German Law Journal (2025), **26**, pp. 790–814
doi:10.1017/glj.2025.10137

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ARTICLE

A Farewell to the Information Model in Standard Form Contracts

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(Received 01 July 2025; accepted 04 July 2025)

Abstract

You can sell your soul to the devil, but it would be especially devilish if the sale were hidden on page twenty-nine of the terms of service of a ride sharing app. Our world is full of contract text for which there are no readers, allowing term setters the unilateral power to make law. There are two ways to approach this problem: providing more information, better information or more salient information on contract terms—information model—or controlling the content of the terms of form contracts—control model. This Article explores the interplay between the information model and the control model for protection of recipients of standard form contracts. It argues that the control model and the information model are mutually exclusive from a conceptual point of view. Therefore, using information to protect consumers should be eschewed in favor of term control – we should say farewell to the information model. This would mean that, given strong court control, contract terms could be set without notice, possibility to review or assent to them. Where court control is weak it should be strengthened. This Article develops these arguments with a view to the European and U.S. discourse on standard form contracts.

Keywords: Boilerplate; wrap contracts; consumer contract; arbitration clause; informed consent

A. The Information Problem of Mass Contracting

Let us begin with what everybody knows: Nobody reads boilerplate.[1] Doing so would be absurd. Walls of text govern many consumer transactions offline, and all interactions on the internet. The opportunity cost of engaging with this information load would be gigantic. Yet at the same time,

[1]*Cf.* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire*, 104 MICH. L. REV. 837, 841 (2006); Robert A. Hillman, *On-Line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, *in* CONSUMER PROTECTION IN THE AGE OF THE "INFORMATION ECONOMY" 283, 286 (Jane K. Winn ed., 2006); Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUM. BEHAV. 293, 295 (2012); Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863 (2010); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617, 678 (2009) (describing studies on actual reading behavior); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. L. STUD. 1, 1 (2014); Florencia Marotta-Wurgler, *Will Increased Disclosure Help - Evaluating the Recommendations of the ALI's Principles of the Law of Software Contracts Symposium: The Licensing of Intellectual Property*, 78 U. CHI. L. REV. 165, 167 (2011); Florencia Marotta-Wurgler, *Are Pay Now, Terms Later Contracts Worse for Buyers: Evidence from Software License Agreements*, 38 J. L. STUD. 309, 313 (2009). *See generally* Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship: Comments on Florencia Marotta-Wurgler's Studies Book Symposium on Florencia Marotta-Wurgler's Studies*, 12 JERUSALEM. REV. L. STUD. 137 (2015). *But see* Shmuel I. Becher & Esther Unger-Aviram, *The*

the benefits would be very slim. The most important reason for this is that most contracts are performed without a hitch.[2] It is pointless to engage with rules governing a conflict if it is extremely unlikely that a conflict will ever occur. Beyond this, even if one were to sift through the walls of text and find some undesirable clause in the details, one could not change it. Friedrich Kessler, a German born U.S. law professor, is credited with coining the term "take-it-or-leave-it."[3] It has been cited and examined by most of the literature on the subject.[4] It seems that with regard to contracts of adhesion the much invoked serenity prayer has been answered: People accept what they cannot change.

This rational ignorance of the recipient allows the term drafter to unilaterally impose its clauses on the other party. For how can a party object to a disadvantageous clause, if they never become aware of it? Thus, businesses are given an incentive to make the clauses as onerous as possible and use the cost savings to improve product dimensions like price that consumers actually care about,[5] or internalize the gotten gains. This power to unilaterally determine contract content to the detriment of recipients does not necessarily require market power.[6] Rather, it follows from the non-existent incentives to read contract terms. The value of most transactions in itself,[7] and the possibility that something in fact does go wrong, are so low, that any engagement with the

Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction, 8 DEPAUL BUSI. & COMM. L. J. 199, 200 (2009) (criticizing this assertion as "personal belief or intuition").

[2]Arthur Allen Leff, *Unconscionability and the Crowd-Consumers and the Common Law Tradition*, 31 U. PITTSBURGH. L. REV. 349, 351 (1970); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 446 (2002); Hillman, *supra* note 1, at 841; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1226 (1982).

[3]Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (using the French expression *à prendre ou à laisser* to the same meaning); Edwin W. Patterson, *Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (providing the origin for the connected term "contract of adhesion").

[4]Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, FORDHAM L. REV. 761, 770 (2002); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 364 (2012); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 50 (1993); Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 101, 101 (2010); Rakoff, *supra* note 2, at 1222; Becher and Unger-Aviram, *supra* note 1, at 201; Hillman and Rachlinski, *supra* note 2, at 436; Michael I. Meyerson, *Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 593 (1990); Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TEL. & TECH. L. REV. 303, 308 (2008); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUSI. L. J. 723, 742 (2008); James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 166 (2013); John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 288 (1999); Plaut and Bartlett, *supra* note 1, at 299; Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone: Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 243 (2013); Ronald J. Mann, *Contracting for Credit Boilerplate: Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 899, 905 (2006); Schmitz, *supra* note 1, at 865; Florencia Marotta-Wurgler, *Some Realities of Online Contracting Symposium: Online Markets vs. Traditional Markets*, 19 SUP. CT. ECON. REV. 11, 12 (2011); Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1264 (2011); Nancy S. Kim, *Two Alternate Visions of Contract Law in 2025*, 52 DUQ. L. REV. 303, 306 (2014); NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 26 (2013); John E. Jr. E. Murray Jr., *The Judicial Vision of Contract: The Constructed Circle of Assent and Unconscionability Drafting Our Future: Contract Law in 2025*, 52 DUQ. L. REV. 263, 265 (2014); Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 32 (2017); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1160 (2000).

[5]*C.f.* Russel Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1226 (2003); Hillman & Rachlinski, *supra* note 2, at 452; Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1994); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 3 (2012).

[6]Restatement (Second) of Consumer Contracts, introduction (Am. L. Inst. 2022); Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *The American Law Institute's Restatement of Consumer Contracts: Reporters' Introduction*, 15 EUR. REV. CONT. L. 91, 92 (2019); Korobkin, *supra* note 5, at 1209. *C.f.* G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 J. L., ECON. & POLICY 413, 434 (2015).

[7]Eisenberg, *supra* note 5, at 243; Becher and Zarsky, *supra* note 4, at 318; Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1753 (2014).

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contractual framework is inefficient.[8] For the term setter, who uses the same contract template thousands of times, this is different. One party cares deeply about cost reductions accruing thousands of times, the other party cares little.[9]

Boilerplate contracts are not a new phenomenon. If a merchant likes a contract that has been drafted, why would they not copy and re-use it for all future transactions? Pre-drafted contracts are thus centuries old and have been reported even in Roman law.[10] They allow for efficiency increases in the provision of services, for drafting contracts is a costly exercise.[11] Despite this, the apotheosis of the standard form contract mirrors the standardization of services, industries and products commencing in the 19th century.[12] Standardized contracts are a part of and a pre-requisite for this standardization.[13] Think of the restrictions imposed on the size of airline baggage. Negotiating the permissible baggage dimensions individually would lead to huge transaction costs acruing to airline and consumer. It would also require that each piece of luggage is individually analyzed as to the respective agreement. With a standardized contract, the airline can simply put a box at the airport in which the flight crew fits—or does not fit—the luggage. The box as a sole arbiter of baggage compliance is not possible without standardized contracts. Standardized contracts are thus not only efficiency promoting, but have rather been a prerequisite of modern service economies for at least a hundred years. It is therefore unsurprising that the first academic examinations of unilaterally drafted and unchangeable contracts are eighty or even a hundred years old.[14] Although we lack empirical data on readership in the early 20th century, due to the congruent incentives, we can assume that these agreements were not read significantly more than their modern descendants.[15]

The diagnosis of an economy being based on contracting in ignorance is therefore not a new one, yet the advent of the digital economy has put the information problem on steroids.[16] There are two reasons for this. First, the digital world allows for reproduction of information at almost zero cost, and has therefore removed the few limits that exist in the physical world, like printing

[8]Leff, *supra* note 2, at 351; Richard A. Posner, Economic Analysis of Law 125 (2014); Hillman and Rachlinski, *supra* note 2, at 446; Hillman, *supra* note 1, at 841; Kenneth K. Ching, *What We Consent to When We Consent to Form Contracts: Market Price*, 84 UMKC L. Rev. 1, 3 (2015); Rakoff, *supra* note 2, at 1226.

[9]Karl N. Llewellyn, *What Price Contract-An Essay in Perspective*, 40 Yale L. J. 704, 731 (1930) (discussing an early expression of this).

[10]Bruce W. Frier, Landlords and Tenants in Imperial Rome 63 (1980) (noting that "by and large they do not appear to have been particularly onerous – nothing so complex and imposing as in modern contracts."). *C.f.* Phillip Hellwege, Allgemeine Geschäftsbedingungen, Einseitig Gestellte Vertragsbedingungen Und Die Allgemeine Rechtsgeschäftslehre (2010) (giving a German historical view of the phenomenon).

[11]Kim, *supra* note 4, at 27.

[12]Hellwege, *supra* note 10, at 2.

[13]Kessler, *supra* note 3, at 631; Bar-Gill, *supra* note 5, at 91; Kim, *supra* note 4, at 305; Wurgler & Taylor, *supra* note 4, at 241; Cole, *supra* note 6, at 425 (discussing its reference in modern literature).

[14]*C.f.* O. Prausnitz, The Standardization of Commercial Contracts in English and Continental Law 8–20 (1937) (describing the history of form contracts). *See generally* Karl Llewellyn, *Book Review of The Standardization of Commercial Contracts in English and Continental Law*, 4 Harv. L. Rev. 700, 703 (1939); Llewellyn, *supra* note 9; Patterson, *supra* note 3, at 222 (exploring an early expression of unilaterally drafted and unchangeable contracts); Ludwig Raiser, Das Recht Der Allgemeinen Geschäftsbedingungen (1935); Cole, *supra* note 6, at 425 (noting that this fact is undisputed, despite the contested inferences drawn from it approaches believing in the efficacy of markets policing form terms also emphasize that these are unilaterally set, for example, by stating that they lead to the efficient use of expensive legal talent by the term setter).

[15]*C.f.* Daniel D. Barnhizer, *Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts Nancy Kim's Wrap Contracts Symposium*, 44 Sw. L. Rev. 215, 217 (2014) (stating that "the norms of contract "likely did not reflect the reality of contracting even in that slower and 'gentler' golden age of standard form contracts of adhesion.").

[16]Kim, *supra* note 4, at 308; Douglas G. Baird, *The Boilerplate Puzzle Boilerplate: Foundations of Market Contracts*, 104 Mich. L. Rev. 933, 934 (2006); David A. Hoffman, *Defeating the Empire of Forms*, 109 Va. L. Rev. 1367, 1371 (2023) ("our swelling empire of forms is built on the portable screen.").

https://doi.org/10.1017/glj.2025.10137 Published online by Cambridge University Press

costs and the physical limitations of notice boards.[17] Terms that would seem unfathomably long, and possibly nefarious, when printed are now hidden behind hyperlinks and checkboxes; lengthy notices are made to seem like just another element of an app's user interface and experience.[18] The digital economy has also affected the information dynamics of contracting by giving rise to a plethora of new and complex business models, which require standard form contracts in order to develop. While the sale contract for an old Chevy may be scrawled on a cocktail napkin; namely because the deal is uncomplicated and the legal framework is strong and well developed, the same cannot be said for the use of an online service or social media platform, which in turn are usually governed by a barrage of contractual terms. In Europe, a recent trend in regulatory technique adds fuel to the fire. The European Union increasingly relies on the instrument of mandating businesses to regulate and disclose certain issues in their form contracts, in other words, requiring lengthy form contracts by law.[19] The simpler approach of stating statutory default or even mandatory rules, is eschewed in favor of an approach that makes businesses draft these long contract terms, and later subjecting these terms to court review. Naturally, this increases text length. Thus, the more atomized online services become, the more the online world moves towards service provision instead of pure sale, and the more regulators use the *you-set-the-terms-now-we-control-them-later* approach, the more pronounced the information problem will become. Although regulatory trends cannot be predicted, the inclusion of software and digital services in more and more products is to be expected.[20]

Due to the technological nature of these heightened challenges, there is the possibility of a deus ex machina solution for this problem.[21] The newest candidate for a technology that could change the information dynamics of form contracting is Artificial Intelligence (A.I.).[22] Still, the hopes pinned on A.I. are the same hopes that were previously pinned on the blogosphere,[23] social media,[24] the internet of things,[25] augmented reality,[26] or machine bargaining.[27] Of course, the failure of these previous technological champions to solve the information problem gives no insight as to the effects of a watershed technology like A.I. Yet there are reasons to be doubtful as to whether A.I. will solve the information problem of mass contracting. The digital age aggravated

[17]Restatement (Second) of Consumer Contracts Introductory Note, p. 2 ((Am. L. Inst. 2022); Bar-Gill, Ben-Shahar & Marotta-Wurgler, *supra* note, 6 at 92; Kim, *supra* note 4, at 308; Nancy S. Kim, *The Wrap Contract Morass Nancy Kim's Wrap Contracts Symposium*, 44 Sw. L. Rev. 309 (2014); Kim, *supra* note 4, at 58.

[18]Nancy Kim, *Adhesive Terms and Reasonable Notice*, 53 Seton Hall L. Rev. 85, 133 (2022).

[19]*See E.g.*, Regulation 2022/2065, of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Dircteive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) (requiring that "policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review" are disclosed in the standard business terms).

[20]Kim, *supra* note 4, at 311 (examining the effect of these changes on contract law).

[21]Hillman & Rachlinski, *supra* note 2; Hillman, *supra* note 1, at 837; Becher & Zarsky, *supra* note 4; Chari, *supra* note 4; Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 Yale J. L. & Tech. 1, 3 (2009). *See generally* Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. Rev. 676, 676 (2012); Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting Essay*, 108 Colum. L. Rev. 984, 985 (2008).

[22]*C.f.* Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 Geo. Wash. L. Rev. 83, 86 (2022); Noam Kolt, *Predicting Consumer Contracts*, 37 Berkeley Tech. L.J. 71, 71 (2022); Hoffman, *supra* note 16, at 1389 (providing early examinations of artificial intelligence).

[23]Becher & Zarsky, *supra* note 4, at 323.

[24]Cole, *supra* note 6, at 415.

[25]Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 Hofstra L. Rev. 839, 841 (2016).

[26]Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 Tex. L. Rev. 85, 687 (2014).

[27]Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 193 (2013); Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 Cap. U. L. Rev. 617, 652 (2012); Zamir & Farkash, *supra* note 1, at 161.

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the information problem by decreasing information reproduction cost. Artificial Intelligence has so far reduced not only the cost of information *reproduction*, but the costs of original information *production*. Artificial Intelligence is already used to reduce contract drafting costs.[28] Under this view, it seems likely that any A.I. world contains more information in general and contract terms specifically than the human intelligence world. Of course, A.I. can greatly increase consumers' capabilities to process this information. Yet whether this will overcome the massively-stacked odds of the current information dynamics remains to be seen. It seems possible that a consumer will choose to eschew running A.I. contract-crunching-models over a set of terms, if they are presented on *a take-it-or-leave-it* basis anyway, leaving us back on square one with Kessler. Although nobody can predict the future, it seems that A.I. will not solve the underlying incentive issues regarding mass-contracts.

The impact of the information problem of mass contracting on the institution of contracts is profound. Freedom of contract, itself understood as the basis of market economies, imagines contracts as an expression of individual liberties, autonomy and self-determination.[29] In an ideal world, both parties, equipped with full mental capacities, meet on equal footing and thrash out a deal, which they fully and completely understand. Think of Adam Smith's baker selling a shipment of bread to the brewer[30], or, as Kessler has put it: "[A] contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and relative economic equality."[31] This has a political dimension, allowing individuals to create legal obligations purely based on their will, without government intrusion or judgment.

Saying that this ideal differs from the reality of consumer contracting would be an understatement. Not only have many consumers never concluded such a contract in their entire life.[32] But it is at odds with this concept that most legal transactions happen in complete ignorance of almost all of their contents. Even earliest commentators have noted that the unilateral imposition of a term on a take-it-or-leave-it basis is not an expression of freedom of contract,[33] and it has been universally accepted since. Thus, almost all contracts a person concludes in their life, bear little resemblance to the idea of freedom of contract. There is no doubt that almost all terms of almost all consumer transactions are imposed unilaterally. You cannot participate in modern life without assenting to a myriad of take-it-or-leave-it terms.[34] The connection between the idea of freedom of contract and actual contracts is wafer thin at best,[35] which is corrosive to the idea of freedom of contract.[36]

[28]Adam Gale, *Swedish Payments Unicorn Klarna is Using ChatGPT to Draft Legal Contracts — But AI isn't Replacing Lawyers Yet*, Fortune (May 14, 2024), https://fortune.com/europe/2024/05/14/klarna-payments-unicorn-chatgpt-draft-legal-contracts-ai-replacing-lawyers/.

[29]Radin, *supra* note 27, at 3; Nancy S. Kim, *Relative Consent and Contract Law*, 18 Nev. L. J. 165, 166 (2017).

[30]Adam Smith, An Inquiry into the Nature and Causes of Wealth of Nations 19 (1776).

[31]Kessler, *supra* note 3, at 630.

[32]David W. Slawson, *Standard Form Contracts and Democratic Control of Law-Making Power*, 84 Harv. L. Rev. 529, 529 (1971) ("Most persons have difficulty remembering the last time they contracted other than by standard form; except for oral agreements, they probably never have."). *See also* Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. Penn. L. Rev. 2109, 2109 (2015) ("Contracts of adhesion constitute the bulk of consumer experience with contract law.").

[33]Patterson, *supra* note 3, at 222.

[34]*See* Tess Wilkinson-Ryan, *Justifying Bad Deals*, 169 U. Penn. L. Rev. 193, 197 (2020); Cole, *supra* note 6, at 443 (discussing how a theory to classify standard contract terms and separate them into classes which they need not read, "better read carefully," and everything in between, should not be followed). To equate that consumers should read contract terms in some markets means that they should not engage in those markets altogether, as the opportunity costs will in most cases exceed the benefits of reading and consume the cooperative gain of the transaction. It is advocated here that the law should be crafted in order to place all clauses in the "no need to read" category.

[35]Wilkinson-Ryan, *supra* note 7, at 1746 (emphasizing the contradiction between the moral and social norms on contracts, and their everyday application).

[36]Zev J. Eigen, *Norm Shifting By Contract*, 44 Sw. L. Rev. 231, 234 (2014); Radin, *supra* note 27, at 624.

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Scholars have emphasized that this discrepancy is not actually a problem at all.[37] A person can easily agree in ignorance, because they are not promising the content of an unread document, but simply stating that they are agreeing to an—unread—promise.[38] This is undoubtedly true. To refuse this truth would mean that any unread agreement can never create a contractual obligation. Thus, to have any enforcement of any boilerplate term requires a theoretical framework as to how an obligation can be created in ignorance. The earliest German law treatise on boilerplate terms provides this framework, by outlining that assent to unread terms is akin to a declaration for a risky event, and it is within freedom of contracts to take risks.[39] Every day unread obligations are created and enforced. The issue is not whether this can be done at all, but whether systematically unread documents can create the same legal effect as understood contracts. How much blind risk is the legal order comfortable with?

It is, however, not the sanctity of the institution of contracts that keeps consumer protection advocates up at night. Rather, the information dynamics allow the term setter to skew the contractual balance of rights and obligations in their favor. Because the individual is unaware of the content of the terms, they cannot reject terms that they deem unwanted or inappropriate. As contracting in ignorance is widespread, recipients are also not protected by the power of the market. This would require sufficient readership for the recipients to form an informed minority.[40] Yet in lieu of such a minority, the unread terms become a non-salient product dimension.[41] This provides incentives to reduce quality in this dimension, while improving salient product dimensions such as price.[42] The result is a market failure in which one would expect boilerplate to hide the most egregious terms.

Although the concept of an informed minority is deeply steeped in the Law and Economics approach, the diagnosis of the information problem need not be. Many Law and Economics scholars were able to describe a failure for the market for contract terms through their respective instruments, especially when taking behavioral economics on board. Yet so was everybody else, without reference to economics. Not only has the truth that these take-it-or-leave-it agreements are not read been accepted by "[v]irtually every scholar who has written about contracts of adhesion."[43] But also, doctrinal theories of law commonly find there to be some form of deficiency in the contracting process, which needs be compensated by law,[44] or lead to

[37]Randy E. Barnett, *Consenting to Form Contracts Symposium: A Tribute to Professor Joseph M. Perillo*, 71 FORDHAM L. REV. 627, 627 (2002).

[38]*Id.* at 636.

[39]RAISER, *supra* note 15, at 170; Julius Siegel, *Die privatrechtlichen Funktionen der Urkunde. Eine Studie zur Lehre von den Willenserklärungen nach dem Recht des Bürgerlichen Gesetzbuchs unter Berücksichtigung der Zivilprozeßordnung*, 111 AcP 1, 92 (1914).

[40]*See generally* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analsysis*, 127 U. PENN. L. REV. 630, 631 (1979); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Securities*, 69 VA. L. REV. 1387, 1397 (1983) (writing based on the concept of competition for the marginal consumer also applying for contract terms). *C.f.* Cole, *supra* note 6, at 418 (criticizing the law and economics approach as incomplete but failing to engage with the concept of term salience introduced by Korobkin, *supra* note 5, at 1229 and expanded by BAR-GILL, *supra* note 5). *See also* Korobkin, *supra* note 5, at 1209, Russel Korobkin, *Possibility and Plausibility in Law and Economics*, 32 FLOR. ST. U. L. REV. 781, 784 (2005) (addressing the emphasis placed by Cole, *supra* note 6, at 438 on the market structure—in other words, monopoly, oligopoly or competitive markets); Ted R. Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HAST. L. J. 635, 638 (1996).

[41]Korobkin, *supra* note 5, at 1226.

[42]*Id.* at 1234; BAR-GILL, *supra* note 5, at 15.

[43]Cole, *supra* note 6, at 414 (noting skepticism based on behavioral law and economics as well as doctrinal views, yet arguing in favor of a more nuanced understanding of the economics of form contracts).

[44]This can be seen in the German literature on the issue, all major doctrinal reconstructions of contract law in the 20th century have dealt with this issue, finding that these are not real contracts. *See e.g.*, Werner Flume, *Rechtsgeschäft und Privatautonomie*, I *in* HUNDERT JAHRE DEUTSCHES RECHTSLEBEN - FESTSCHRIFT ZUM HUNDERJÄHRIGEN BESTEHEN DES DEUTSCHEN JURISTENTAGES 1860–1960 101, 145 (Ernst von Caemmerer, Ernst Friesenhahn, & Richard Lange eds., 1960);

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non-enforcement.[45] Although the information problem is often phrased in terms of benefits and costs of reading, it is not a problem solely posed, understood, or solved by the economic analysis of law.

Before continuing, some pruning of the terminology is required. On the one hand, in the American literature, the take-it-or-leave-it aspect of mass contracting is described under the term "contract of adhesion."[46] The term boilerplate, on the other hand, references the phenomenon of lengthy, pre-drafted and usually contractual text.[47] Current discussions focus on the issue of online consumer contracts, specifically regarding assent to arbitration clauses.[48] The German term Allgemeine Geschäftsbedingungen refers to pre-drafted and unchanged contract terms universally imposed by one party onto another, which follows from Section 305 German Civil Code. "Standard Business Terms" is the rather clunky but official translation of this statutory term, while General Terms and Conditions would be a more succint translation for international audiences. Both German terms not only span both the paper and the online world but—rather controversially—also cover wide ranges of business-to-business contracts.[49] The concept of a contract of adhesion may be wider than that of a modern wrap contract, with German terms ranging potentially wider still. Thus, to avoid getting bogged down with the devil in the details of whether principles perceived and restated for this situation also apply to the paper[50] or the business-to-business world, this Article will focus on online contracts which are offered to a large mass of consumers. These contracts are understood to contain the purest expression of the information problem, despite this issue having broader implications. Limiting the scope of examination does not imply that the information problem is necessarily limited to the online world or is even exclusive to the business-to-consumer-context.

B. The Legal Theorists' Response

From the perspective of legal theory, the alternative to this inconsistent approach is simple: Not considering boilerplate as contracts at all. Like most simple ideas, this one is not new. One may recall the famous passage in *Hennigsen v. Bloomfield Motors*, uttered nearly sixty-five years ago:

> The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole.

Manfred Wolf, Rechtsgeschäftliche Entscheidungsfreiheit und vertraglicher Interessenausgleich 231 (1970); Walter Schmidt-Rimpler, *Grundfragen einer Erneuerung des Vertragsrechts*, 147 AcP 130, 157 (1941). *C.f.* Peter McColgan, Abschied Vom Informationsmodell Im Recht Allgemeiner Geschäftsbedingungen 183–192 (2020).

[45]Rakoff, *supra* note 2.

[46]Patterson, *supra* note 3, at 222; Kessler, *supra* note 3.

[47]*See e.g.*, Radin, *supra* note 27, at 10; Omri Ben-Shahar, *Foreword Boilerplate: Foundations of Market Contracts Symposium*, 104 Mich. L. Rev. 821, 821 (2006).

[48]*See infra* note 151.

[49]See the monographies of Constantin Axer, Rechtfertigung Und Reichweite Der AGB-Kontrolle Im Unternehmerischen Geschäftsverkehr (2012); Felix Becker, Die gebotene Grenze zwischen AGB und Individualvereinbarungen im unternehmerischen Geschäftsverkehr (2011); Tobias Miethaner, AGB-Kontrolle versus Individualvereinbarung: Zweck Und Grenzen Der Inhaltskontrolle Vorformulierter Klauseln (2010); McColgan, *supra* 44, at 277. *See also* Lars Leuschner, *Gebotenheit und Grenzen der AGB-Kontrolle*, 207 AcP 491 (2007); Lars Leuschner, *AGB-Kontrolle im unternehmerischen Verkehr*, 65(18) JZ 875 (2010); Lars Leuschner, *Die Kontrollstrenge des AGB-Rechts - Empirische Belege für eine systematische Fehleinschätzung in der unternehmerischen Praxis*, 48 NJW 1222 (2016); Friedrich Graf v. Westphalen, *Wider einen Reformbedarf beim AGB-Recht im Unternehmerverkehr*, 62(41) NJW 2977 (2009); Friedrich Graf v. Westphalen, *Schwellenwert und Neuregelung einer vertraglichen Haftungsbegrenzung - Ist das der "Königsweg" einer Reform des AGB-Rechts?*, 36(28) ZIP 1316 (2015).

[50]Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of the Law of Consumer Contracts*, 32 Loy. Consumer L. Rev. 456, 480 (2019); Kim, *supra* note 4, at 61 (seeking to distinguish between the paper world and the online world).

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> But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position [. . .] Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds.[51]

In the U.S., the classic scholars have emphasized the disconnect between mass-contracts versus freedom of contract and the similarity between form contracts and legislation. Llewellyn noted that the form contract "[. . .] amounts to the exercise of unofficial government of some by others, via private law."[52] Kessler stated that "[f]reedom of contract enables enterprisers to legislate by contract".[53] Slawson notes that they are "privately made law".[54] Modern interlocutors have taken up this cause. Ben-Shahar has stated "[o]n a theoretical level, boilerplate is shown to be a legal phenomenon different from contract. Is it a statute? Is it property? Is it a product?"[55] Kim has stated that wrap contracts create their own laws.[56] Others have questioned whether boilerplate contracts are even contracts at all.[57]

The German law equivalent to the canonical passage of *Bloomfield Motors* originates from a speech of *Großman-Doerth* in 1933.[58] Standardized contracts are described as "self-created law of the economy" (*Selbstgeschaffenes Recht der Wirtschaft*). Following this idea, scholars influenced by a sociologist's perspective of law advanced a theory of norms (*Normentheorie*) that sought to describe boilerplate as ready-made de-facto statutes to which the recipient party subjected themselves to.[59] In this theory, boilerplate contracts are understood to be factually similar to legal norms. We find substantial overlap between the American and German perspective.

It may appear somewhat suprising then, that the German norm theory of standard form agreements was almost universally rejected in the second half of the 20th century, while in the United States, such descriptions have remained common. The explanatory memorandum on the law governing mass-contract form agreements expressly sought to establish these agreements firmly in the realm of contract, and thus rejected norm therory[60] Throughout the German

[51] *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960).

[52] Llewellyn, *supra* note 9, at 731; *c.f.* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) ("Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all.").

[53] Kessler, *supra* note 3, at 640.

[54] Slawson, *supra* note 32, at 530.

[55] Ben-Shahar, *supra* note 47, at 826.

[56] KIM, *supra* note 4, at 71; *c.f.* Eigen, *supra* note 36 at 233 ("With respect to form contracts, drafters are like de facto quasi-state actors.").

[57] Kim, *supra* note 18, at 88; Ben-Shahar, *supra* note 47, at 826; RADIN, *supra* note 27, at 197; Peter Linzer, *Contract as Evil Contract Law Present and Future: A Symposium to Honor Professor Charles L. Knapp on Fifty Years of Teaching Law*, 66 HASTINGS L. J. 971, 980 (2015); *c.f.* Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS, 145, 256 (Omri Ben-Shahar ed., 2007).

[58] *See generally* HANS GROßMAN-DOERTH, SELBSTGESCHAFFENES RECHT DER WIRTSCHAFT UND STAATLICHES RECHT (1933).

[59] *See generally* MCCOLGAN, *supra* 44, at 243.

[60] *See* Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT]7/3919, https://dserver.bundestag.de/btd/07/039/0703919.pdf (Jan. 22, 2021) (explaining that the overriding policy goal of the law is to restore contractual fairness when pre-drafted clauses are utilized:

> The primary legal policy objective of this draft law is to ensure the application of the principle of a fair balance of both parties' interests in the use of general terms and conditions (AGB) in commercial transactions, which, according to the fundamental ideas of the Civil Code, legitimizes freedom of contract. This freedom functions to create contractual justice by enabling the free negotiation of contracts between parties who are free and capable of self-determination in legal transactions. Consequently, the draft law aims at nothing other than restoring the function of private contract law, which has been disrupted by the unchecked development in the area of general terms and conditions (AGB).).

https://doi.org/10.1017/glj.2025.10137 Published online by Cambridge University Press

statutory provisions, pre-drafted terms are understood as contracts, albeit subject to heightened court scrutiny and special provisions on their inclusion into an agreement and application.

Thus, the contractual nature of boilerplate is handed down by law. A partial reason for this is that the idea of a unilateral legal norm outside of contract law was considered to be stooped in the civil law theory of national-socialist civil law reform. It is understood that the national-socialist approach to private law sought to establish the creation of other sources of law besides contract, due to its rejection of liberal individualism. Therefore, to many post-war commentators, the idea of creating law through other means than party autonomy and therefore liberal individualism, was seen as ideologically suspect to say the least. That being said, no German scholar has ever denied the highly diluted connection between mass contracts and party autonomy, but commentators ritually are obliged to locate form agreements firmly in the contractual realm. In German legal theory, although mass contracts are definitely contracts and not norms, it is clear that they are not akin to real contracts.

Given that the norm theorists viewed the law through the lens of sociology,[61] they were not academic navel gazers; rather, their approach was similar to that of the legal realists.[62] Thus the norm theorists, as do modern American theorizers, did more than fabulate on the nature of boilerplate, but rather raised specific demands on how the law should deal with standard form contracts. Like their modern American counterparts, norm theorists sought not only to describe the law, but shape it. They argued that due to their nature, form contracts should not be interpreted like regular contracts, in other words, by searching for the understanding of the parties, but rather under the principles of statutory interpretation.[63] Norm theory was also utilized to allow for increased scrutiny of these norms as to whether they created a just balance of rights and obligations between the parties. Finally, a duty to apply these norms in a non-discriminatory way was suggested.[64] Under German national law, most of these demands have been implemented through legislation in the year 1974, thus almost twenty years earlier than the EU Unfair Contract Terms Directive in 1993, which further established these in European law.[65] It could be said, that non–discriminatory application follows from general anti-discrimination law created in 2001. Despite its almost universal rejection, the demands of norm theory have largely been vindicated.

C. The Legal Realists' Response: The Information Model and the Control Model

Thus, the discussion about the nature of boilerplate is always a discussion about the instruments to be applied to their control. A legal realist would thus not focus on the legal or even metaphysical nature of boilerplate, but rather seek to analyze what remedies the law can offer for the information problem. These can be broadly categorized into two different approaches: the information model and the control model.[66]

I. The Control Model

The control model is simple: It subjects the terms agreed upon in the fine print to heightened court scrutiny. In the United States, the method for doing so is the doctrine of unconscionability.[67]

[61]HELLWEGE, *supra* note 10, at 213.

[62]Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1237 (2006) (highlighting this approach).

[63]*C.f.* Helmt Meeske, *Die "Unterwerfung" unter Allgemeine Geschäftsbedingungen*, BB 857, 860 (1959). *See generally* Choi & Gulati, *supra* note 57.

[64]Manfred Wolf, *Normsetzung durch Private Institututionen*, 28(8) JURISTENZEITUNG 229, 230 (1973).

[65]Directive 93/13 on unfair terms in consumer contracts, Art. 3, Art. 5, 1993 O.J. (L 95) 29 (EC).

[66]Restatement of Consumer Contracts Introductory Note, p. 1 (AM. L. INST. 2022) (discussing a similar distinction between "mutual assent" and "mandatory restrictions"). *See also* Bar-Gill, Ben-Shahar & Marotta-Wurgler *supra* note 6, at 92.

[67]*C.f.* Stephen J Ware, *Consumer Arbitration As Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 207 (1998) (explaining that both in Europe and the United States, general statutory provisions

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Following the seminal case of *Williams v. Walker Thomas Furniture Co.*,[68] unconscionability requires an "absence of meaningful choice" and clauses that are "unreasonably favorable" to the other party.[69] Unconscionability therefore has a procedural and a substantive element.[70] In Europe, pre-drafted contracts are subject to much greater court control than individual agreements. This follows from the EU Directive on Unfair Contract Terms. Not only does this ban unfair contract terms, in other words, terms that "contrary to the requirement of good faith, [cause] a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."[71] Additionally, the Directive provides a blacklist of terms that cannot validly be agreed in the mass-contract setting. The national laws of the Member States implement these requirements, and a grey list for which unenforceability is presumed. The threshold for court intervention is understood to be much lower than in the United States.[72]

II. The Information Model

The information model seeks to give consumers the necessary tools to make an informed decision. It can thus be described as the self-help model of consumer protection. Ideologically, these approaches seek to reconcile the idea of a free-market society based on liberal-individualism with the apparent market failures it produces. But instead of throwing out the market-economy-baby with the bathwater of command-and-control regulation, it is attempted to merely inform consumers—thus maintaining the benefits of a market approach and light-touch regulation. Although contract law focuses on creating a binding legal obligation, it imposes informational requirements on businesses in exactly the same way as an information mandate. In an ideal world, meaningful assent to a contract requires knowledge of the agreement. If it is not given, there needs to be some mental gymnastics to find a meaningful understanding of the agreement. Viewing contract law in this way allows a connection to the global legal discussion on the role of information mandates in regulating business practices. This debate borders on religious conviction and spans the true disciples sitting in lawmaking commissions, reformers, who seek to save the information gospel by reinterpretation in smart disclosure[73] or other nudges,[74] to heretical sceptics.[75] Although some have sought to frame this discussion as policy-neutral, it should be apparent that the information model has always contained a clear view on how economies should operate.[76] That being said, sometimes the information model is advocated not

limit freedom of contract in order to protect consumers and to regulate certain industries, while these provisions meaningfully curtail freedom of contract, they do so irrespective of the form of contracting and are thus not explored in this examination).

[68] *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

[69] *C.f.* David Horton, *Unconscionability Wars Colloquy Essay*, 106 NW. U. L. REV. 387, 297 (2012); Dov Waisman, *Preserving Substantive Unconscionability Nancy Kim's Wrap Contracts Symposium*, 44 SW. L. REV. 297, 298 (2014); KIM, *supra* note 4, at 87 (discussing a more detailed explorations of the case law and standards).

[70] RADIN, *supra* note 27, at 125.

[71] Directive 93/13 on unfair terms in consumer contracts, Art. 3, 1993 O.J. (L 95) 29 (EC).

[72] Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants*, 62 THE BUSINESS LAWYER 209, 217 (2006).

[73] *See generally* BAR-GILL, *supra* note 5; Oren Bar-Gill & Oliver Board, *Product-Use Information and the Limits of Voluntary Disclosure*, 14 AM. L. & ECON. REV. 235 (2012); Oren Bar-Gill, *Defending (Smart) Disclosure: A Comment on More than You Wanted to Know*, 11 JERUSALEM. REV. L. STUD. 75 (2015); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1028 (2011).

[74] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE : IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[75] OMRI BEN-SHAHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Omri Ben-Shahar & Carl Schneider, *Coping with the Failure of Mandated Disclosure*, 11 JERUSALEM. REV. L. STUD. 83 (2015).

[76] Kim, *supra* note 50, at 467 (proposing that the "shrinkwrap" cases, meaning ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), and Hill v. Gateway, 105 F.3d 1147 (7th Cir. 1997), were based on the ideology of the Law & Economics

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out of ideological but practical reasons, in other words, that it is the second best, but politically achievable form of control.

The main expression of the information model in mass-contracting is the issue of term adoption or "manifestation of assent", as referred to in U.S. contract law. As stated in the Restatement of Contracts: "The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and consideration."[77] Term adoption sets informational requirements for a clause to be considered as agreed upon between the parties, in other words, part of the contractual agreement. In the United States, these issues have garnered growing attention under the many forms of wrap contracts.[78] Shrinkwrap poses the question whether there is sufficient information about the content of an agreement if the agreement is packaged inside the shrink-wrapped box of a product. Using this image, clickwrap poses the question of sufficient notice in the online marketplace if contract terms are accepted by clicking a checkbox.[79] Browsewrap poses the same question, yet simply for the issue of whether scrolling through a wall of text is sufficient notice.[80] Despite their conceptual origins as expansions of shrinkwrapping contracts, online wrap contracts do not actually wrap anything at all. Rather, the judicial and academic debates on term adoption are mainly concerned with the design of information provision on the internet. The information model can accurately be described as a checkbox model or a user interface model.

Recently, in U.S. discourse, the requirements for term adoption have been restated in § 2 of the Restatement of the Law of Consumer Contract.[81] § 2(a) of the Restatement of the Law of Consumer Contracts requires notice, opportunity to review, and assent.[82] § 2(b) of the Restatement of the Law of Consumer Contracts loosens the grip of these requirements.[83] This section allows for the adoption of terms available for review only after the contract is concluded, if there was reasonable notice to the existence of the standard contract term, a reasonable opportunity for review is given at a later time and the consumer may terminate the transaction without unreasonable negative effects.

In the European Union, term adoption is an issue of national law, as the European Directive on Unfair Contract Terms in Consumer Contracts provides few specifics regarding the informational design of mass-contracts. The requirements of § 2(a) of the Restatement of Consumer Contract Law will be familiar to German lawyers. In Germany, boilerplate term inclusion is governed by the BGB, which similarly requires a notice, an opportunity to review the terms, and assent to these terms.[84] Although much older, German law therefore mirrors this part of the Restatement, yet does not provide the additional leeway of § 2(b) of the Restatement of the Law of Consumer

movement); Anne-Lise Sibony, *European Unfairness and American Unconscionability: A Letter from a European Lawyer to American Friends Special Issue on the ALI Restatement on Consumer Contract Law from a European Perspective*, SSRN DATABASE, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3351083 (finding there to be a pro-marketed orientation of EU Consumer Law).

[77]Restatement (Second) of Contracts § 17 (Am. L. Inst. 1981).

[78]Nancy S. Kim, Juliet M. Moringiello & John E. Ottaviani, *Notice and Assent through Technological Change: The Enduring Relevance of the Work of the ABA Joint Working Group on Electronic Contracting Practices 75th Anniversary Articles*, 75 BUS. LAW. 1725, 1731 (2019) (noting that "the number of electronic contracting formation cases is unsurprising, given the explosion of electronic commerce and the ubiquity of contract terms online."). *See also* KIM, *supra* note 4.

[79]*C.f.* Christina L. Kunz, Maureen D. Del Duca, Heather Thayer & Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent Survey*, 57 BUS. LAW. 401, 402 (2001); KIM, *supra* note 4, at 36.

[80]*C.f.* Christina L. Kunz, John E. Ottavini, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements Survey*, 59 BUS. LAW. 279, 280 (2003).

[81]*C.f.* Restatement of Consumer Contracts § 2(a) (Am. L. Inst. 2022).

[82]*Id.* at § 2(b).

[83]*See* Hoffman, *supra* note 16, at 1387 (stating that the Restatement de-emphasizes "the importance of active consent to terms."). *See also* Kim, *supra* note 50, at 457 (criticizing this restatement as engaging in "ideologically motivated rule-making.").

[84]Bürgerliches Gesetzbuch [BGB] [Civil Code], § 305, para. 2 (Ger.).

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Contracts. Beyond term adoption, an additional information requirement arising from European law, is that the terms must be intelligible and contain no surprising clauses.[85]

III. Information and Control in the U.S. and Europe

Given the universal nature of the information problem, it is not surprising that the legal frameworks in the U.S. and Europe are somewhat similar. Yet, there are two important differences. The first is a difference in emphasis. Although it is difficult to measure, there seems to be a much stronger focus of U.S. jurisprudence on issues of assent. Sibony has articulated the uncontroversial intuition that "US law seems to trust markets more and EU law seems to trust courts more."[86] It would follow, that the Europeans would focus more on the control model, Americans more on the information model. This shows in the fact that U.S. jurisprudence provides an unerring mass of high-profile cases which deal with term adoption on the basis of the wrap-principles. Compared to this wealth of jurisprudence, Europeans are paupers. Contracts rarely fail the inclusion test, and it is treated as a formality. This is not to say, that the European approach has not affection for checkbox design. Yet in the context of form contracts, the requirements are seen as a hoop to jump through—rather than as safeguards of contractual equity.

This difference is also evident in the academic sphere. In the U.S., issues of term adoption are controversial. Recently, the shrinkwrap line of jurisprudence has come under fire, for undermining the requirement of assent provided outlined in Section 2-207 (2) UCC.[87] The Restatement of the Law of Consumer Contracts has also come under substantial criticism.[88] Much of which is centered around the concept of assent in Section 2 of the Restatement. In Germany there has not been significant activity to this effect. Section 305 BGB, which stipulates the requirements of term adoption in standard form contracts and thus would govern the equivalent wrap scenarios, has been the subject to almost no academic interest.[89] The provision of assent is not understood to be of any importance and assent is routinely construed to have been given tacitly if there was sufficient notice. Curiously, the requirements of notice, opportunity to review and—implied—assent have come under criticism as subverting contract law in the U.S.[90] In the German context these very requirements were viewed as establishing mass contracts as contracts.[91]

[85]Bürgerliches Gesetzbuch [BGB] [Civil Code], § 305, para. 2 (Ger.). The German law draws a distinction between the term adoption ("*Einbeziehung*") and the validity of the term ("*Wirksamkeit*"). Lack of an opportunity to review the terms bars term adoption, whereas a lack of transparency makes the clause invalid. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 307, para. 1 (Ger.).

[86]Sibony, *supra* note 76, at 212.

[87]Kim, *supra* note 50, at 469.

[88]*See generally* Kim, *supra* note 50; Adam J. Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts Essay*, 36 YALE J. ON REG. 447, 458 (2019); Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45 (2019); Melvin A. Eisenberg, *The Proposed Restatement of Consumer Contracts, if Adopted, Would Drive a Dagger through Consumers' Rights*, NOTICE & COMMENT (Mar. 20, 2019), https://www.yalejreg.com/nc/the-proposed-restatement-of-consumer-contracts-if-adopted-would-drive-a-dagger-through-consumers-rights-by-melvin-eisenberg/.

[89]Only three publications have dealt with modifications to term adoption recently: Dimitrios Linardatos, *Die Einbeziehung von AGB Im Digitalen Rechtsverkehr Mit Verbrauchern*, JZ 1097 (2020) (calling for a more restrictive approach, somewhat akin to specific assent); MCCOLGAN, *supra* 44, at 145-274; Peter McColgan, *Welchen Sinn hat die Einbeziehungskontrolle, wenn ihr Regelungszweck völlig verfehlt wird? Zu Linardatos, Einbeziehung von AGB im digitalen Rechtsverkehr mit Verbrauchern*, JZ 827 (2021) (arguing in favor of liberalizing the information mandates provided by contract law).

[90]Kim, *supra* note 50, at 471.

[91]Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen[BT]7/3919, https://dserver.bundestag.de/btd/07/039/0703919.pdf, (stating that

> § 2 of the draft wants to ensure that the inclusion of general terms and conditions in the individual contract is again firmly anchored on the basis of the legal contractual intent relevant under the German Civil Code, without, however, setting requirements which, contrary to the legitimate rationalization function of general terms and conditions, unnecessarily hinder legal transactions, especially in mass transactions of everyday life (McColgan Trans.)).

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Another major difference is the existence of a separate legal framework for issues of data collection in Europe, specifically the GDPR. In the U.S. the issue of consent to data collection and usage, in other words the assent to privacy notices and policies is routinely framed as contractual.[92] In Europe, it is viewed as consent to an infringement of a right to personally, akin to consent to medical treatment. Again, legal theory argues whether these consent declarations are of contractual nature or not.[93] But what matters is that they are subject to an entirely different and fully harmonized framework, in other words the EU GDPR. The boundaries between GDPR and contract law are often murky.[94] Thus, although the European Court of Justice loves to rule on the design of checkboxes, and app design, it usually does so outside of contract law.[95]

IV. The Interplay between Information and Control

Before evaluating the pros and cons of these models, it is important to understand their interplay. Both the information model and the control model respond to a limitation of freedom of contract. Mass-contracts do not live up to the lofty ideal of well-informed contractual self-determination. The information model thus seeks to create this ideal, or at least a mirage of it. The control model by contrast uses the failure of freedom of contract to legitimize court control. Because the ideals of freedom of contract are not met, the courts are granted far greater leeway in content control.

A closer look at the dynamics shows that the control model and the information model are mutually exclusive. If the information model succeeds, it delegitimizes the control model. If a person were well-informed enough for their declaration to be viewed as a pure—or pure-ish—expression of freedom of contract, then a court deeming the reached agreement to be unfair or unconscionable would be nothing more than pure paternalism—or the less common gender neutral phrase parentalism.[96] Although such a "welfarist"[97] approach is not outside the academic or political spectrum, it requires different justification than a simple failure of freedom of contract. This connection seems intuitive to the American lawyer, because procedural unconscionability effects material unconscionability. For the European approach, this is less obvious. This is due to the fact that the procedural elements, in other words the procedural breakdown of contracting, are viewed as a separate requirement to term control itself. In German law, one must first determine that: (a) The term in question is actually an adopted standard business term before (b) subjecting it to heightened scrutiny. Thus, procedural elements of term adoption just open the gates to the kingdom of control, but do not seem to govern that kingdom at all. Despite this, in the European context it is equally universally acknowledged that term control follows from a failure of freedom of contract. If this failure were remedied, it would logically lack a basis. Put simply, contract terms are controlled, because they are not read. If they are read, then why control them?[98]

[92]*See e.g.*, KIM, *supra* note 4, at 74; RADIN, *supra* note 27, at 177; Bakos, Marotta-Wurgler & Trossen *supra* note 1, at 5.

[93]*C.f.* PHILIPP HACKER, DATENPRIVATRECHT: NEUE TECHNOLOGIEN IM SPANNUNGSFELD VON DATENSCHUTZRECHT UND BGB 348-369 (2020).

[94]Peter McColgan, *Die Inhaltskontrolle von Datenschutzerklärungen ist keine Inhaltskontrolle*, 221 ACP 695, 705-716 (2021) (arguing that there is no coherent understanding of the interplay between the GDPR and the Unfair contract terms directive).

[95]*See e.g.*, C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherbände — Verbraucherzentrale Bundesverband eV v. Planet49 GmbH, ECLI:EU:C:2019:801, para. 44-65 (Oct. 1, 2019) (adressing whether a pre-ticked checkbox declares consent under Art. 6 I lit. a GDPR); C-252/21, Facebook Deutschland GmbH v. Bundeskartellamt, ECLI:EU:C:2023:537, para 150 (July 4, 2023), (holding that assent can only be given a social media platform with market power, if that platform also offers to provide its services for a fee instead of data collection).

[96]*C.f.* Stephen J. Ware, *Paternalism or Gender-Neutrality?*, 52 CONN. L. REV. 537, 546 (2020) (stating that the phrase paternalism is not gender neutral and should therefore be eschewed in favor of the gender neutral *parentalism*, unless emphasizing the importance of gender).

[97]Sibony, *supra* note 76, at 213.

[98]Murray, *supra* note 4, at 270 (raising a similar point, "[t]he whole notion of courts "policing" contracts for egregiously unfair (though not fraudulent or mistaken) terms was difficult to assimilate in light of the fundamental duty to read rubric.").

https://doi.org/10.1017/glj.2025.10137 Published online by Cambridge University Press

The reverse relationship is less obvious. The efficacy of term control takes away the necessity of the information model. If terms are controlled *because* there is a failure of freedom of contract, then why make efforts to safeguard freedom of contract *at all*. If clauses are controlled, why must there be opportunity to read and notice? Put simply again, contract terms are controlled because they are not read. Why should we try to design them in a way, which allows them to be read? Therefore, we can establish that the more control exists as to the content of an agreement, the less control needs to exist with regard to information.

This has repercussions for the ideological underpinnings of contract. As mentioned above, the information problem in mass contracts can be described through the instrument of economic analysis, but is also understood by doctrinal approaches. Once we get to curing the disease, the approaches taken may matter. On the one hand, for the law and economics approach, the exclusivity of the information model and the control model is especially stark. Unless one argues with behavioral biases or some other rationality defect, term control cannot be rationalized economically, if the information model works.[99] On the other hand, an information model that does not work cannot promote efficiency. Thus, the law and economics approach has a hard time rationalizing that the law implements both models. This is due to the fact that law and economics is built on a consequentialist and therefore outcome-oriented approach. Conversely, approaches which view contract as a procedural tool for the expression of freedom may have less issue with rationalizing that the requirements for self-determination need to be given, even if they are not used. That being said, this point is still a somewhat pyrrhic victory for skeptics of law and economics. Term control is rationalized throughout doctrinal approaches with a breakdown of the process of bargaining. Theorizing that this *potential bargaining* is important in light of a universally accepted breakdown of bargaining seems strange. It calls those approaches into question.

V. Mass Contracts without the Information Model

We have seen that the information and the control model seek to combat the same problem, but are mutually exclusive on a theoretical level. Where the information model fights fire with fire, the control model fights fire with a ban on fire. Which model works better against the information problem is an empirical question. How informed are consumers about contract terms? The evidence suggests low readership rates, even if they are not zero.[100] That being said, there is a broad consensus that the information model is ineffective. We have also seen that the information model is tied up with the idea of contractual self-determination. Yet at the same time it is common in the literature to view standard form contracts as something less than contracts, more like laws, making the link between contractual self-determination and mass contracting seem less essential. Thus, the rational response would seem to be to abandon the information model altogether. We will explore how such a system could work and what advantages it could bring.

1. Shifting the Needle of Self-Determination

Neither German law nor United States law fully commits to either the information or the control model, but rather uses a combination of both information mandates and court control.[101] Instead of taking a strict "either information or control" approach, it is more apt to view information and

[99]Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine: Usury Laws, and Related Limitations to the Freedom of Contract*, 24 J. L. STUD. 283, 285 (1995) (arguing that the states' enforcement of contracts has not one, but two goals: To maintain a free market and to reduce poverty. This secondary goal is then used to describe an economic rationale of the unconscionability doctrine.). This discussion however does not intersect with the idea of a failure of the information model, as unconscionability, which Posner provides an economic rationale for, is a part of the control model.

[100]*See generally* Hillman, *supra* note 1; Becher, *supra* note 1; Plaut & Bartlett, *supra* note 1; Schmitz, *supra* note 1; Pogrund & Choplin, *supra* note 1; Bakos, Marotta-Wurgler & Trossen, *supra* note 1; Marotta-Wurgler; Zamir & Farkash, *supra* note 1.

[101]Restatement of Consumer Contracts § 2, § 6 (Am. L. Inst. 2022)

https://doi.org/10.1017/glj.2025.10137 Published online by Cambridge University Press

control to be complementary, in other words, each being able to compensate the shortcomings of the other. Although this of course expresses the same thing but inside-out, it allows us to view contractual self-determination and non-consent-based statutory obligations as two extremes on a sliding scale. Unless we are at the extreme ends, we are always looking at a blend of contractual-self-determination and non-consent-based obligations. German judgements influenced by norm theory argued that a ready-made statutory order could not create obligations for another person ipso iure, but rather that the recipient had to make a declaration of submission, which was a declaration of will.[102] Thus, finding boilerplate to be akin to norms rather than contracts is not an extreme departure from the status quo, but a slight shift of the needle on the sliding scale. In a recent publication, Kim has proposed a taxonomy of adhesive agreements,[103] filling out the sliding scale. If the only tool available is a hammer, every problem must be considered a nail. If the only way for parties to create legal obligations is through contract, every obligation requires a contract. Given that there is universal consensus on the realities of online mass contracts, the question remains where they fit on the spectrum between individual and collective rule making. When we seek to abandon the legitimacy created through the information model, we shift the needle towards the more collective spectrum.

2. An Issue of Constitutional Rights?

That does not mean to say that the needle can be placed at will, rather the use of the information model is dependent on preferences, politics and ideology. In some areas of life and law, the information model is a quasi-ethical necessity. There are certain decisions that are so bound up with personhood and respect for basic rights, that there is very little choice but to have them be made by the individual, even if this individual might not reach, or could ever reach, the standard of rationality and informedness that such a decision should reasonably require, they must make the decision anyway as best they can. A textbook example of such decisions would be consent given to medical treatment, or a determination about post-mortem organ donation. It is assumed that given the necessary information, a person can make the correct determination about their own body. Even if there were evidence to the contrary, namely that people neither read nor understand even the simplest surgery disclosures, there seems little alternative but to using the framework of self-determination to justify putting scalpel to skin. Yet again, these scenarios show the inverse relationship between information and content-control. If a person has informedly objected to post-mortem organ donation, it would be very difficult to control whether this decision was fair, just, or conscionable. It would be unclear against what baseline the decision could even be measured. This shows that informed consent is a normative necessity in many contexts. However, it is argued here, that mass contracts, specifically dispute resolution clauses, are not one of them.[104]

The argument could therefore be made that if human rights are involved, the information model always becomes a normative necessity. Such a strong inference is unfounded, as many contract law disputes can be framed as an issue of human rights. This includes the issue of

[102]*See* Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 19, 1951, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 1, 83, 85 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 10, 1951, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 3, 200 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 2, 1953, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 9, 1 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 1976, Neue Juristische Wochenschrift [NJW] 2075 (1976) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 6, 1990 Neue Juristische Wochenschrift Rechtsprechungs-Report [NJW-RR] 570-71 (1991) (expressing this jurisprudence, although it is disputed).

[103]Kim, *supra* note 18, at 109 (stating the difficulty in judging "how much consent is necessary for there to be valid consent"). *C.f.* Ware, *supra* note 4, at 34 (mapping the consent requirement for arbitration clauses to the political spectrum between very progressive, moderate, and very conservative).

[104]Douglas G. Baird, *The Boilerplate Puzzle*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 131, 138 (Omri Ben-Shahar ed., 2007) (expressing a similar view); *c.f.* Ware, *supra* note 4, at 34 (for an examination of consent to arbitration clauses through the lense of political preferences).

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consumer arbitration.[105] German law can give some, possibly cautionary, insight on the role the control model can play in human rights issues, as it has great experience with phrasing civil law disputes as clashes of human rights. Germany follows the Kelsenian System of having a separate constitutional court which may overturn decisions by all other courts if, and only if, they violate constitutional rights. Thus, many higher level court decisions are written with a view to constitutional meaning human rights review. A prime example of this is the 2021 decision by the Federal Court of Justice regarding the removal of a user post on Facebook.[106] In evaluating whether the removal was justified due to a violation of Facebooks anti-hate-speech policy, the court had to decide if and how large social media platforms may regulate speech through user policies, which are considered standard form contracts. It is clear that this is a matter with significant effect on the exercise of free speech, a fundamental constitutional right, which the court expanded on at length. It applied the control model, with a view to constitutional rights. Yet despite the huge impact of the decision on how an algorithmic-democratic society functions, the information model demanded that the court had to lead Facebook through the hoops of term adoption and analyze the design of the checkbox, that the hate-speech spouting user had clicked when creating his account. After all, they could not be bound by speech regulating policies, without sufficient assent. In a case like this, focusing on the form of contracting, rather than the content, verges on the bizarre. The constitutional weight of the case bulldozes through any impact of whether the policies in question were read, pre-drafted, clicked eccetra. What if the user had not actually clicked the checkbox, or the browsewrap was defective in some technical aspect? Would this make us more or less comfortable of with allowing hate speech on Facebook? While in some contexts, human rights issues may require the use of an information model, in other contexts the use of the information model borders on the absurd.

D. World without Boilerplate

Against this backdrop, in a world without the information model, we assume that a business may unilaterally set terms in an online mass contract setting. The requirements for this are that there is some basic form of contractual agreement, thus providing an anchor for the creation of legal obligations. This core bargain is what the Restatement of Consumer Contract has called "the dickered terms" in reference to Llewelyn.[107] Yet if an online contract is concluded, abandoning the information model assumes that this contract is governed by "invisible"[108] terms. While Rakoff argued that the invisible terms should not be valid without affirmative justification,[109] and recently Hoffman has advocated a battle against the empire of forms by enforcing only contracts subject to market discipline,[110] my goal here is the opposite; in other words, to make these invisible terms as invisible as possible. The invisible terms govern the transaction without notice or assent, as a pure expression of unilateral rulemaking. They are invisible, yet adhesive to the dickered terms.

If the contract terms do not need to be clicked, checked, or browse-wrapped, how can interested parties learn the scope of their rights and obligations? And more importantly, beyond the interest of contract aficionados, how can a court determine what was actually agreed upon? The answer for the courts is the same as under current law: Interpretation of party conduct and the burden of proof. If a party seeks to rely on a standardized wording, it must prove that it was its

[105]Kim, *supra* note 18, at 145; RADIN, *supra* note 27, at 16 (expressing a similar approach).

[106]Bundesgerichtshof [BGH] [Federal Court of Justice] Jul. 29, 2021 Neu Juristische Wochenschrift [NJW] 3179 (2021) (Ger.).

[107]Restatement of Consumer Contracts Introductory Note, p. 4 (AM. L. INST. 2022); Llewellyn, *supra* note 9, at 706; LLEWELLYN, *supra* note 52, at 370.

[108]Rakoff, *supra* note 2, at 1251.

[109]*Id.*; *c.f.* Rakoff, *supra* note 62.

[110]Hoffman, *supra* note 16 (arguing that boilerplate production has become to cheap and thus too ubiquitous. His approach is in effect to make low stakes written form contracts unenforceable); *c.f.* Linardatos, *supra* note 89 (suggesting a similar approach under German law); *contra* McColgan, *supra* note 89.

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common and indiscriminate practice to use the term sheet in question for contracts of this type. As not to deprive consumers of information, this contract must be easily found on the website of the business. This obligation would go beyond the current practice of having a section for "terms and conditions." Rather the different versions of contracts would need to be accessible allowing consumers to find "their contract." However, the obligation would exist in the abstract, not in the context of each and every transaction. For large companies with a plethora of fast-changing services, this would create an online archive similar to the archives commonly found for user manuals. This obligation will actually make it easier for consumers to become aware of their rights. Think of this: If you want to re-program your robot vacuum, is it quicker to look for the manual in a dusty box in the attic, or to simply find the PDF document through a search engine? The same is true for contracts.

It shall not be overlooked that there may be a generational element at play here. Note however that the dusty box in the attic is somewhat metaphorical, as in the online space the comparison would be finding terms on a website or finding them in some documentation received in an email in the browsewrap process. In this context, finding the terms through a search engine is clearly easier, indifferent of age.

I. Advantages of a World without Boilerplate

1. Breaking the Information Bottleneck

The information model creates an information bottleneck at the time of contracting. Yet for any information mandate to be effective, or daresay smart, it needs to provide the information at the most relevant and opportune point in time. The information model cannot accommodate this, because it ipso iure needs to inform the recipient *before* contract formation. It is obvious that this is not the best point in time to inform consumers about their rights and obligations. At this point in time, it is very unlikely that any of the provisions will ever become relevant. Barnhizer has correctly pointed out that, "the time of contracting is not the best moment for promoting the ability of adherents to affect the terms of their transactions or to protect themselves against predatory or pathological contract terms."[111] This is different if a conflict has already materialized.

The information model seeks to facilitate an informed decision on contracting, rather than mandating intelligible disclosure on the rights and obligations of parties at the moment those rights and obligations become relevant. It is argued, however, that the second goal might actually be achievable through information mandates. If and when a dispute has arisen, businesses can and should be hit with the full arsenal of smart disclosure. Focusing on this later point in time will be infinitely more fruitful than providing information when most people are simply not interested. Of course, this ex post contract information does not prevent harmful terms. If a person is told after the fact that they have sold their soul to the devil, it will be of little solace that the notice is easy to understand. Therefore, it has to be re-emphasized that abandoning the information model is suggested in conjunction with strong term control.

Beyond the bad timing of the information, the design, language, and content of contracts are equally unfit for the purpose of informing consumers about their rights. Ex post contractum information grants more license in these aspects. It does not need to communicate all contract provisions or structure them into legalese contract clauses. Rather, certain scenarios can be determined, and the relevant rights —whether they are arising from the agreement itself, precedent, or statute— can be explained. By contrast, writing a contract that explains the most common scenarios bit by bit would create unmanageable contract length. Ex post contractum this is not an issue. The user can select the scenario relevant for them, and ignore the rest. Note also that the contractual information on liability is often incomplete, as a contract need only contain the information that deviates from the legal framework. You cannot understand what a waiver of

[111]Barnhizer, *supra* note 15, at 216.

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liability means if you don't know the rules for liability in the first place.[112] Finally, the contractual text might not actually represent the real deal at all, but rather a paper deal which is routinely changed in ex post bargaining.[113] This can be disclosed ex post contract.

Abandoning the information model seeks to fundamentally change the relationship between the contractual document and information mandates. Dropping the information model means dropping contractual documents as sources of consumer information. Think of the contract as a source code of a program, the resulting information as the program's interface. The consumer does not need to understand the code, if the program is easy to use. Dropping the information model would allow for such approaches. Contracts themselves could remain legalese, as long as their corresponding information materials are not. Under European Law, Article 5 Unfair Contract Terms Directive requires terms to be transparent—in other words, that consumers are able to foresee the economic consequences of a given term.[114] Transparency is supposed to allow consumers to understand their contractual rights, which requires transparency to exist before contract formation and during performance.[115] Beyond the information model, it would be sufficient if the contractual information presented at the point of an issue is understandable to the consumer. If the explanations provided to consumers are transparent, the contract itself need not be.

2. Courts Should Focus on Material, not Formal Decisions

Reducing the importance of the information model focuses judicial decision making on the material rather than the formal aspects of the case. If courts have fewer procedural tools, for example, questions of term adoption, at hand, they will need to rely on material control more. Take the issue of consumer arbitration. A real benefit for consumers comes to exist, if the law focuses on how and to what extent businesses may refer their customers to arbitration, and which procedural safeguards need to exist for consumer arbitration being a de facto default in mass contracts. This is done by taking attention away from the examination of whether the business in question has jumped through the correct hoops of contract inclusion.

The interplay between formal and material methods of term control can be seen in the jurisprudence on GDPR. As shown above, in German contract law, term adoption is not a major issue, but emphasis is given to term control. The opposite is true for consent under GDPR. The reason for this is that content control of privacy policies and consent declarations is not well developed and commonly misunderstood under GDPR.[116] The GDPR provisions do not mention term control at all. The Unfair Contract Terms Directive with its term control is only referenced in Recital 42, not in the actual statue. The recitals are merely guidelines to inform teleological application of European Law.[117] Courts are thus left with a vague feeling that term control is

[112]Cole, *supra* note 6, at 426 (referencing Hadley & Anor v Baxendale & Ors [1854] EWHC (Ch) 70) (arguing that the deviation from the default rule communicates the contents of the legal rule, on the basis of Fedex Standard Terms deviating from the default rule from *Hadley v. Baxendale*). This is however not always the case. Many contracts contain clauses re-emphasizing existing legal frameworks, making the disction unclear. It is also only true, if the phrasing of the deviating contract clause mirrros the default. The broader and less specific the disclaimer, the less of such an effect can be hypothesized to exist. *Id.*

[113]*See* Lisa Bernstein & Hagay Volvovsky, *Not What You Wanted to Know: The Real Deal and the Paper Deal*, 12 JERUSALEM. REV. L. STUD. 128, 130 (2015). *See generally* Jason Scott Johnston, *Cooperative Negotiations in the Shadow of Boilerplate*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 12, 14-17 (Omri Ben-Shahar ed., 2007).

[114]*Cf.* Cases C-84/19, C-222/19, C-252/19 Profi Credit Polska SA and others v QJ and others, ECLI:EU:C:2020:631, para 73 (September 2020).

[115]Jacobien Rutgers, *Business First. A Comment on the Adoption of Standard Terms under the American Restatement of the Law Consumer Contracts from a European Union Perspective*, 15 EUR. REV. OF CONTACT L. 130, 135 (2019).

[116]McColgan, *supra* note 94, at 710.

[117]*C.f.* Bernhard W. Wegener, *TFEU Article 19 [Court of Justice of the European Union]*, *in* EUV/AEUV, DAS VERFASSUNGSRECHT DER EUROPÄISCHEN UNION MIT EUROPÄISCHER GRUNDRECHTECHARTA (Christian Calliess & Matthias Ruffert eds., 2011).

https://doi.org/10.1017/glj.2025.10137 Published online by Cambridge University Press

possible under the Unfair Contract Terms Directive, but its application and legal source are unclear. Rather than entering these murky waters, they focus on the clear formal hoops for consent from the GDPR.

The ECJ's focus on formal aspects can be seen in the decision regarding Meta's data collection practices.[118] The Court had to determine whether Facebook's much-criticized tracking of users over the entire internet through tracking cookies and other instruments, and Meta's practice of combining Facebook user data with accounts of other services like Instagram, and WhatsApp was compliant with GDPR.[119] The privacy policies, on which GDPR consent is based, are of course read no more than form contracts. Therefore, term control under the Unfair Contract Terms Directive would have allowed the Court to focus on whether practices of tracking in exchange for a free service are, all in all, a fair deal.

This did not happen. The Court ruled that the consent provided in the privacy policies could only be valid if Facebook offered an alternative service not based on data collection—in other words, for a fee.[120] In lieu of such an alternative, consent was not valid. The court is thus again preoccupied with maintaining the requirements of a meaningful decision, rather than reflecting the breakdown of the information model in this context. Recall that under Article 3 EU Unfair Contract Terms Directive a clause is "unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."[121] Focusing on the choice a consumer has in regard to clauses that they most likely did not read does not inform this standard. Therefore, the core issue is ignored, while details of choice architecture and user interface design are emphasized. As to the fairness of the core bargain struck in any use of online social media—personal data for social media services—we are still none the wiser.

3. Court Mandated User Interface Design is Bad Design

The design of digital user interfaces should be left to designers, not the courts. Designing digital user interfaces and experiences with a view to legal requirements of contract law, makes these interfaces and experiences significantly worse. If a camel is a horse designed by a committee, it should not be surprising that app UI designed by contract law comes with a few extra bumps. European readers will be familiar with the now ubiquitous cookie banners, while the contractification of the online world means that a large number of web services now require some form of sign in. Without evaluating the efficacy of cookie banners to improve privacy, they cannot be said to have improved the user experience of the internet. Undoubtedly, these banners have some effect on the expressed preferences for data collection, otherwise companies would not employ methods to affect consumer choice.[122] Yet they also annoy people by interrupting natural browsing.[123] Additional checkboxes make sign-ups more cumbersome and browsewraps take unnecessary time to scroll through. Individually, these detriments are miniscule, but one must be wary of a death by a thousand cuts.

[118]C-252/21, Facebook Deutschland GmbH v. Bundeskartellamt, ECLI: EU:C:2023:537, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 2023, 1131 (July 4, 2023).

[119]Case C-252/21, Meta Platforms Inc. and Others v. Bundeskartellamt, ECLI:EU:C:2023:537, ¶ 28 (July 4, 2023) (alternatively available in the 2023 publication of Gewerblicher Rechtsschutz und Urheberrecht [GRUR], page 1131).

[120]*Id.* at ¶ 150 (alternatively available in the 2023 publication of Gewerblicher Rechtsschutz und Urheberrecht [GRUR], page 1143).

[121]Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, art. 3, 1993 O.J. (L 95) 29 (EC).

[122]Soheil Human & Florian Cech, *A Human-Centric Perspective on Digital Consenting: The Case of GAFAM*, *in* Human Centred Intelligent Systems 139, 189 (Alfred Zimmermann, Robert J. Howlett, & Lakhmi C. Jain eds., 2021).

[123]*See generally* Nurullah Demir, Tobias Urban, Norbert Pohlmann & Christian Wressnegger, *A Large-Scale Study of Cookie Banner Interaction Tools and Their Impact on Users' Privacy*, *in* Proceedings on Privacy Enhancing Technologies 1 (2024); Oksana Kulyk, Annika Hilt, Nina Gerber & Melanie Volkamer, *"This Website Uses Cookies": Users' Perceptions and Reactions to the Cookie Disclaimer*, Conference Paper presented at 3rd European Workshop on Usable Security (EuroUSEC) 4 (2018).

https://doi.org/10.1017/glj.2025.10137 Published online by Cambridge University Press

4. Legal Certainty and Flexibility

Leaving the information model behind creates legal certainty or more precisely, it reduces the cost to attain it.[124] The information model puts organizational and financial costs on businesses, which need to attain legal sign off for every form of term inclusion. Think of all the unnecessary boilerplate printouts, signs, and checkboxes which populate our lives. This is even more pronounced, if the law of term inclusion is under constant flux as it is in the United States, which can be especially poignant if one focuses more on information than control. Under U.S. jurisprudence, the issues of term inclusion require significant thought. Of course, sophisticated players like Uber, Meta or Samsung are able to navigate these obstacles. Yet this sophistication incurs unnecessary costs.

Beyond this, the information bottleneck created by the fiction of consent is a barrier for new and innovative methods of contracting, all of which must go through the process of courts establishing the requirements for the new kind of wrap. The information model is especially restrictive in contract formation that is not text based. Consider the Amazon Dash Button, a now discontinued little button which consumers could put in their cupboard next to the laundry detergent, which would order additional detergent and other everyday consumables on Amazon at the push of the button. It seems clear that consumers–having purchased and installed this button–would understand its workings and the following contractual obligations. Yet the Amazon Dash Button was ruled by a German court to violate information mandates on consumer contracting.[125] This shows that the information model might curtail innovation for non-text-based contracting, which seems especially detrimental to voice assistants and other forms of Artificial Intelligence.

5. The Frame of Contracting is Harmful

Abandoning the information model sets the correct mental frame for mass contracts, in other words, that they are unilaterally imposed private rulesets; something less than contract. By making the terms invisible, or visible only to interested parties, it becomes clear that these are unilaterally imposed, and lack meaningful assent. This framing is not only closer to the truth, but is likely to influence how consumers react to the imposed clauses.

Under current law, form contracts look just the same as regular contracts, especially to lay people. Although browsing through or clicking them is a hollow exercise, the form of contracting is maintained. This framing as a contract carries real weight. Contracts maintain the "image of a 'binding commitment' that symbolizes efficiency, effectiveness, free choice and legal protection for both sides."[126] Yet as we have seen above, this could not be further from reality. Assent to form contracts is "fiction piled upon fiction".[127] Wrap contracts and their text-wall cousins thus put the veneer of non-form-adhesive contracts onto something that is de-facto unilateral private law making,[128] and, in doing so, legitimize potentially nefarious, business practices.[129]

[124]This is also advocated by the Restatement of Consumer Contracts, Introductury Note, p. 2 (Am. L. Inst. 2022).

[125]OLG München, Decision of Jan. 10, 2019 (29 U 1091/18) (Ger.).

[126]Mark C. Suchman, *The Contract as Social Artifact*, 37 L. & Soc. Rev. 91, 127 (2003).

[127]Barnhizer, *supra* note 15, at 217.

[128]Ethan J. Leib & Zev J. Eigen, *Consumer Form Contracting in the Age of Mechanical Reporduction: The Unread and the Undead*, 108 U. Ill. L. Rev. 65, 86 (2017)

> Because contracts produced by zombie exchange are reminiscent of contracts produced by archetypal exchange, there is dissonance between the perceived obligation to do as one promised to do and the de- sire to disregard zombie contractual terms divorced from the primary benefit of the bargain motivating the consumer's entrance into the contract.;

c.f. Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 Cornell L. Rev. 117, 164 (2017) (discussing "when terms are memorialized and documents shared, they assume the mantle of contract-capital-C, with all of its moral and social baggage").

[129]Kim, *supra* note 4, at 71; Kim, *supra* note 17, at 313; Kim, *supra* note 18, at 144.

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This has a psychological effect on consumers. Research has found a disconnect between the moral weight of contracts as a serious obligation, and the everyday submission to unread terms.[130] Although people understand it is unrealistic to read terms, they cannot shake the framing of contract when attributing responsibility for transaction harm.[131] They do not make the leap that a contract is not that serious, if there is no real opportunity to read it. It is suggested that this has to do with a correlation of the morality of promise keeping and the morality of contract.[132] Promise keeping is a moral value that is important to people,[133] thus breaking a promise is immoral.[134] The hollow assent, even if it could not realistically have been given due to reading constraints, thus affects how the resulting obligations are understood. To put it succinctly, "assent seems, for the average consumer, to cleanse the transaction – to press the reset button, morally as well as legally."[135] The proposed reason for this is the desire to feel in control of a situation that is not within the persons control.[136] More recently, it has been proposed that bloodless assent to unilaterally imposed terms serves the psychological function, of making peace with the status quo.[137] The result is contract double think, where we are forced on a daily basis to promise things which are entirely unknown to us, and then pretend that these are real promises only to not feel at the mercy of corporations. It becomes understandable, that boilerplate and its empty consent contribute to the degradation of the legal system.[138]

The information model is central to perpetuating these fictions, as it safeguards the, albeit theoretical, possibility of meaningful term understanding and thus meaningful assent. In doing so, it shores up the cultural norms surrounding contractual exchange onto something that is fundamentally not a meaningful contractual agreement.[139] Therefore, the form of mass agreements as unread but assented-to contracts matters because it phrases the blanket assent to unread terms in the realm of a promise. A study by Wilkinson-Ryan compared consumer reception of an onerous and unread clause when presented in a contractual setting or framed as an online policy.[140] It found that subjects "believed policies embedded in a contract were more likely to be legally enforceable, judged those policies as more fair, and imagined that they would be less likely to challenge those policies in court."[141] Similarly, it is argued that the form matters because of consumers' commonsense intuitions about the law, in other words, that contracts will be enforced.[142] Even compromised consent therefore psychologically shifts blame to the consumer.[143] Against this background, the assumption that unread disclosures are at best harmless has been challenged.[144]

Formalities may create the feeling of obligation, which firms may then leverage to minimize consumer conflict.[145] Increased participation in the contract formation stage has been argued to

[130]Wilkinson-Ryan, *supra* note 7.

[131]*Id.*

[132]Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 99 WAKE FOREST L. REV. 843, 845 (2012). *C.f.* Roseanna Sommers, *Commonsense Consent*, 129 YALE L. J. 2232, 2265 (2019).

[133]Wilkinson-Ryan, *supra* note 132, at 846.

[134]Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIR. L. STUD. 405, 405 (2009).

[135]Wilkinson-Ryan, *supra* note 32, at 2127.

[136]Wilkinson-Ryan, *supra* note 34, at 239.

[137]*Id.*

[138]RADIN, *supra* note 27, at 625; *c.f.* RADIN, *supra* note 27; Cole, *supra* note 6, at 429 (for a critical account of this argument).

[139]Eigen, *supra* note 36, at 234.

[140]Wilkinson-Ryan, *supra* note 128, at 154.

[141]*Id.* at 164.

[142]Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 545 (2020); Kim, *supra* note 18, at 88.

[143]Wilkinson-Ryan, *supra* note 7, at 1782.

[144]Wilkinson-Ryan, *supra* note 7; Wilkinson-Ryan, *supra* note 128.

[145]Wilkinson-Ryan, *supra* note 32, at 2126.

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result in greater contract compliance.[146] However, abandoning the information model seeks to achieve the opposite. Instead of adapting the reality of consumer choice to the law, the law should adapt to consumer choice. Given that there is no meaningful assent, the formal language of assent should not be utilized. Because factually hidden and unknown terms govern the mass-contract, they should also appear as factually and hidden terms.

If we abandon the information model, mass consumer contracts begin to look a lot more like the unilateral company policies that they are. This change should make consumers more critical of their content, and more aware that these terms were in fact not born of their consent, but imposed on them. It is argued here that the resulting non-compliance is a good thing. Although it is commonly understood that contract compliance promotes market efficiency,[147] and thus promoting non-compliance seems questionable, there are two reasons to seek non-compliance. The first is that ex post control is reliant on non-compliance.[148] Compliance with a contract term much reduces the likelihood of a legal dispute ensuing, and thus acts to curtail *ex post* control. Therefore, non-compliance is a necessity for the control model, and increasing it is beneficial to the reduction of unfair terms. That being said, this connection is highly dependent on the framework in place for the representation and aggregation of consumer interests—in other words, class actions, private enforcement, public action, eccetra. However, it can be hypothesized that there is actually too much compliance with boilerplate terms, as the mere existence of form contracts deters people from taking action. Steering against this by abandoning the information model is a step in the right direction. Beyond this, an efficiency argument can be made. Given the realities of form contracting, there are reasons to believe that boilerplate terms are inefficient terms.[149] In effect, this is an application of Akerlof's "Lemons" framework.[150] The compliance with inefficient terms is however not an increase to market efficiency.

6. Approaches to Regulating Consumer Arbitration

These remarks have been of general nature; however, they bear special significance to consumer arbitration. The reason is that in the U.S., consumer or employment arbitration clauses have been the bone of contention of most disputes involving online consumer contracts,[151] and thus have also given rise to new proposals on how to deal with them.

The arguments on consumer arbitration, whether it creates shadow law unknowable to the public,[152] or even alternative legal universes,[153] or rather is a fully legitimate tool that is less

[146]Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. L. STUD. 67, 67 (2012); Eigen, *supra* note 36, at 236.

[147]Eigen, *supra* note 36, at 236.

[148]KIM, *supra* note 4, at 87.

[149]*C.f.* Korobkin, *supra* note 5; Meyerson, *supra* note 4, at 595.

[150]George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 489-499 (1970). *C.f.* RADIN, *supra* note 27, at 108.

[151]*C.f.* Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1169 (2019); BAR-GILL, *supra* note 5, at 74; Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Markets*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 3, 4 (Omri Ben-Shahar ed., 2007); Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado about Nothing?*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 45, 47 (Omri Ben-Shahar ed., 2007); BEN-SHAHAR AND SCHNEIDER, *supra* note 75, at 49; Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 UC DAVIS L. REV. ONLINE 232, 234 (2019) (discussing an empirical view and finding that 81 of the 100 largest U.S. companies use arbitration clauses and that over 60% of U.S. e-commerce sales are subject to arbitration). *See generally* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2900 (2015) (finding that almost no consumers arbitrate their dispute); Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 642-653 (2020).

[152]KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 181 (2020); Knapp, *supra* note 4, at 762; Resnik, Garlock & Wang., *supra* note 151, at 679.

[153]RADIN, *supra* note 27, at 8.

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expensive and time-consuming for firms than going to court,[154] shall not be explored here. As this Article is on the methods of contracting, it will solely assert that concerns about consumer arbitration are best-availed through term control, not information mandates.

Naturally, U.S. consumer advocates have attempted to curb consumer arbitration through legislation, with the most recent attempt being the proposed Forced Arbitration Injustice Repeal (FAIR) Act.[155] Recently, a proposal of a group of almost 170 law professors, signed an open letter urging the U.S. Consumer Financial Protection Bureau to require meaningful consent to consumer arbitration clauses for financial products and services.[156] Meaningful consent is envisioned to be given when it is declared *after* the dispute arises.[157] Under German law, a similar provision exists, albeit only for consumer forum selection clauses.[158]

This approach is rooted both in the control model and the information model. In some way, it is informational, as it seeks to break the information bottleneck. At the time ex post contractum the incentives to engage with contract terms are much higher. The information model is amended to apply to a later point in time. That being said, requiring an ex post contract decision is nothing short of a ban on pre-dispute clauses. The German Code of Civil Procedure bans pre-dispute forum selection clauses. The control model is in full effect here.[159]

For consumer arbitration clauses, German law has provided a reduced version of the information model, namely manufacturing specific assent. The terminology is based on Llewelyn who noted that boilerplate is covered only by *blanket assent*, not *specific assent*.[160] *Specific assent* advocates agree that we can never get people to care about everything that is in boilerplate enough to understand it, but propose that individual terms can be highlighted in such a way that consumers will understand them.[161] Thus, *blanket assent* is turned into *specific assent* and the information problem disappears. Even if *specific assent* does not make consumers read or consciously note the terms, *specific assent* seeks to provide a transactional hurdle that signals the burdensome nature of the clause in question.[162] It is this very system that German law uses to regulate consumer arbitration clauses. The German Code of Civil Procedure requires that a party signs a consumer arbitration clause in a document separate from the main contractual agreement.[163] This separate document may not contain any other provisions than the arbitration clause, which makes it factually impossible to include such a clause in a standard form contract.[164] This is seen as the reason why consumer arbitration is not common in Germany.[165] German law, quite curiously, despite being deeply steeped in the control of terms through blacklists, whitelists and general clauses, has opted for two different approaches to dispute resolution and forum selection clauses. Section 1031 German Code of Civil Procedure is, at least to my knowledge, the only provision on specific assent in German contract law. It provides a "proven and high"

[154]Cole, *supra* note 6, at 426. *C.f.* Radin, *supra* note 27, at 132.

[155]*C.f.* Garrett Meisman, *Opt-in Arbitration: A Functional Alternative to the FAIR Act Comments*, 46 BYU L. Rev. 1647, 650 (2020) (providing an overview of this Act).

[156]Letter from Consumer Law Professors to Rohit Chopra, Comments of Consumer Law Professors on Petition No. CFPB-2023-0047-0001 (Nov. 14, 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvorxbxypd/frankel-cfpbrule–lawprofletter.pdf.

[157]*C.f.* Ware, *supra* note 4, at 34.

[158]Zivilprozessordnug [ZPO] [Code of Civil Procedure], § 38, para 3, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

[159]*Id.*

[160]Llewellyn, *supra* note 52, at 370.

[161]Ayres and Schwartz, *supra* note 73; Kim, *supra* note 18; Kim, *supra* note 4, at 195 (suggesting attempts towards increasing consumer understanding of individual terms).

[162]Kim, *supra* note 4, at 197.

[163]*C.f.* Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 Loy. U. Chi. Intl. L. Rev. 81, 96 (2013).

[164]Gerhard Wagner, Prozeßverträge: Privatautonomie Im Verfahrensrecht 158 (1998).

[165]*C.f.* Thomas Rauscher, Münchener Kommentar zur Zivilprozessordnung: ZPO, at Introduction, para. 82 (2025).

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standard of consumer protection.[166] The information and assent requirements are so high, the information model so effective, that they have the same effect as simply putting the term on a blacklist. Taking specific assent this seriously amounts to an effective ban under the guise of the information model.

Of course, requiring the signature of a separate document is more extreme than the forms of specific assent advocated by Kim or Ayres & Schwartz.[167] Undoubtedly, the methods suggested would leave room for more actual agreements than the German law on consumer arbitration clauses. Yet these attempts show that modifications to the information model always require a delicate balance. The Goldilocks principle applies: Make the requirements too harsh, and the effect is the same as a ban. Make them too soft, and there is no effect at all. Finding just the right balance, where there is some information effect, yet the obstacles imposed are not so onerous as to prevent all transactions is a very difficult enterprise.

Even if specific assent is set "just right," some general criticisms persist. As Barnhizer has pointed out, this approaches "focuses on a symptom of the problem–lack of assent to the terms of a wrap contract–and consequent attempts to cure that symptom."[168] If consumers do not understand arbitration clauses,[169] neither specific assent nor *ex post* assent saves the information model. Although it can be argued that ignoring boilerplate is fully rational, this does not make the person who does so a perfectly rational *homo oeconomicus*. Beyond this, the common criticism of specific assent is that no decision is made in isolation.[170] If every contract term, or further every element of every transaction, is raised to specific assent, then our lives would be filled with only one activity: assenting to things. There is an inherent limit to how many terms can be made "salient" to the consumer.[171] Clearly, specific assent has to be limited to the most pressing issues.

Specific assent promotes information and in doing so *influences* control. Put simply, specific assent undermines *ex post* control of terms.[172] It is theorized that courts will be more likely to enforce terms if they have been agreed upon through specific assent.[173] Making terms more prominent comes with the implication that consumers know, or should know, of their existence.[174] Psychologically, there is research indicating that people feel more bound to obligations if they are connected to formalities.[175] Of course, this is not a bad thing, if specific assent works, in other words, if consumers understand their obligations and factor them into their choice. Whether this is the case is an empirical question, with the aforementioned research giving reasons to be doubtful. Assent increases the pressure on consumer understanding and puts a greater emphasis on the expressions of consumer choice. This might be harmful, because specific assent can be obtrusive and is subject to manipulation. Think again of the most widespread use of specific assent, the cookie banner. Even these obtrusive assent prompts are significantly influenced by interface design, i.e. dark patterns.[176]

Dipping our toes into the waters of dispute resolution clauses has shown that some expressions of the information model, in other words, ex post assent or specific assent, may be effective. They

[166]*C.f. Eckpunkte des Bundesministeriums der Justiz zur Modernisierung des deutschen Schiedsverfahrensrecht*, 2 (Apr. 18, 2023) (stating the intention to keep this system for consumer protection in place).

[167]Ayres & Schwartz, *supra* note 73; Kim, *supra* note 18, at 85; KIM, *supra* note 4, at 195.

[168]Barnhizer, *supra* note 15, at 216.

[169]Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understandings of Arbitration Agreements*, 75 MARYL. L. REV. 1, 2 (2015).

[170]BEN-SHAHAR AND SCHNEIDER, *supra* note 75, at 125; Wilkinson-Ryan, *supra* note 32, at 2113.

[171]Korobkin, *supra* note 5, at 1206 (explaining the salient terms are the terms that the consumer considers in her decision).

[172]Hillman, *supra* note 1, at 839; Barnhizer, *supra* note 15, at 221.

[173]Hillman, *supra* note 1, at 839; Barnhizer, *supra* note 15, at 221.

[174]Eigen, *supra* note 36, at 235.

[175]Wilkinson-Ryan, *supra* note 32, at 2126.

[176]*See generally* Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 48 (2021); Gregory M. Dickinson, *Privately Policing Dark Patterns*, 57 GA. L. REV. 1633, 1635 (2022); Martin Brenncke, *Regulating Dark Patterns*, 14 NOTRE DAME J. INT'L COMP. L. 39, 43 (2024).

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do, however, come with drawbacks where consumer understanding is limited. They may compound if specific assent is used throughout the legal system. As expressions of the information model, they seek to maintain more of freedom of contract versus content control, or in economic terms, allow for efficient transactions below the threshold of court control. It is doubtful, that such a fine-tuned approach, which gets the informational load "just right" is necessary for the issue of consumer dispute resolution clauses.

E. Conclusion

Psychologically, it might be more comfortable to live in an ideal world in which we can decide every one of our legal obligations with meaningful assent, as this would put us in full control. However, control is an illusion, at least with regard to consumer contract terms. Legal scholars agree that we live in a cold, harsh world, which requires the assent to unread agreements in order to function. This Article suggests that we should face this reality, rather than covering it up with the forms of contracting. The main reason for this, is that the form of contracts legitimizes these practices, and in the long run may de-legitimize actual contracts.

Much of what makes contract is wrapped up in ideas safeguarded–in theory but not in practice–by the information model. A cynic could therefore rephrase the title of this Article as *A Farewell to Contracts in Mass Contracts*. This would be short-sighted, as this Article attempts to protect the core of contracting; the bargain, the dickered terms, while stripping the veneer of contract from unread walls of text. This is an attempt to provide a boon to contract as a social institution, to combat its further erosion, rather than an attack on it.

Maybe there is another ideal world. A world in which puny and irrelevant technicalities, cumbersome contracts, and annoying banners– which almost never pertain to anyone– do not pop up in our faces. A world in which we can continue without engaging with the nitty-gritty of wrap contracts just to order some take-out. In which these rules do not have the teeth to bite us. Meaning that we are free of our labors of deciding whether we prefer consumer arbitration for a social media app we delete minutes later, and joined back to safely ignoring them, all watched over by term control of loving grace. Maybe this ideal world is also unattainable, but steps towards it seem possible.

Acknowledgement. The author thanks Gralf-Peter Calliess for the invitation to the ICtDRA Conference on Informed Consent to Dispute Resolution Agreements, Nicholas Mouttotos for organizing the draft submissions, Daniel Barnhizer, Stephen Ware, Gerhard Wagner, Sebatian Eller and Gesine Müller for helpful comments. Additional thanks to Oren Bar-Gill and Omri Ben-Shahar for discussions that shaped more basic variants of these ideas many years ago.

Funding Statement. No specific funding has been associated with this Article.

Competing Interests. The author declares none.

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Cite this article: McColgan P (2025). A Farewell to the Information Model in Standard Form Contracts. *German Law Journal* **26**, 790–814. https://doi.org/10.1017/glj.2025.10137