

## Conceptualising unconscionability in Europe: in the kaleidoscope of private and public law

MEL KENNY, JAMES DEVENNEY AND LORNA  
FOX O'MAHONY

### 1. Introduction

The aim of this project has been to explore particular conceptions of, and responses to, unconscionability and similar notions, with specific reference to financial transactions across Europe. Such an endeavour is difficult for at least five reasons.

First, the process can be obscured by the nuances of emphasis<sup>1</sup> and language<sup>2</sup> both within jurisdictions and at a pan-European level.<sup>3</sup> Secondly, as the chapter by Waddams<sup>4</sup> suggests, particular jurisdictions may choose, to varying degrees, to respond (sometimes indirectly) to unconscionability issues through a variety of devices rather than through an independent doctrine of unconscionability. Thirdly, as we have suggested elsewhere,<sup>5</sup> conceptions of, and responses to, unconscionability may be shaped by,

<sup>1</sup> See, for example, R. Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"' (1996) 16 *Oxford Journal of Legal Studies* 503 and J. Devenney and A. Chandler, 'Unconscionability and the Taxonomy of Undue Influence' (2007) *Journal of Business Law* 541.

<sup>2</sup> See, for example, J. Elvin, 'The Purpose of the Doctrine of Undue Influence', in P. Giliker (ed.), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Leiden: Martinus Nijhoff Publishers, 2007) and the review thereof by J. Devenney, (2008) *Legal Studies* 477 at 479.

<sup>3</sup> M. Kenny, 'Standing Surety in Europe: Common Core or Tower of Babel', (2007) 70 *Modern Law Review* 175 in particular at 180 ff.

<sup>4</sup> Waddams, Chapter 2.

<sup>5</sup> J. Devenney, L. Fox O'Mahony and M. Kenny, 'Standing Surety in England and Wales: The Sphinx of Procedural Protection' (2008) *Lloyds Maritime and Commercial Law Quarterly* 527 and J. Devenney, M. Kenny and L. Fox O'Mahony, '[The Protection of Non-Professional Sureties in England and Wales]', in A. Colombi Ciacchi and S. Weatherill (eds.), *Regulating Unfair Banking Practices in Europe: The Case of Personal Surety-ships* (forthcoming, OUP). See also M. Kenny and J. Devenney, 'The Fallacy of the Common Core: Polycontextualism in Surety Protection – a Hard Case in Harmonisation Discourse', in M. Andenaes and

for example, the social security and insolvency regimes within a particular jurisdiction.<sup>6</sup> Fourthly, as Capper demonstrates, conceptions of unconscionability may be dependent on context<sup>7</sup> and, as Swain and Fairweather<sup>8</sup> clearly demonstrate, may vary over time. Indeed a week after the conference upon which this collection of essays is based, Lehman Brothers collapsed and the landscape of financial transactions and many of the assumptions underlying traditional approaches to the protection of the vulnerable in financial transactions was radically challenged; our perception of risk, attitudes towards regulation and understandings of risk may never be the same again. As Capper<sup>9</sup> demonstrates, even within particular jurisdictions conceptions of unconscionability can be contested.<sup>10</sup> Indeed Waddams thought-provokingly suggests that unconscionability 'has had multiple dimensions, and that it has not been confined to a single conceptual category'.<sup>11</sup> This idea is elaborated in Wightman's approach to the neglected dimension of unconscionability and the specific issue of transactional risk, where the characteristics of particular kinds of transaction, in interaction with the conduct of the parties, create unusual risk for one party.<sup>12</sup> Transactional risk is, as Rott and Halfmeier analyse, endemic in financial services' contracts.<sup>13</sup>

In this chapter we will seek to pull together some of the key issues and themes which emerge from this collection of essays and the conference upon which it is based. We will also comment on the challenges for programmes of harmonisation in this area.<sup>14</sup>

C. Andersen (eds.), *The Theory and Practice of Harmonisation* (forthcoming, Edward Elgar Publishing).

<sup>6</sup> See also R. Parry, 'The Position of Family Sureties within the Framework of Protection for Consumer Debtors in European Member States' (2005) 13 *European Review of Private Law* 357.

<sup>7</sup> See also J. Devenney and A. Chandler, 'Unconscionability and the Taxonomy of Undue Influence' (2007) *Journal of Business Law* 541.

<sup>8</sup> Swain and Fairweather, Chapter 8.

<sup>9</sup> Capper, Chapter 9.

<sup>10</sup> Compare, for example, P. Birks and Y. Chin, 'On the Nature of Undue Influence', in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995) with Devenney and Chandler, 'Unconscionability and the Taxonomy of Undue Influence', n. 1 above.

<sup>11</sup> Waddams, Chapter 2. <sup>12</sup> Wightman, Chapter 6.

<sup>13</sup> Rott and Halfmeier, Chapter 17.

<sup>14</sup> See also J. Devenney and M. Kenny, 'Unfair Terms, Surety Transactions and European Harmonisation: A Crucible of Europeanised Private Law?' (2009) *Conveyancer and Property Lawyer* 295.

## 2. Challenging private law elaborations of unconscionability

### *Public vs. private, common law vs. civil law?*

A central issue which arises from this project relates to the respective roles of private and public law in responding to issues of unconscionability. Common lawyers would automatically tend to understand unconscionability as a private law problem, as an exception to the primacy of notions of freedom of contract. Traditionally at least, the central place of freedom of contract led to the assumption that exceptions should be avoided, or at the very least restricted to the bare minimum. Civil lawyers might more naturally tend to view equivalent concepts to unconscionability such as good morals (*gute Sitten*) in German law, good faith (*redelijkheid en billijkheid*) and mistake (*dwal-ing*) in Dutch law,<sup>15</sup> contractual unfairness as elaborated through doctrine, consumer protection and pre-contractual fraud (*la r eticence dolosive*) in France,<sup>16</sup> as, in certain circumstances, relieving vulnerable parties from the full play of their contractual obligations.

Yet why should freedom of contract continue to play such an important and constricting role in the elaboration of unconscionability? Surely, as Colombi Ciacchi challenges, a case can be made to fundamentally revamp private law, to make the law relevant for the twenty-first century by ensuring a tangible freedom from unconscionable transactions rather than a one-dimensional notion of freedom of contract. Indeed, in more recent times the traditional private law approaches to fleshing out the content of unconscionability have been increasingly challenged; and all European jurisdictions have had to find ways to respond to this challenge. The challenge, as this volume demonstrates, has arisen on at least three fronts: by public law/constitutional principles (fundamental rights); attempts at European regulation (see in this connection, in particular, Rott and Halfmeier on the MiFID); and the challenge presented to traditional private law approaches by broader exercises in private law codification (for example, the Common Frame of Reference project).<sup>17</sup> At this stage we can briefly describe the three respective challenges to the private law elaboration of unconscionability:

- (a) Constitutional challenge: this is strikingly seen in the German Constitutional Court's decision in the *B urgschaft* case, in which it

<sup>15</sup> Cherednychenko, Chapter 13. <sup>16</sup> Saintier, Chapter 4.

<sup>17</sup> See generally Kenny and Devenney, 'The Fallacy of the Common Core', n. 5 above.

was held that courts were obliged to give effect to extensive substantive protection of family members against disproportionate obligations in suretyship agreements on the basis of good morals. The case shows the enormous flexibility inherent in German contract law to import or transplant constitutional principles: but also begs the question of whether this truly represents the triumph of, or the constitutionalisation of, German private law.<sup>18</sup>

- (b) European regulation: for example, the tendency towards accommodating contract law duties of care towards customers within regulatory supervision rules, especially in financial transactions, has been further strengthened as a result of the adoption of the Markets in Financial Instruments Directive (MiFID), described by some as Europe's 'new constitution' for investment services and secondary capital markets.<sup>19</sup> A characteristic feature of the EC approach to investor protection is its procedural nature and consequent reliance on the information paradigm. Despite the objections to the model adopted in overstating the capacity of consumers to process the information given, expanded upon in Rott and Halfmeier's contribution, the MiFID aims to protect non-professional investors solely by procedural means: extensive duties to inform, advise or warn the customer in combination with the duties to know one's customer and to assess the suitability of a particular investment service or financial instrument for the customer.<sup>20</sup> As with the suretyship constellation, in the context of financial transactions consumers may simply not respond to such steps, no matter how extensive the information given.
- (c) Codification: given the fragmentation of law which uneven patterns of national private law and consumer protection across different European jurisdictions have produced, a fragmentation further exacerbated by the piecemeal, sectoral adoption of vertical instruments of European regulation, can a case be made for the wholesale codification of European private law?

<sup>18</sup> Rott and Halfmeier, Chapter 17 elaborating the German approach: Bundesgerichtshof (BGH) *ZIP Zeitschrift für Wirtschaftsrecht*, 22 (2001), 189; BGH *Juristische Schulung*, 41 (2001), 606; BGH *Neue Juristische Wochenschrift*, 55 (2002), 2228; BGH *Neue Juristische Wochenschrift*, 55 (2002), 2230; BGH *Neue Juristische Wochenschrift*, 55 (2002), 2634.

<sup>19</sup> See, K. J. Hopt, 'Grundsatz- und Praxisprobleme nach dem Wertpapierhandelsgesetz – insbesondere Insidergeschäfte und Ad-hoc-Publizität', *Zeitschrift für gesamte Handelsrecht und Wirtschaftsrecht*, 159 (1995), 135, 135; H.-D. Assmann/U. H. Schneider, *Wertpapierhandelsgesetz* (Cologne: Otto Schmidt, 2006).

<sup>20</sup> See Article 19 of the MiFID.

Furthermore, and even more subtly, if courts – whether common law or civil law – make judgments about particular norms such as unconscionability or equivalent concepts,<sup>21</sup> can a pan-European concept of unconscionability emerge indirectly through judicial harmonisation rather than through the more invasive codification exercise announced in the CFR initiative? Can the emergent concept be influenced by a mixture of private and public law concepts as elaborated in domestic case law? Smaliukas in his analysis suggests that European private law regimes may indeed be more resilient in their capacity to import or transplant legal doctrine than we may think,<sup>22</sup> a point which Willett also alludes to in his chapter.<sup>23</sup> As Cherednychenko notes, to an extent the challenges which have arisen have at least been accommodated within the private law: the *Bürgschaft* case can be seen not simply as a case of constitutionalisation but also, if more subtly, as a prime example of a more piecemeal *judicial harmonisation* of private law. What is important with such judicial harmonisation is, ultimately, that the results produced are similar and here, though the facts of the Dutch and English suretyship cases were broadly similar, unlike in Germany, in neither jurisdiction did fundamental rights play any significant role.<sup>24</sup>

### *Constitutionalisation*

The intervention of fundamental rights to protect the vulnerable family member in the German *Bürgschaft* case<sup>25</sup> represents at one level, as previously alluded to, a constitutionalisation of unconscionability; a valuable assertion, as Colombi Ciacchi observes, of freedom from unconscionable transactions. It comes as a qualification of the traditional model which looked to the fundamental importance of freedom of contract. Under the ‘constitutionalised’ approach, in cases where a structural imbalance in bargaining power has led to a contract which is exceptionally onerous for the vulnerable party, private law courts are obliged to intervene on the basis of general clauses of good morals and good faith.<sup>26</sup> Through the

<sup>21</sup> See also Devenney and Kenny, ‘Unfair Terms, Surety Transactions and European Harmonisation’, n. 14 above.

<sup>22</sup> Smaliukas, Chapter 14. <sup>23</sup> Willett, Chapter 18.

<sup>24</sup> See HR 1 June 1990, *NJ 759 (Van Lanschot Bankiers v. Bink)* and *Barclays Bank plc v. O'Brien* [1994] 1 AC 180, for Dutch and English law, respectively. On these cases in more detail, see O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Munich: Sellier, 2007).

<sup>25</sup> BVerfG 19 October 1993, *BVerfGE 89, 214 (Bürgschaft)*.

<sup>26</sup> §§ 138(1) and 242 of the German Civil Code.

interpretation of fundamental rights, the Constitutional Court in Germany thus entered into the kaleidoscope of public and private law; into the elaboration of contractual justice in modern contract law. By holding the private law courts to be *obliged* to protect the constitutional rights of weaker parties, the judiciary can thus be seen to be limiting the role played by contract law in determining when a contract is unconscionable.

Cherednychenko criticises this approach: the interests of the vulnerable party can be protected by several fundamental rights; a competition between the applicable fundamental rights or *Grundrechtskonkurrenz* is possible, begging in turn the question as to when the courts should determine which fundamental right/s is/are applicable. Whereas the German Constitutional Court in the *Bürgschaft* case provided relief on the basis of the right to private autonomy in conjunction with the social state, it would have been equally possible, as Cherednychenko suggests, to argue the case on the basis of the surety's right to family life within the framework provided by Article 6(1) of the German Constitution. Moreover, even when the *Grundrechtskonkurrenz* can be resolved, in certain cases one and the same right can be used to support both of the claims of the parties involved in the case. Consequently, the courts are charged with resolving the conflict between the two fundamental rights. In the absence of a clear hierarchy of fundamental rights, the only way of doing this is by mediating or balancing the competing rights against each other. Here, in the *Bürgschaft* case, the 'conflict of fundamental rights' arose between the surety's right to private autonomy versus the bank's right to private autonomy. A balance had to be struck on the constitutional level between the protection of the private autonomy of the vulnerable and interference with the private autonomy of the stronger party to the contract.

The major problem with this approach is that, as it is not clear which outcomes should follow from the individual fundamental right, the issue – unsatisfactorily – is simply left to private law courts to resolve. In this regard, as Cherednychenko goes on to argue, it would have been equally consistent with the Constitutional Court's approach to the effect of fundamental rights to uphold the original decision of the Supreme Court in the *Bürgschaft* case: after all, it could be argued that the surety's constitutional right to private autonomy had been respected; every person would have to have been aware of the risks involved.

But are we really dealing with the constitutionalisation of private law? Surely, as Cherednychenko argues, is this not simply a case in which judicial innovation has transplanted constitutional rights into private

law analysis? Moreover, a comparable or at least equivalent result to the *Bürgschaft* case was achieved, in the context of surety agreements, in both England and Wales and the Netherlands on the basis of different concepts within a traditional private law approach. Although in both Dutch and English law the protection granted to sureties is limited to procedural protection,<sup>27</sup> the contract law of both legal systems also contains concepts which can be resorted to in order to introduce substantive protection in those cases where there is a gross discrepancy between the amount of liability potentially faced by the surety and the financial means of the prospective surety at the time of the conclusion of the surety agreement.<sup>28</sup>

Between the positions adopted by Cherednychenko and Colombi Ciacchi, Teubner points to a subtle transformation of the notion of freedom of contract itself. Freedom of contract in a layered context of private law instruments, doctrines and protective levels, becomes a much broader concept: 'While . . . freedom of contract was limited to the protection of free choice in the market against fraud, deception, and . . . political interference, the new freedom of contract . . . extend(s) to a protection of contract against the free market itself.'<sup>29</sup> In this model the need to limit autonomy, to respect a complex array of social expectations and third party interests is accentuated, Teubner concluding that constitutional law will play a mediating role in this hybridised, discursive contract law:<sup>30</sup> '[C]ontract as interdiscursivity raises . . . the issue of constitutional rights . . . these rights can no longer be seen as protecting only the individual actor against the repressive power of the state, but . . . need to be reconstructed as "discourse rights" . . . The . . . correlate of contract as translation would be an extension of constitutional rights into the context of private governance regimes.'<sup>31</sup> Yet the implications of such

<sup>27</sup> For Dutch law, see HR 1 June 1990, *NJ 759* (*Van Lanschot Bankiers v. Bink*). For English law, see *Royal Bank of Scotland v. Etridge (No. 2)* [2001] 4 ALL ER 449.

<sup>28</sup> J. Devenney, L. Fox-O'Mahony and M. Kenny, 'Standing Surety in England and Wales', n. 5 above.

<sup>29</sup> G. Teubner, 'Das Recht hybrider Netzwerke', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 165 (2001), 550. English version: G. Teubner, 'In the Blindspot: The Hybridisation of Contracting', available at [www.jura.uni-frankfurt.de/ifawz1/teubner/dokumente/VERTRAG\\_eng\\_TheoreticalInquiries.pdf](http://www.jura.uni-frankfurt.de/ifawz1/teubner/dokumente/VERTRAG_eng_TheoreticalInquiries.pdf), at 14.

<sup>30</sup> S. Weatherill, 'The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis' (2002) 13 *European Business Law Review* 497, O. Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 *European Law Journal* 766, H. Schepel, 'The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to "Constitutionalise" Private Law' (2004) 12 *European Review of Private Law* 661.

<sup>31</sup> Teubner, 'In the Blindspot', n. 29 above, at 18.

constitutionalisation or quasi-constitutionalisation on the constitutional democracy are, as Hirschl observes, massive and potentially pernicious; launching a process in which lawyers intervene to insulate traditional hierarchical patterns:

By keeping popular decision-making mechanisms at the forefront of the formal democratic political processes while simultaneously shifting the power to formulate and promulgate certain policies from majoritarian policy-making arenas to semiautonomous professional policy-making bodies, those who have disproportionate access to and have a decisive influence upon such bodies minimize the potential threat to their hegemony . . . the current global trend toward judicial empowerment through constitutionalisation is part of a broader process whereby self-interested political and economic elites . . . *attempt to insulate policy-making from the vagaries of democratic politics . . . [I]t can best be understood as an attempt to defend established interests from the potential threats posed by the voices of cultural divergence, growing economic inequality, regionalism, and other centrifugal forces that have been given a public platform through the proliferation of representative democracy.*<sup>32</sup>

#### *Constitutionalisation and harmonisation vs. regulation and codification*

Given the legitimacy caveats regarding constitutionalisation, which can perhaps be seen as a type of judicial harmonisation or innovation, can a case be made for a more formal, regulatory harmonisation through European secondary law or, even more radically, a comprehensive codification of European private law? Given the differences between Member States' financial services' laws, the Commission had, until September 2008, taken the view that improving access to credit, enhancing consumer protection through responsible lending, and thus 'promoting' consumer debt and encouraging, in particular, the active consumer could generate significant economic growth. The aim of promoting the depth, liquidity and dynamism in financial markets so as to allow for more efficient resource allocation and enhanced competition<sup>33</sup> was

<sup>32</sup> R. Hirschl, *Towards Juristocracy* (Harvard University Press, 2004) at 217 (emphasis added).

<sup>33</sup> Green Paper on Financial Services Policy (2005–2010) (COM(2005) 177 final) at: [http://ec.europa.eu/internal\\_market/finances/docs/actionplan/index/green\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/actionplan/index/green_en.pdf). Financial Services White Paper 2005–2010: [http://ec.europa.eu/internal\\_market/finances/docs/white\\_paper/white\\_paper\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/white_paper/white_paper_en.pdf). identifying EC objectives of an integrated, open, inclusive, competitive and efficient financial market; removal of the remaining barriers to financial services; high levels of financial stability; consumer protection; deepened relations with other global financial market places and globally enhanced European influence.



also an aspect of the Lisbon strategy.<sup>34</sup> To these ends, in 2002, the Commission proposed the adoption of a new, maximum harmonisation Directive on consumer credit.<sup>35</sup> The Commission's interest in the integration of the financial services' market can be illuminated: extrapolating from UK levels of secured and unsecured debt, there appeared – at least up to the advent of the Credit Crunch – to be a potential for a European debt market in excess of 13 trillion Euros.<sup>36</sup>

Increasingly, therefore, the question to emerge was not whether but how a single financial services' market could be achieved: through selective measures of sectoral harmonisation or more adventurous measures of 'internal market', maximum harmonisation. In this volume Rott and Halfmeier examine the virtues of the sectoral approach to harmonisation. Moreover, even if the question as to the depth of harmonisation or the feasibility of codification can be resolved, what type of financial services' regulation would recommend itself: the traditional Anglo-American model of unregulated financial services' provision<sup>37</sup> or a more European model involving a higher level of consumer protection? Alternatively, is the integration of the financial services' market best left after all to less invasive, non-legislative, judicial harmonisation,<sup>38</sup> to a competition of legal orders<sup>39</sup> or to the market and spontaneous

<sup>34</sup> Presidency Conclusions, Lisbon European Council, 23–24 March 2000 (Lisbon Strategy): [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/00100-r1.en0.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm). 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.

<sup>35</sup> Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, Brussels 11.9.2002, (COM(2002) 443 final) Explanatory Memorandum, Section 1.2. at 3: [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2002/com2002\\_0443en01.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2002/com2002_0443en01.pdf). Section 3, Explanatory Memorandum emphasising the information paradigm, at 8: 'The directive also covers surety agreements. The harmonisation being sought for these agreements will centre mainly on the information to be provided to consumers concluding such agreements, even if they guarantee credit that is granted for employment-related purposes'.

<sup>36</sup> In February 2006, the UK secured lending at GBP 981.8 bn and consumer credit at GBP 192.6 bn making a total indebtedness of GBP 1.174 trillion. For policy initiatives: [www.creditaction.org.uk/debtstats.htm](http://www.creditaction.org.uk/debtstats.htm) and [www.debt-on-our-doorstep.com](http://www.debt-on-our-doorstep.com).

<sup>37</sup> C. McCreedy, DG Internal Market, Speech at Centre for European Reform, 'Financial Markets Integration', London, 9 March 2006: [http://ec.europa.eu/commission\\_barroso/mccreedy/docs/speeches/2006-03-09/centreureform\\_en.pdf](http://ec.europa.eu/commission_barroso/mccreedy/docs/speeches/2006-03-09/centreureform_en.pdf).

<sup>38</sup> A. Colombi Ciacchi, 'Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships' (2005) 13 *European Review of Private Law* 285.

<sup>39</sup> J. H. M. van Erp, 'European Private Law: Post-modern Dilemmas and Choices' (1999) 3 *Electronic Journal of Comparative Law*, [www.ejcl.org/31/art31-1.html](http://www.ejcl.org/31/art31-1.html).

harmonisation,<sup>40</sup> or is it best achieved through a mediation of claims through a constitutionalisation of private law?<sup>41</sup> Clearly, the scale of intervention identified as necessary – whether substantive control or the need for procedural rules and behavioural change to bank practice – will inform the choice and location of measures to be adopted.

### 3. Key themes demarcating unconscionability

Across the range of topics and contributions covered in this collection, it is possible to identify a number of key themes that emerge across the 'unconscionability scholarship' in the context of financial transactions. These key themes are vulnerability, risk and responsibility.

#### *Vulnerability*

Our perception of vulnerability and the adequacy of private law, regulatory and codification responses aimed at protecting the vulnerable has altered dramatically in the last months. Again, different legal orders have focused on different categories as particularly vulnerable,<sup>42</sup> for example, whether consumer, family member or non-professional; and some of the fragmentation of European approaches to unconscionability can be attributed to these different and sometimes inconsistent demarcations of vulnerability across legal orders.<sup>43</sup>

The understanding of unconscionability may also hinge on one's approach to freedom of contract, in particular on whether a freedom to conclude contracts should be understood in a formal or a substantive sense. This conflict goes to the heart of modern European contract discourse between private autonomy and social justice, as alluded to above – between the assertion of freedom of contract and the assertion of the importance of fairness and solidarity in contract law; it shapes the extent of the class of vulnerable contracting parties. Increasingly, as Colombi Ciacchi observes, a new substantive understanding of freedom of contract is emerging, requiring the judge to consider the contractual

<sup>40</sup> A. I. Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 *International and Comparative Law Quarterly* 405.

<sup>41</sup> O. Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 *European Law Journal* 766.

<sup>42</sup> See generally, Devenney and Kenny, 'Unfair Terms, Surety Transactions and European Harmonisation', n. 14 above.

<sup>43</sup> Kenny and Devenney, 'The Fallacy of the Common Core' n. 5 above.

parity in the given case. Colombi Ciacchi points to a range of cases in Germany, Slovenia, Greece and the Netherlands in which judges have been asked to address the imbalance between the parties and to ensure substantive freedom of contract.<sup>44</sup>

Thus, the question Cherednychenko sets as to whether and to what extent the weaker party must be protected against entering into highly risky financial transactions: should the financial institution be obliged to refuse to execute transactions where the transaction is extremely risky in view of the customer's financial situation? Clearly this may lead to an unstable definition of vulnerability: the customer's solvency may be irrelevant in determining his/her protection where the risk involved in the investment is significant. Alternatively, should the customer be able to assume such risks subject to the condition that the investment firm, as a more professional party, has fully explained the transaction, in particular by explaining the risks involved?<sup>45</sup>

Here Rott and Halfmeier's critique is instructive: both the MiFID Directive (2004/39/EC) and the German implementation of the Implementing Directive 2006/73/EC<sup>46</sup> adopt, in their view, far too bank-friendly an approach to non-professional investment advice, adopting an information-based solution towards kickback payments rather than a substantive approach. Interestingly, a substantive 'prohibition' as used with medicines (Directive 2001/83/EC) was not adopted for financial services on the basis that there is no special vulnerability with financial advice, the investor being neither consumer nor vulnerable towards another contracting party. However, Rott and Halfmeier analyse the appropriate approach to protection by incorporating behavioural finance research and disrupt the picture of the 'well-informed consumer' assumed by both the European and domestic legislator to be at the heart of the transaction, concluding that 'the disclosed information does not help the investor to make a reasonable decision' and that only substantive protection is appropriate where conflicts of interest are responsible for incentives to give inappropriate advice. The psychology of the context may thus rephrase the traditional view of the invulnerability of the non-professional investor.

Family members, meanwhile, would seem more naturally a vulnerable group than non-professional investors; as the suretyship cases confirm, no amount of information will be liable to influence the family member

<sup>44</sup> Colombi Ciacchi, Chapter 1. <sup>45</sup> Cherednychenko, Chapter 13.

<sup>46</sup> Rott and Halfmeier, Chapter 17.

in a meaningful way.<sup>47</sup> This explains the intervention of fundamental rights in the German *Bürgschaft* case<sup>48</sup> in which an appeal that the Supreme Court had violated the surety's constitutional right to private autonomy (Article 2(1) of the German Constitution) in conjunction with the principle of the social state (Article 20(1) and Article 28(1)) succeeded. According to the Constitutional Court, in cases where a structural imbalance in bargaining power has led to a contract which is exceptionally onerous for the weaker party, the private law courts are obliged to intervene on the basis of the general clauses (§§ 138(1) and 242 of the Civil Code) on good morals and good faith. Thus, through the interpretation of constitutional rights, the German Constitutional Court entered into the discussion of contractual justice in modern contract law. Constitutional rights were used to challenge the logic of private autonomy. By holding the private law courts to be *obliged* to protect the constitutional rights of weaker parties, the Constitutional Court significantly limited the role played by contract law in determining whether a particular contract is unconscionable. What is at issue in modern contract law is therefore the extent of protection of weaker parties which is necessary in order to address the present challenges arising from changing social and economic conditions of everyday life.

Last but not least, regulating the protection of weaker parties in some areas by means of the conduct of business rules such as European secondary law, exemplified in the MiFID Directive, while leaving such protection in other areas to private law – in particular where the private law concept has been shaped by fundamental rights – may lead to peculiar differences in the extent to which weaker parties are protected in different financial transactions. Thus, for example, as Rott and Halfmeier observe, in German law family sureties enjoy substantive protection against excessively onerous obligations while non-professional investors are denied such protection altogether; in contrast to the treatment of family sureties, where a potentially ruinous obligation exceeding the surety's ability to pay gives rise to the presumption of immorality, no such consequences are attached to the fact that the investor has entered into a highly risky investment transaction which

<sup>47</sup> Kenny, 'Standing Surety in Europe' n. 3 above, in particular at 176 citing J. Gernhüber, 'Ruinöse Bürgschaften als Folge familiärer Verbundenheit' (1995) *Juristenzeitung* 1086, at 1093: 'Warnings and advice . . . are only useful where the addressee is prepared to accept them' (authors' translation).

<sup>48</sup> BVerfG 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*).

was highly disproportional to his financial resources.<sup>49</sup> In Dutch law, as Cherednychenko elaborates, the concern for the effectiveness of the financial system has produced even odder results. While family sureties enjoy only procedural protection by means of the information duties incumbent on the bank,<sup>50</sup> non-professional investors trading in derivatives enjoy a combination of substantive and procedural protection aimed at protecting such investors against themselves.<sup>51</sup> The question which arises in this respect, however, is whether non-professional investors are more vulnerable in risky financial transactions than family sureties.

### *Risk*

It is generally accepted that financial transactions carry risks.<sup>52</sup> Until recently, these risks have been valorised within neoliberal policy, with exposure to risk accepted as part of the modern identity of consumers as 'enterprising entrepreneurs' – as 'the bearer of risk who makes "choices" as to which risks he/she will manage, to what degree, and by what provision, and who must live with the consequences of the mistakes they make'.<sup>53</sup> With 'risk' identified as the leitmotif,<sup>54</sup> and neoliberal policies emphasising the individualisation of citizens,<sup>55</sup> individuals are presented as: 'prudent, rational, desiring to be responsible for themselves'.<sup>56</sup> Within this framework, protection for vulnerable parties has tended to operate at the

<sup>49</sup> See, for example, BGH 8 May 2001, *BGHZ* 147, 343, 350; BGH 11 November 2003, *Wertpapier-Mitteilungen* (2004), 24, 27.

<sup>50</sup> See HR 1 June 1990, *NJ* 759 (*Van Lanschot Bankiers v. Bink*).

<sup>51</sup> Cherednychenko, Chapter 13.

<sup>52</sup> P. Bernstein, *Against The Gods: The Remarkable Story of Risk* (J. Wiley & Sons, 1996), which provides a historical account of risk in financial transactions; K. Byrne, 'How Do Consumers Evaluate Risk in Financial Products?' (2005) 10 *Journal of Financial Services Marketing* 21–36; H. Van Greuning and S. Brajovic Bratanovic, *Analyzing and Managing Banking Risk* (World Bank Publications, 3rd edn, 2009).

<sup>53</sup> M. Cooper, 'The Inequality of Security: Winners and Losers in the Risk Society' (2008) 61 *Human Relations* 1229 at 1233.

<sup>54</sup> A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991); U. Beck, *Risk Society: Towards a New Modernity* (New Delhi: Sage, 1992). See also A. Giddens, 'Risk and Responsibility' (1999) 62 *Modern Law Review* 1.

<sup>55</sup> N. Rose, 'The Death of the Social? Refiguring the Territory of Government' (1996) 25 *Economy and Society* 327; P. O'Malley, 'Risk and Responsibility', in A. Barry, T. Osborne and N. S. Rose (eds.), *Foucault and Political Reason: Liberalism, Neo-liberalism and the Rationalities of Government* (London: UCL Press, 1996); P. Leonard, *Postmodern Welfare* (London: Sage, 1997).

<sup>56</sup> Cooper, n. 53 above, at 1234.

margins, with what Williams describes as a (judicial) tendency to regard 'unfairness in consumer financial markets . . . as an exceptional transaction that departs radically from an unproblematic norm'.<sup>57</sup>

Yet, within this model, two major contemporary challenges can be identified. On the one hand, the emergence of scholarship critiquing Giddens' and Beck's portrait of the 'reflexive individual'<sup>58</sup> has important implications for the 'value of choice' theory delineated by Voyiakis in his analysis.<sup>59</sup> This account of contract law puts the contracting consumer in context, taking account of the structures that frame people's choices in respect of financial transactions, and proposing a more complex, 'pluralist' response.

Meanwhile, the global financial crisis has demonstrated the way in which the risks in the financial system can potentially impact on *all* consumers, and called into question the 'overly optimistic view of self-regulating markets',<sup>60</sup> informing much law-and-economics scholarship. Indeed, even before the 'credit crunch', the relationship between risk, responsibility and regulation had emerged as an important theme in UK policy,<sup>61</sup> with the growing reach of the FSA providing an example of the shift towards growth in the use of regulatory approaches as a response to the risks associated with financial transactions. Yet the way in which *risk* is conceptualised has also been transformed by the global financial meltdown,<sup>62</sup> with the suggestion that permissive regulatory conditions played a role in creating the conditions for the crisis, leading to increased calls for fundamental reviews of the way in which financial transactions are regulated.<sup>63</sup>

This theme is explored in several contributions. Nield's analysis of the new notion of unconscionability that has emerged through a range of statutory provisions and regulatory responses to the risks posed to those who borrow against the security of domestic property, raises questions

<sup>57</sup> Williams, Chapter 12.

<sup>58</sup> Cooper, n. 53 above; A. Aldridge, 'Habitus and Cultural Capital in the Field of Personal Finance' (1998) 46 *Sociological Review* 1; V. Gillies, 'Raising the Meritocracy: Parenting and the Individualization of Social Class' (2005) 39 *Sociology* 835.

<sup>59</sup> Voyiakis, Chapter 5.

<sup>60</sup> R. P. Malloy, 'Mortgage Market Reform and the Fallacy of Self-Correcting Markets' (2009) 30 *Pace Law Review* 79.

<sup>61</sup> Better Regulation Commission, *Risk, Responsibility and Regulation: Whose Risk is it Anyway?* (London: Cabinet Office, 2006).

<sup>62</sup> E. Heilpern, C. Haslam and T. Andersson, 'When it Comes to the Crunch: What are the Drivers of the US Banking Crisis?' (2009) 33(2) *Accounting Forum* 99–113; V. Acharya and M. Richardson (eds.), *Restoring Financial Stability* (J. Wiley & Sons, 2009).

<sup>63</sup> M. Wolf, 'Why the Credit Squeeze is a Turning Point for the World' *Financial Times* 11 December 2007.

about the way in which risk is conceptualised:<sup>64</sup> for example, should transactions which put one's home at risk be regarded as 'higher order risks', on the basis that the harms that may result from a 'bad' outcome are particularly adverse? Across the range of papers, particular sets of risk and different responses to those risks across the nodes of scholarship and the various jurisdictions represented can be identified. For example, Williams demonstrates how the risk of adverse consequences for consumers, even where this risk is not actualised, has been sufficient to justify fines against providers of financial products under the remit of the FSA.<sup>65</sup> From another perspective, Williams' chapter also highlights the emergence of a new methodology for addressing unfairness in consumer markets, which recognises that fairness is contextually related to the characteristics of the product and the parties.<sup>66</sup> This approach is rooted in recognition of the variable measure of risk posed by particular products, to particular parties. Further, it makes a crucial connection in identifying the relationship between the exposure of consumers to risk – whether actualised in a 'bad' outcome or not – and adverse consequences for financial service providers.<sup>67</sup>

It is also valuable to note the debates concerning provision of adequate and qualitative information in the tests seeking to identify unconscionability in financial transactions. Here, Cartwright emphasises the centrality of information as part of a complex, multi-faceted conceptualisation of 'unfairness' within the context of financial regulation, a theme which resonates strongly with conceptualisations of the risk society as characterised by the expansion of choice and the proliferation of information, often in respect of an inherently uncertain future.<sup>68</sup>

However, it is also important to bear in mind that the party with whom the potentially vulnerable consumer is transacting is in a stronger position by virtue of being 'the expert' party. This issue is discussed in Viñals' analysis, where she notes that consumers can be regarded as a weaker party per se by virtue of their non-expert status, particularly in the context of mass or standard form contracts.<sup>69</sup> Viñals notes that 'a mass contract offered to a fungible contractor is drawn up by a class of experts that depend on their technological background of knowledge', thus

<sup>64</sup> Nield, Chapter 10. <sup>65</sup> Williams, Chapter 12.

<sup>66</sup> Ibid. <sup>67</sup> Ibid.

<sup>68</sup> J. Ford, R. Burrows and S. Nettleton, *Home Ownership in a Risk Society: A Social Analysis of Mortgage Arrears and Possessions* (Bristol: Policy Press, 2001) 6.

<sup>69</sup> Viñals, Chapter 3.

placing all consumers in a relatively vulnerable position as the weaker party to the transaction. Yet, it is important to bear in mind the need to balance the tensions between this type of vulnerability, and the need to facilitate efficient business practices through standard form contracts. Cartwright also identifies the problem of 'information asymmetry' between the consumer and the service provider as one of the catalysts of regulation,<sup>70</sup> with reference to the difficulties in putting into practice the objective 'average consumer test' standard and in light of the FSA's recognition that 'there is a lot more to do before information from firms to consumers could generally be regarded to be fair and clear'.<sup>71</sup>

Meanwhile Zhou's contribution looks to the rationale for the operation of the doctrine of unconscionability as being grounded both in the asymmetry of information between the parties and the need to correct the allocative inefficiency caused by the parties' bounded rationality. From an economic perspective, the choice of appropriate remedy among the remedial options, as Zhou observes, depends upon the emphasis placed by the lawmaker. If the lawmaker focuses on deterrence, damages are the preferable option; if the major concern is the disincentive to trade, then judicial modification is the most suitable choice. If, however, the lawmaker seeks to achieve some level of compromise, both invalidation of contract and rescission are plausible alternatives.<sup>72</sup>

Furthermore, what is striking to Rott and Halfmeier is less the informational asymmetry than the prevalence of conflicts of interest affecting financial institutions' ability to act in their clients' best interests and incentives embedded in current practice for advisers to give inappropriate advice. The proceduralisation of risk in this context is simply unequal to the task; instead, Rott and Halfmeier argue that to deal with the risks inherent in investment contexts more substantive protection has to be organised: to disallow inducements for investment advice, introduce fees for such services and pattern regulation so as to divorce front-office investment advice from back-office inducement-collecting.<sup>73</sup> A similar problem, as Kalus and Habdas observe, seems to arise in practice with bank loans in Poland; with banks employing a combination of economic, psychological and legal securities to secure their lending, such that the borrower needs to carefully consider which securities best reflect his/her interests.<sup>74</sup>

<sup>70</sup> Cartwright, Chapter 11.

<sup>71</sup> FSA, *Treating Customers Fairly: Measuring Outcomes* (London: FSA, 2007) 5.

<sup>72</sup> Zhou, Chapter 7. <sup>73</sup> Rott and Halfmeier, Chapter 17.

<sup>74</sup> Kalus and Habdas, Chapter 15.



Moreover, viewing the evolution of legal responses to unconscionability, Swain and Fairweather provided an account of the genesis of 'unconscionable conduct' as behaviour that 'shocks the conscience of the court'.<sup>75</sup> In reviewing the evolution of unconscionability against the current global financial crisis, it is interesting to reflect on how our conceptualisation of the 'normal' levels of risk in financial transactions will provide important context for the development of unconscionability. Finally, given the levels of risk and vulnerability identified in this volume, and the capacity of unconscionable behaviour to shock the conscience of the court one might begin to ask, as does Amato in her contribution, whether the civil law is ultimately equal to the task of addressing such behaviour. As Amato concludes:

civil liability remedies do not provide the only possible answer to the protection of investors against unconscionable financial contracts: in addition, one can consider how alternative remedies subsequent to the occurrence of damages (for example, stricter criminal penalties), preventive measures (rules of conduct) or collateral sanctions (reputational risks) may be able to support and protect investors more effectively than civil liability rules.<sup>76</sup>

### *Responsibility*

Another core theme to be drawn from these chapters relates to responsibility: Who is responsible when the risks to which vulnerable consumers are exposed are actualised, leading to harm? Who is responsible for miscalculation of risk or bad outcomes? The relationship between risk and responsibility is an important theme; Giddens has stated that '[r]isk is ... always connected to responsibility';<sup>77</sup> however, the neoliberal perspective that tends to dominate in the UK typically emphasises the *self*-responsibility of the individual consumer, rather than regarding the provider of financial services, or the state or legal system, as bearing responsibility for the harms that may result when risks lead to bad outcomes. Nevertheless, as the chapters which trace the growing regulatory role of the FSA and the OFT in the UK, including the growth in mandatory codes of conduct, demonstrate, the model of absolute individual consumer responsibility has come under increasing pressure. Nield contrasts the theory of a 'decentered regulatory approach' underpinned by a mantra of 'responsible lending and responsible borrowing',

<sup>75</sup> Swain and Fairweather, Chapter 8.    <sup>76</sup> Amato, Chapter 16.

<sup>77</sup> Giddens, 'Risk and Responsibility', n. 54 above, 7.

with evidence that, in practice, this model has clearly failed in both respects.<sup>78</sup>

A central question is the appropriate allocation of responsibility between the individual consumer or debtor who undertakes financial obligations within what Williams identifies as the 'responsibilised' identity of a self-regulating market actor,<sup>79</sup> and the provider of financial services, constructed as a 'responsibilised firm', also regarded as a 'self-regulating actor, entrusted with the governance of its own conduct'.<sup>80</sup> Yet, Williams demonstrates a significant development in the FSA's approach to such 'responsibilised firms', whereby they are required to demonstrate the performance of fairness, not only in their 'front end dealings', but in their routine business operations. Furthermore, it is increasingly recognised that responsible behaviour on the part of financial institutions requires a contextualised approach, which recognises the importance of distinguishing advice and products, on the basis of their suitability for particular types of consumer. This issue has emerged within the meaning of the FSA's definition of unfairness – as 'taking advantage of the customer' – and represents an important dimension in the regulatory standard of responsibility which the FSA wishes to apply to financial services providers,<sup>81</sup> although, again, it is recognised that considerable work remains to be done before the goals of the FSA in being able to implement and enforce the standards of fairness and responsibility which it has conceptualised are achieved.

The difficulties in giving effect to standards of responsibility in the context of financial markets were recognised by Giddens in his seminal paper on 'Risk and Responsibility'.<sup>82</sup> Giddens set out three models of 'responsibility', a term which he described as 'an interestingly ambiguous or multi-layered term', which connotes (1) being the author of an event; (2) acting in an ethical/accountable manner; and (3) obligation or liability.<sup>83</sup> The evolving approach to regulation of financial services discussed in several papers provides an interesting point of reflection on the shift from 'good practice' approaches to 'responsible lending, responsible borrowing', towards a more enforceable set of obligations and liabilities to which firms are held to account, including by the levying of fines where actions are deemed contrary to the standards of responsibility required in dealing with consumers. Giddens noted, however, that in a

<sup>78</sup> Nield, Chapter 10. <sup>79</sup> Williams, Chapter 12.

<sup>80</sup> Ibid. <sup>81</sup> Cartwright, Chapter 11.

<sup>82</sup> Giddens, 'Risk and Responsibility', n. 54 above. <sup>83</sup> Ibid, 8.

context where risk is viewed as ‘an energising principle . . . responsibility can neither easily be attributed nor assumed’.<sup>84</sup> Giddens went on to suggest that this gives rise to the phenomenon which Beck described as ‘organised irresponsibility’, where ‘there are a diversity of humanly created risks for which people and organisations are certainly “responsible” in a sense that they are its authors but where no one is held specifically accountable’.<sup>85</sup> The difficulty, he argues, is how to allocate responsibility for such risks: ‘Who is to determine how harmful products are, what side effects are produced by them, and what level of risk is acceptable?’<sup>86</sup> Giddens predicted that:

Coping with situations of organised irresponsibility is likely to become more and more important in the fields of law, insurance and politics, but this won’t be easy to do precisely because of the rather imponderable character of most circumstances of manufactured risk.<sup>87</sup>

It is clear that the degree of regulatory responsibility to which firms involved in financial transactions with potentially vulnerable consumers are expected to comply is increasingly under scrutiny and that, while the mantra of ‘responsible borrowing’ continues to impose expectations on consumers as self-regulating market actors, which may present particular challenges for vulnerable or marginalised consumers, the expansion of regulation in recent years is expanding the standard of responsible conduct required of firms, both in its breadth and in the extent to which the FSA is willing to enforce standards of fairness and ‘conscionable’ behaviour. Nevertheless, in the context of financial transactions, the question of responsibility is a complex, multifaceted issue, which poses contextual challenges which the regulatory regimes continue to grapple with.

#### 4. Conclusions

A number of propositions emerge from this project. Perhaps the most important are the caveats which we have introduced to the understanding of European private law as a law possessing a clearly identifiable common core, as a body of law amenable to a broad exercise in codification. Looking at the law in action, we find substantial divergence rather than convergence, and a picture of polycontextualism, legal fragmentation and tension. Amid the general mood of euphoria connected to the

<sup>84</sup> Ibid.    <sup>85</sup> Ibid.    <sup>86</sup> Ibid.    <sup>87</sup> Ibid.

Commission's codification exercise, it is important to stress the fact that Europe's private law can best be described in terms of a lack of commonality rather than by reference to an imagined, simplistic commonality.

As we have seen, the growing impact of public law on private law relationships in the context of risky financial transactions subjects the role of private law in protecting the vulnerable against unconscionable bargains to heightened scrutiny. The central issue to emerge is how the kaleidoscope of public and private law approaches to the protection of the vulnerable can be converged without sacrificing the full autonomy of private law to standards developed by public law. Here Cherednychenko argues that it is only when there is a dialogue between public law and private law that an advance in conceptualising unconscionability may be achieved, and it is only with such a re-conceptualisation, providing new and better solutions, that we will be able to protect the vulnerable in financial transactions.

#### *Polycontextualism in Unconscionability*

This survey has made clear that unconscionability involves a plurality of parties and competing interests. The doctrine has a polycontextual function, and the balancing or mediation of the interests involved can take place at a number of levels and fields of law, for example in: contract law (traditional defences: fraud, duress, mistake, misrepresentation); procedural protection (duties to inform of financial risks); consumer law (formal requirements and duties to inform); family law (protection of family interests); insolvency law (regulation of rights of recourse, symmetry of fresh start protection); constitutional law (proportionality considerations); property law. The polycontextual function of unconscionability and the location of protective mechanisms within this matrix of levels and fields of law affects both the level of protection and the prevalence of different types of agreements. As we have observed, this may lead to inconsistencies: for example, between the level of protection offered the family surety on a fundamental rights basis and the relatively low level of protection offered non-professional investors via European secondary law under the implementation of the MiFID framework directive. In contrast, other legal regimes establish quite different levels of protection for different categories of vulnerable contracting parties. In the Netherlands, for example, the non-professional investor enjoys substantive protection whilst the family surety must rely on a quite different standard of procedural protection.

*The uncommon core*

Whilst, at a basic level of abstraction common elements of unconscionability can be recognised in all legal systems, the coherence of this picture of commonality becomes fragmented the higher the level of abstraction. Member States' legal orders have their own demarcations and differentiations, locating protection in different legal institutions and fields of law. Even at a conceptual level the differences are striking: in the suretyship context, for example, either involving three parties in a two-transaction agreement<sup>88</sup> or a trilateral agreement.<sup>89</sup> This leads to further demarcational problems as between legal orders: thus whilst the creditor may be seen in some legal orders as the professional (Germany), in others he may also be a non-professional (Belgium and France). A major distinction emerges in the balances struck between market-liberal formalism and interventionist, substantive approaches. The market-liberal approach, underscores the central importance of freedom of contract and allows the individual the freedom to enter 'unwise' obligations. Meanwhile, the substantive approach focuses on the bargaining power of the parties and the social implications of disproportionate guarantees.<sup>90</sup> Whilst substantive analysis discloses the limits to the information model, at its outer limit it appeals to the horizontal effect of fundamental rights.

*Spectral analysis*

A major reason for the uncommon core of European private laws lies in the fragmentation of the contexts in which they operate; unconscionability being correctly seen as an element or part of a wider spectrum, of a *layering* of divergent protective mechanisms. Against this background, standards of protection are fleshed out in the framework of national standards of consumer/debtor protection. This means that we need to

<sup>88</sup> Two-transaction: underlying and unilateral contract. See generally, M. Siems, 'No Risk, No Fun? Should Spouses be Advised before Committing to Guarantees? A Comparative Analysis' [2002] *European Review of Private Law* 509 at 517; O. Cherednychenko, 'The Constitutionalisation of Contract Law: Something New under the Sun?' (2004) 8 *Electronic Journal of Comparative Law*, [www.ejcl.org/81/art81-3.html](http://www.ejcl.org/81/art81-3.html).

<sup>89</sup> Art. 7:850(1) Dutch Civil Code, provides: 'Suretyship is a contract whereby one party, the surety, obliges himself towards the other party, the main creditor, to perform an obligation to which a third person, the main debtor, is or will be bound towards the main creditor.'

<sup>90</sup> U. Reifner, 'Konsumentenkreditrichtlinie im Europaparlament – Zurück zu den Siebzigern?' (2004) *Verbraucher and Recht* 85. Current critique contained in a modified proposal for a directive on credit agreements for consumers: [www.responsible-credit.net/media.php?id=1812](http://www.responsible-credit.net/media.php?id=1812).

consider a number of legal institutions in comparing the level of protection of the vulnerable. In turn, this variety hinders the integration of a European credit market. Moreover, social and behavioural factors can play a decisive role in determining the real extent of liability. The level of social welfare may influence the likelihood of default, whilst banking practice will also influence the treatment of the vulnerable. As alluded to above, legislators and judiciary have to find the balance between competing interests in the law of polycontextual unconscionability: between contractual security and the interests of guarantors; between family and bank interests; between the parties' rights in bankruptcy; and between family members' rights. In the following a cross-section of national protection systems are charted.

#### *Towards a unitary network*

It can be countered that some commonality is present in the law on unconscionability, but at a different level; that a type of uniformity emerges from the tension at the heart of the uncommon core. If we can understand unconscionability as the law of an interface or layering of overlapping legal systems, then, whilst some elements may require uniform treatment, we can otherwise rely on a conflicts' approach, competition and spontaneous harmonisation. In describing uniformity through tension we have to change our perception of law. The central idea here is that law depends on contradiction; that a multiplicity of systems can also work as a unitary network, producing, as Teubner notes, a hybridised, ambivalent unity: '[O]nly the combination of both sides of the difference . . . brings out the special nature of the hybrid: neither mediation nor synthesis, but extremely ambivalent unity.'<sup>91</sup>

#### *A tripartite approach?*

Given its polycontextual function and uncommon core, an incremental tripartite approach involving a combination of measures of (1) legislative regulation, (2) non-legislative harmonisation admitting selective constitutionalisation, and (3) non-legislative harmonisation (judicial convergence) recommends itself for the required elaboration of the doctrine of unconscionability in Europe. Despite calls for full-blown private law codification it is, in these authors' assessment, unlikely that ultimately

<sup>91</sup> Teubner, 'Das Recht hybrider Netzwerke', n. 29 above.

anything more than selective, vertical measures of legislative harmonisation (EU secondary law) will be adopted in those narrow areas of functional similarity where uniform law produces clear efficiency gains. Whilst such areas, given the heterogeneity identified in this chapter, will be rare, EU legislation could be important, for example, in ensuring access to credit, establishing criteria for responsible lending or criteria relating to community reinvestment initiatives along US lines.<sup>92</sup> More common will be measures of non-legislative harmonisation through judicial convergence, a common law turn, and an effective, sensitive and legitimate way of harmonising private law.<sup>93</sup> Finally, in these authors' view the elaboration of unconscionability, inspired by the German example, should admit selective constitutionalisation where the fundamental rights of the vulnerable party require more substantive and not merely procedural protection. Substantively, all that matters is that the courts achieve the same results regardless of which norms, doctrines or procedures they apply in order to come to this end. Such a pragmatic approach, avoiding the superficial attraction of codification, could, in Teubner's terms, more effectively illuminate the 'blindspots' in the elaboration of European unconscionability.

Finally, the virtue of such a tripartite strategy lies in its simultaneous appeal to advocates of the uniform law and the unitary network, as well as incidentally appealing to the financial services industry and the European executive, and in its acknowledgment of the interplay of private and public in the kaleidoscopic concept of unconscionability in Europe.

<sup>92</sup> Cf. US Community Reinvestment Coalition: [www.ncrc.org](http://www.ncrc.org).

<sup>93</sup> A. Colombi Ciacchi, 'Non-Legislative Harmonisation of Private Law', n. 38 above.