

# TABLE OF CONTENTS

<b>INTRODUCTION</b>	1
Relevance	1
Purposes	15
Comparative Methodology	18
<b>PART I: REGULATION OF STANDARD FORM CONTRACTS IN THE JURISDICTIONS OF SELECTED EUROPEAN UNION MEMBER STATES</b>	
<b>I. Rationale for Controlling Standard Form Contracts</b>	25
1. Myths and Reality about the Freedom of Contract	25
1.1 True and Disguised Purposes of the Standardisation of Contracts	25
1.2 Policing the Fairness of Standard Form Contract	36
1.3 Difficulties in Finding an Appropriate Formula for Appraising Fairness in Contractual Relations	45
2. Regulating Fairness in Business-to-Business Contracts	56
2.1 Similarities and Differences between Consumer Contracts and Business-to-Business Contracts	56
2.2 Protection of Small and Medium Sized Enterprises	61
2.3 Administrative Supervision of Standard Form Commercial Contracts	66
3. Provisional Assessment	69
<b>II. Regulating Standard Form Contracts in Selected Jurisdictions: Germany, France, England, and Lithuania</b>	71
1. Geopolitical Dimensions to the Regulation of Standard Form Contracts	71
1.1 The Role of the Doctrine of Good Faith in early German Case Law	72
1.2 From the Classical to Modern Law of Contract in England	73
1.3 General Safeguards in the Code Napoleon	75
1.4 Historical Foundations of the Lithuanian Law of Contract	77
2. Contemporary Reforms of English and German Law in the Context of European Integration	79
2.1 German Perspective	79
2.2 English Approaches	81
3. Special Statutory Interventions: the English UCTA 1978 and the German BGB 1977 in Brief	83
3.1 The German BGB: the Problem of Separating Consumer and Business-to-Business Contracts	83

3.2 Striking out Unfair Terms in Commercial Contracts at Common Law and UCTA	88
3.3 Comparison of Regulations on Standard Form Contracts under English UCTA and the German BGB	91
4. Hidden Regulation of Unfair Contract Terms under the French Code Civil	98
5. The Main Amendments to the New Lithuanian Civil Code	99
5.1 General Framework	99
5.2 The Concept of Good Faith in the LCC	100
5.3 Special Regulations on Tackling Unfairness in Standard Form Contracts	102
6. Assessment	105
 <b>III. Regulation of Exclusion Clauses in Standard Form Contracts</b>	 108
1. Preliminary Observation	118
2. The German Approach to the Exclusion of Contractual Liabilities	110
2.1 Breaches of Essential Contractual Rights and Duties	111
2.2 Intentional and Negligent Infringements of Contractual Obligations	113
2.3 Limitation of Remedies in Standard Form Contracts	115
3. The Enforceability of Exclusion and Limitation Clauses under English Law	116
3.1 Exclusion and Limitation Clauses in Business-to-Business Contracts	116
3.2 The Test of Reasonableness: Practical Implementation of the Act	120
4. The French Approach	128
4.1 General Prohibitions on Limiting the Availability of Remedies	128
4.2 Limitation of Liability under 'Vendeur Professionel' Case Law	129
5. The Lithuanian Approach to the Exclusion of Liability in Contractual Relations	131
6. Assessment	133
 <b>IV. Regulation of Standard Contracts in the International Business Transactions</b>	 135
1. Regulation of Standard Form International Contracts	135
1.1 The Question of Regulation of National and International Business Contracts	135
1.2 Comparison of National Mandatory Rules on International Contracts	137
2. Choice of Law in International Business Dealings	141
2.1 The Freedom of Choice of Law in Standard Form Contracts	141
2.2 Mandatory and Overriding Provisions	146
3. Assessment	151

## **PART 2: THE INTERACTION OF UNION LAW AND NATIONAL REGULATIONS ON STANDARD CONTRACT TERMS**

<b>I. Elimination of Trade Obstacles to Intra-Union Trade</b>	154
1. Impact of the Market Freedoms on Intra-Union Trade	154
1.1 The Positive and Negative Integration of National Legal Systems	154
1.2 Structural Convergence of the Market Freedoms	157
2. Difficulties in Assessing the Nature of a Restriction: ‘before and after Keck’	161
2.1 General	161
2.2 The early Case Law of the Court of Justice: ‘Dassonville’	162
2.3 Change of the Direction: the Ratio of the Cassis de Dijon Case	166
2.4 The Case of Keck and Mithouard: did the Court of Justice get it right?	169
2.5 The Later Case Law of the Court of Justice: de facto Discrimination and Substantive Market Access	173
3. Conclusion	176
<b>II. The Legitimacy of Regulations on Standard Form Contracts in Union Law</b>	178
1. Removal of Trade Distortions in intra-Union Business Transactions	178
1.1 Law of Contract and the Freedoms	178
1.2 The Boundary between Measures Hindering Access to the Market and Measures that do not impede Trade: Analysis of the Case Law	182
1.3 Free Choice of Law in Commercial Arrangements	186
2. The Legitimacy of National Regulations on Standard Form Contract as a Trade Barrier	188
2.1 Regulations on Standard Form Contracts: Mandatory or Default Laws?	188
2.2 Relevance of the ‘Keck’ Case Law to the Legitimacy of Regulations on Standard Form Contracts	189
3. Justification for National Regulations on Standard Form Contract	193
3.1 Derogations from Article 36 TFEU	193
3.2 Mandatory Requirements and Statutory Rules of Private Law	195
3.2.1 Fairness of Commercial Transactions	195
3.2.2 Proportionality	196
4. Conclusion	198
<b>III. Overcoming inter-State Trade Distortions in the Internal Market</b>	200
1. Mutual Recognition in International Trade	200
1.1 General Observations	200
1.2 Export by a Country of its own National Regulations on Standard Form Contracts into other Jurisdictions in the European Union	201

2. Positive Elimination of the Distortions in intra-Union Trade	204
2.1 Harmonisation of National Regulations on Standard Form Contracts	204
2.1.1 Shortcomings of the Existing International Regulations	204
2.1.2 Legitimacy of Harmonisation of the Laws of Contract under TFEU	207
2.1.3 Practical Obstacles to intra-Union Trade	211
2.2 Alternative Avenues to the Unification of Rules on Standard Form Contracts for European Business Transactions	218
3. An Interim Solution: Purposive Interpretation of Divergent National Rules	225
4. Conclusion	227
<b>FINAL REMARKS</b>	<b>229</b>