union law. The question posed by the national court is however narrow, consequentially rendering a narrow answer by the ECJ. If the expression does indeed have a meaning and hence not a truism, it is according to my opinion quite likely that the Kásler judgment has a narrow meaning; i.e. the precedent only applies when the contract cannot continue to exist without the unfair term.

### 4.4.1.2 Swedish implications

In conclusion, the Kásler judgment complements the Camino judgments but leaves some question open regarding the Spanish legislation and scope of the

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\(^{130}\) Kásler (n 73) p. 85
judgment. However, it seems sufficiently clear that a national court cannot under Swedish law revise an unfair term, according to a consistent interpretation of Section 36 of the Contracts Act in the light of the Camino judgments. The courts are nevertheless free to supplement the contract through Complementary Construction of Contract. The Kásler judgment does allow national courts in member states to supplement a deleted term with provisions from the national law (i.e. default rules) in accordance with the national principles of contract law. Complementary Construction of Contracts gets its substance from, inter alia, national provisions and as said, it constitutes a principle, or more accurate, a method of applying different principles of contract law. Then, Article 6 (1) UCT seems to allow such a mechanism in Swedish contract law when dealing with the aftermath of a disregarded unfair term. This conclusion does comply with Article 1.2 UCT which stresses that terms which reflect mandatory regulatory provisions are not subject under UCT. Article 1.2 UCT covers default rules.\textsuperscript{131} It follows by applying the notion of Complementary Construction of Contracts that, if supplementing a contract due to the invalidity of an unfair term renders in term, which reflects default rules, it is not under the subject of the UCT. Consequentially, Complementary Construction of Contract may be allowed according to Kásler and Article 1.2 UCT.

However, as said above, the scope of the Kásler judgment does in fact leave some questions. Supplementation could very well only be the case if the contract cannot continue to exist without the unfair term. Thus, if so, a way around could be as the Provincial Court of Barcelona concluded; that the creditor could be free to seek action in another court proceeding. That is, damages and late payment interest due to the late payments of the debtor.

\textsuperscript{131} Nebbia (n 52) p. 220
5 Conclusions

“Ein Gespenst geht um in Europa” - Karl Marx

5.1 Summary

The case law on Article 6 (1) UCT does bring meaning on how to assess the legal consequence of an unfair term in consumer contracts. From the Camino judgments it follows, according to my interpretation, that an unfair term cannot in any way be revised. Rather, an unfair term should not be binding upon the consumer. Therefore, an unfair term must be declared void, inadmissible or any other judicial consequence which cannot bind the consumer upon the unfair term. This is, according to the ECJ, the solution which confers best with the overall aim and scheme of the UCT; which is to, inter alia, prevent the usage of unfair contract terms (see Article 7 UCT).

The Camino judgments are a continuum of the market functional EU consumer law development we have seen since the SEA, which entails instrumental interpretation and application of Union private law. This instrumental approach, to eradicate any obstacle for the functioning of the internal market, affects member state national private law accordingly. In addition, the ECJ’s methodology adds further depth to the instrumental approach by its effet utile.

Article 6 (1) UCT and the recent case law does not allow national Swedish courts to adjust an unfair term, when the UCT is applicable, but to rather disregard it. From the recent Kásler judgment however, it seems possible to reconstruct a contract term, in accordance with the principles of national contract law, after deleting an unfair term from the contract. In the Swedish case, principles of national contract law would be Complementary Construction of Contracts. It must be held that this possibility may only be probable when the contract cannot continue without the unfair term.
Moreover, this instrumental basis of EU consumer law and effet utile of the ECJ may defy the idea of private law. Firstly, UCT and its case law challenge the idea of private law by eradicating the possibility of adjusting an unfair term. The legal consequence of adjusting an unfair term makes it possible to let the contract continue. A still existing term makes it possible for the parties to retain their rights and fulfil their obligations, all in accordance with the idea of corrective justice. Secondly, a void term such as the one in the Camino case constitutes overcompensation. Overcompensation, even if done in the name of consumer law, is not in accordance with corrective justice to equalize any gain or loss. To declare the term which regulates the late payment interest is not to give the debtor his due but to overcompensate the consumer. This recent case law has effects which goes beyond what Sweden could imagine at 1994 and seem to challenge the idea of Swedish contract law.

5.2 Swedish Contract Law

In conclusion, the case law on Article 6 (1) UCT affects Swedish contract law in the following ways.

Technically, a court cannot adjust an unfair contract term when the UCT comes into play. However, as it seems from the Kásler judgment, a national court could disregard an unfair contract term then replace it with a term reflecting default rules in accordance with the concept of Complementary Construction of Contract, under certain circumstances it seems. These affects do probably apply on the Finnish and Danish provisions as well, as they have similar structure. In the Camino case, the Spanish legislation was nevertheless precluded. If Section 36 of the Contracts Act was under the scrutiny of the ECJ, it could not be impossible that the ECJ also would declare Section 36 of the Contracts Act inconsistent with the UCT. It would seem wise a move from the legislature to enact, similar to the Finnish alternative, a provision which specially deals with
consumer contracts with an explicit legal consequence of voidability.\textsuperscript{132} This would certainly secure Sweden’s obligations towards the full effect of the UCT. In England for example, the exact wording of Article 6 (1) UCT was implemented into Section 8 (1) of the Unfair Terms in Consumer Contract Regulations 1999.\textsuperscript{133} However, it is possible to make a consistent interpretation of Section 36 of the Contracts Act in the light of the recent Camino judgments. Such a consistent interpretation has not, at least not intentionally what I can see, been done yet by the Swedish courts.

Practically, the news from the Camino judgments is not so revolutionary. The case law, on which legal consequence Swedish national courts choose, is clear. Swedish courts do almost all of the time prefer to disregard an unfair contract term in consumer relations.\textsuperscript{134} Adjustment of contract is a rare notion in consumer disputes.\textsuperscript{135} However, the Appeal Court did adjust a term between a consumer and a seller in accordance with default rules but the case concerned payment of a fee.\textsuperscript{136} Therefore, it is likely that the case did not touch upon the UCT. Although the Camino judgment was delivered in 2012, I have until now not yet seen any reference to the settled case law on Article 6 (1) UCT. It would be too far reaching to claim that the judgment from the Appeal Court is inaccurate, as what is not brought up to the light could not be assessed properly. It could also be the case that the Swedish courts are well aware of the Camino judgments. In conclusion, the Camino judgments do have little effect on the Swedish case law in regards to legal consequences of unfair contract terms in consumer relations. Nevertheless, it would be enlightening if the Swedish court did bring up the Camino judgments when deciding upon the legal consequences of an unfair term.

\textsuperscript{132} It seems however, that the Swedish government has opposite plans. In SOU 2013:78 p. 228 it is proposed that it should be possible to adjust unfair interest rates. No considerations are taken to the UCT or the recent case law on Article 6 (1) UCT
\textsuperscript{133} 1999 No. 2083
\textsuperscript{135} RH 110:85, RH 1986:112
\textsuperscript{136} FT 1933-12, judgment 2012-10-02
Theoretically, the idea of private law as bringing justice to the parties is challenged by the Camino judgments and the instrumental market-functional basis of the consumer acquis. The possibility of adjusting an unfair term is a manifestation of corrective justice, as it gives each party the right to claim their mutual rights and obligations. Adjustment as a legal consequence does bring justice by equalizing a wrongful gain or loss by means of penalty (i.e. adjustment) which equalizes the relationship and hence brings justice to the private law relation. For example, a too high interest rate is an injustice because the private law relationship is unbalanced. The debtor has been given a transaction which is considered unfair. There is an inequality in the relationship. The legal consequence of adjustment could give the private law relation equality by means of revising the unfair term so that the interest rate is no longer a basis of a transaction based on injustice. To totally eradicate the term is not giving inequality a remedy. To declare a term (regulating the interest rate) void creates a new inequality, this time for the debtor. The private law relation can never come to fulfil its purpose to satisfy the parties’ rights and obligations in an equal and justified way. In conclusion, the Camino case does not in any way bring justice to the Swedish contract law, rather the opposite.

An observant reader will however argue that the Káslar judgment does bring some remedy to the critique of the Camino case. The Káslar judgment allows national courts to replace an unfair term which has been deleted. This would bring justice as an interest rate would be complemented by default rules, which are not considered unfair. Nevertheless, it is not enough. It still takes some freedom from the courts to adjust a term freely for the purpose of the contract in question. Moreover, it is unclear if it is allowed to replace a term when the contract still can supersede the deleted unfair term. Even if the Káslar brings some conformity to the system of Swedish contract law, it is not enough until it has been adjudicated at the ECJ. There is still, a kind of injustice in the ruling from Camino upon Section 36 of the Contracts Act, although the later Káslar judgment has mitigated this injustice.
5.3 European Union Private Law – EU consumer law

As for EU consumer law, the Camino judgments are yet an example of the instrumental market-functional approach. In the Camino judgment, the ECJ is clear on the fact that, if national courts were able to revise the content of an unfair term it would undermine the UCT’s aim to eradicate the use of unfair terms in consumer relations. These conclusions have been reaffirmed by later judgments. The solution put forward by the ECJ goes hand in hand with the aim of consumer law to be market-functional because EU consumer law has been based upon the establishment of an internal market. The ECJ also plays a part in this, by the effet utile. Schmid argues that such an instrumental approach and effet utile of consumer law affects the justice between the private law parties.\textsuperscript{137} The Camino judgments would therefore, in the eyes of Schmid, be yet another example of when the effet utile of the market integration prevents private law parties to create justice between them. Nevertheless, the picture is more nuanced.

Consumer law has consumer protection aspirations and does indeed bring unity between the member state national laws in consumer protection areas. The treaties do refer to quality of life and improvement of standard within the EU. Case law, old as Mostaza Claro and new as Kásler, suggests the ECJ also aims to protect the formal balance between the parties and creating equality between them. In the end, EU consumer law has a strong integration approach towards the market, however with aspects of consumer protection and formal justice. The UCT is aimed to increase consumer protection. Do the Camino judgments achieve consumer protection better than, for example, Section 36 of the Contracts Act?

Firstly, adjustment of contracts could be seen as a violation of the freedom of contract. However, as we are talking about consumer law, any legal consequence following an unfair term will constitute a violation of the freedom of contract. Secondly, adjustments of contracts bring flexibility and adaptation to the situation (i.e. the unfairness of the term) which could prolong the contract relation.

\textsuperscript{137} Schmid (n 33) p. 218 f, Schmid (n 87) p. 312
This is also pointed out in the preparatory works.\textsuperscript{138} An annulment can often cause more harm than help. However, the Kásler judgment opens the door for filling of the contract with default rules. In the preparatory works introducing Section 36 of the Contracts Act, it is held that adjustments often reveal the reasons behind a court’s intervention. Hence, making adjustments of contracts more open and therefore more predictable for the parties (inter alia, the consumers).\textsuperscript{139} However, it is acknowledged that regarding an unfair term void, has more of preventive effect.\textsuperscript{140} This is an argument which also is put forward by the ECJ in Camino p. 69. It may very well be the case that annulment of unfair terms sends a clear message to the suppliers and sellers. However, the term can be replaced any way according to Kásler, if the contract cannot outlive the deleted unfair term. So, what is the point if the same result of “revising” a term can be achieved by adjustment and by deleting and replacing? It becomes a question of methodology rather than substantive legal solution. Even if Kásler may have its limits, nothing stops a creditor to file another claim in another court proceeding. It seems to me, that the ECJ does not really accomplish its aimed result to totally abolish the usage of unfair terms by precluding adjustment. It only devours member state national law even more for the sake of toothless consumer protection. Unfair standard terms are, for example, still commonly used against consumers.\textsuperscript{141}

If we look at the Camino judgments from a comparative view, it makes more sense. In most of Europe’s legal systems, invalidity of an unfair term is the most common legal consequence.\textsuperscript{142} Declaring an unfair term invalid is, according to Rott, not in any way revolutionary.\textsuperscript{143} German law does not give the possibility to reduce an unfair term nor do the English law courts allow adjustment. Therefore, a comparative view makes the Camino judgment more understandable than consumer protection aspirations. Hence, it is probable that the ECJ used

\begin{footnotesize}
\textsuperscript{138} SOU 1974:83 p. 121
\textsuperscript{139} Ibid p. 115 f
\textsuperscript{140} Ibid p. 120
\textsuperscript{141} Rott, ‘Case note on Banco Español de Crédito v Joaquín Calderón Camino’, ERCL 2012 8 (4) p. 471
\textsuperscript{142} Gavrilovic, ‘The Unfair Contract Terms Directive through the practice of the Court of Justice of the European Union: Interpretation or Something more?’, ERCL 2013 9 (2) p. 173
\textsuperscript{143} Rott (n 134) p. 477
\end{footnotesize}
comparative method to justify its conclusion and to secure the effet utile. It could be discussed whether a comparative method is suitable for deciding upon Union law. Could not a more justice oriented view be advocated? Looking at the bigger picture rather than how single market could be achieved, it might be that adjustment of contracts such as Section 36 of the Contracts Act stipulate, is more appropriate.

By having a more commutative or corrective justice view upon private (and consumer law) trust is created. This because of the fact that trust gives the incitem-ment for private parties to do trade.\textsuperscript{144} The private law parties can be confident that every subject will get its due and that every wrongful act will be equalized to restore the balance and justice between the parties. And trust is, in the light of the economic crisis, a highly important factor. As one of the consequences of the economic crisis was that consumers and customers lost confidence in banks and banks lost confidence on the loan market.\textsuperscript{145} Commutative or corrective justice can re-estate that lost balance. Not as the Camino case which hinders the possibility to adjust the private law relation, leaving the creditor without interest rate. Consumer protection is arguably only successful when it establishes freedom of choice or bargaining power, and not when it creates additional costs.\textsuperscript{146} A creditor without an interest rate will make the loan market doubtful, consequent-ially rendering in higher costs and perhaps even doubts on giving a loan. Even if the interest rate is considered unfair and deleted, the debtor will seek action in another court proceeding, claiming interest rate and damages for late payments. Court proceedings can be expensive for consumers. Adjustment of unfair terms is therefore necessary to mitigate these costs and to bring justice for both the creditor and debtor, hence creating trust for the sake of consumer protection and the functionality of the loan market.

Luckily, the Kásler judgment makes it possible, to some extent, to replace an unfair term with default rules. Although, it does not make explicitly possible to adjust an unfair term, it is what de facto happens. The interest rate is replaced,

\textsuperscript{144} Lando (n 29) p. 245 f
\textsuperscript{145} Luger (n 36) p. 104 f
\textsuperscript{146} Ibid. p. 95
instead of adjusted, by rules from national contract law. So, even if the ECJ started on this market-functional path with the Camino judgments, for the sake of achieving consumer protection and realization of the internal market, the ECJ have to some extent changed path through the Kásler judgment.

As we look into the future, in the proposal for the CESL it is stipulated in Article 79 (1) that an unfair term is not binding upon the party which has not provided it. Even in the perhaps biggest private law legislation made by the Union, we see that adjustments of contracts are not possible when a term is found unfair. It seems that the justice oriented view on legal consequences of an unfair term is once again lost to the instrumental, comparative and market-functional approach. I would rather see the aims reconciled, preventing the usage of unfair terms and restoring the formal balance and equality between the parties, so that the private law can create trust and justice.

5.4 European Private Law

The Swedish parliament has given its blessing for a promotion of a European contract law as long as it promotes freedom of contract and consumer well-fare, however only to serve as model rules and inspiration. However, looking at the experiences from EU consumer law, the development should be worrying from a justice oriented point of view.

In the DCFR, Book II. 9:408 (1) it is stipulated that the effect of an unfair term is, that it shall not be binding upon the party which has not provided it. Moreover, in PECL, it is formulated as a party may avoid a term if it is considered unfair (Article 4:110 (1)). Comparing these formulations to Article 6 (1) UCT, it does indicate that adjustment of contracts are not possible, as Section 36 of the Contracts Act stipulate. This is noteworthy as there may be a tendency for European Private Law to move away from a justice oriented approach to a more unionized market instrumentalism.

147 COM (2011) 635 final
148 2010/11:CU6
The instrumental approach seems to be incorporated in the EU legislation.\textsuperscript{149} For example, the CESL proposal has Article 114 TFEU as legal basis. The CESL do indeed have a symbolic value to it. If the EU succeeds into adopting it, many more private law measure may come after.\textsuperscript{150} The internal market has been the driving power and the ratio legis behind the core of European Private Law. For example, it is claimed that the UCT shall apply in all contracts.\textsuperscript{151} This would mean that the reasons behind the Camino judgments would probably apply in commercial context. The DCFR has been criticised for being market-functional, taking influence from the consumer acquis. Even the whole idea of creating a European civil code has been criticised for its functional aims and methods.\textsuperscript{152} We have seen the example from the effects from Article 6 (1) UCT and the Camino judgments, upon Swedish contract law. If a European civil code is enacted upon the ideas of an internal market, the idea of private law justice will be diminished. The new European Private Law will not be a new ius commune, as the old ius commune was built upon ideas of justice from Aristotle and Ulpian, but it will rather become, what I would call, a new \textit{ius instrumentalis}. Private law will be a tool to create a single market.\textsuperscript{153} The purpose of private law is to be private law; to bring justice; to render every man his due; to enforce rights and obligations; to solve conflicts. The legislature in Europe, the member states and the academics in Europe must ask the rights questions, rather than looking for the right answers for achieving an internal market. What kind of European Private Law do we want? The question may be too late to be proposed, as the syntax between the DCFR and Swedish law has already become.\textsuperscript{154} Nevertheless, the question is of great importance as it will probably define the future of not only Swedish private law but for the whole European Private Law.
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